COURT FILE NUMBER	2603-15449	Clerk's Stamp: FILED DIGITALLY 2603 15449 Jul 17, 2026 9:29 AM JUDICIAL CENTRE OF EDMONTON CLERK OF THE COURT
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
APPLICANT	MCAP FINANCIAL CORPORATION as agent for and on behalf of COMPUTERSHARE TRUST COMPANY OF CANADA	
RESPONDENTS	LUXOR LAND LTD., MESA WEST CAPITAL CORP., PACIFIC PLAZA LIMITED PARTNERSHIP, GPCO LTD. and GEORGE SCHLUESSEL	
DOCUMENT	**BOOK OF AUTHORITIES**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Cassels Brock & Blackwell LLP Suite 3700, Bankers Hall West 888 3rd Street SW Calgary, Alberta, T2P 5C5 Telephone: 403-351-2920/403 351 2638 Email: joliver@cassels.com / djorgenson@cassels.com File No. 29633-416 **Attention: Jeffrey Oliver / Danica Jorgenson**	

LIST OF AUTHORITIES

STATUTES

Tab	Authority
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Alberta Rules of Court*, Alta Reg 124/2010

JURISPRUDENCE

Tab	Authority
3.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430
4.	*Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11
5.	*Schendel Management Ltd,* 2019 ABQB 545
6.	*Cascade Divide Enterprises, Inc. v Laliberte,* 2013 BCSC 263
7.	*Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47
8.	*BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953
9.	*Sherman Estate v Donovan,* 2021 SCC 25
10.	*Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41

TAB 1

KeyCite treatment
Most Recently Cited in: Bruce Community Futures Development Corporation v. Future Health Technologies Inc., 2025 ONSC 5206, 2025 CarswellOnt 15428 | (Ont. S.C.J. [Commercial List], Sep 11, 2025)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

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

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

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

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

243(1.1)Restriction on appointment of receiver
In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

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

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

243(2)Definition of "receiver"
Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

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

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

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

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

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Judicial Consideration (9)

Currency
Federal English Statutes reflect amendments current to July 30, 2025
Federal English Regulations Current to Gazette Vol. 159:7 (March 26, 2025)

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

KeyCite treatment
Most Recently Cited in: Institutional Mortgage Capital Canada Inc. v. Mortise (Scott Road Residential) Holdings Ltd., 2025 BCSC 1500, 2025 CarswellBC 2310 | (B.C. S.C., Jul 23, 2025)

R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

244(2) Period of notice
Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

244(2.1)No advance consent
For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

244(3)Exception
This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

244(4)Idem
This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History
1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency
Federal English Statutes reflect amendments current to July 30, 2025

Federal English Regulations Current to Gazette Vol. 159:7 (March 26, 2025)

End of Document

TAB 2

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

KeyCite treatment
Most Recently Cited in: Odo v. John Doe #1, 2025 ABKB 368, 2025 CarswellAlta 1376, [2025] A.W.L.D. 2864 | (Alta. K.B., Jun 16, 2025)

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

6.28Application of this Division

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.

Currency
Alberta Current to Gazette Vol. 121:6 (March 31, 2025)

TAB 3

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers
  VII.3 Appointment
    VII.3.a General principles

Headnote

Receivers --- Appointment — General

Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in

Algoma Steel Inc., Re [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*, [8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms* [9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*, [10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act* [11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available." [12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne [*]

Table of Authorities

Cases considered by *Romaine J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected.

The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

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

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

TAB 4

2025 ABKB 11
Alberta Court of King's Bench

Bank of Nova Scotia v. Smiling Simba Learning Academy Inc

2025 CarswellAlta 47, 2025 ABKB 11, [2025] A.W.L.D. 440

Bank of Nova Scotia (Plaintiff / Applicant) and Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal (Defendants / Respondents)

M.A. Marion J.

Heard: January 6, 2025; January 9, 2025
Judgment: January 10, 2025
Docket: Calgary 2401-04463

Counsel: Jeffrey Oliver, Natalie Thompson, for Bank of Nova Scotia
Randolph W. Mitchell, for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal
Cale W. Ellis Toddington (January 9, 2025 only), Madona Markaj (student-at-law), for Mortgagequote Canada Corp.
Anthony Merah, for 2499311 Alberta Ltd
Derek Pontin (January 9, 2025 only), for Proposed receiver

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Headnote
Bankruptcy and insolvency --- Bankruptcy and receiving orders
Table of Authorities
Cases considered by *M.A. Marion J.*:

ATB Financial v. Mayfield Investments Ltd (2024), 2024 ABKB 635, 2024 CarswellAlta 2744 (Alta. K.B.) — referred to

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 1953, 2020 CarswellOnt 5156, 78 C.B.R. (6th) 299 (Ont. S.C.J. [Commercial List]) — referred to

Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership (2024), 2024 BCSC 47, 2024 CarswellBC 78, 11 C.B.R. (7th) 57 (B.C. S.C.) — referred to

Braile v. Calgary (Police Service) (2018), 2018 ABCA 109, 2018 CarswellAlta 512, 72 Alta. L.R. (6th) 267 (Alta. C.A.) — referred to

CWB Maxium Financial Inc v. 2026998 Alberta Ltd (2021), 2021 ABQB 137, 2021 CarswellAlta 392, 88 C.B.R. (6th) 196, [2021] 7 W.W.R. 299, 25 Alta. L.R. (7th) 3 (Alta. Q.B.) — referred to

Chegancas v. Lukezic (2011), 2011 CarswellOnt 10873, 2011 CarswellOnt 10874, (sub nom. *Royal Bank of Canada v. Lukezic)* 429 N.R. 391 (note), (sub nom. *Royal Bank of Canada v. Lukezic)* 294 O.A.C. 398 (note) (S.C.C.) — referred to

Freyberg v. Fletcher Challenge Oil & Gas Inc. (2005), 2005 ABCA 46, 2005 CarswellAlta 152, 363 A.R. 35, 343 W.A.C. 35, 42 Alta. L.R. (4th) 41, [2005] 10 W.W.R. 87, 252 D.L.R. (4th) 365 (Alta. C.A.) — referred to

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd. (2013), 2013 ABQB 63, 2013 CarswellAlta 153, 20 P.P.S.A.C. (3d) 128, 99 C.B.R. (5th) 178, 76 Alta. L.R. (5th) 407, 555 A.R. 305 (Alta. Q.B.) — referred to

Law Society of Alberta v. Higgerty (2023), 2023 ABKB 499, 2023 CarswellAlta 2316, [2023] 11 W.W.R. 511, 62 Alta. L.R. (7th) 78, 9 C.B.R. (7th) 59 (Alta. K.B.) — followed

Murphy v. Cahill (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — referred to

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — referred to

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Royal Bank v. Lukezic (2011), 2011 ONCA 314, 2011 CarswellOnt 8970 (Ont. C.A.) — referred to

Royal Bank v. Walker Hall Winery Ltd. (2010), 2010 ONSC 4236, 2010 CarswellOnt 6025 (Ont. S.C.J. [Commercial List]) — referred to

Schendel Management Ltd., Re (2019), 2019 ABQB 545, 2019 CarswellAlta 1457, 73 C.B.R. (6th) 13, 1 Alta. L.R. (7th) 385, [2020] 10 W.W.R. 443 (Alta. Q.B.) — referred to

Servus Credit Union Ltd. v. Proform Management Inc. (2020), 2020 ABQB 316, 2020 CarswellAlta 903, 12 P.P.S.A.C. (4th) 120, 18 Alta. L.R. (7th) 277 (Alta. Q.B.) — considered

Worth Ventures Ltd v. MegaSys Enterprises Ltd (2024), 2024 ABKB 385, 2024 CarswellAlta 1728 (Alta. K.B.) — referred to

2531005 Alberta Ltd. v. Katharine Enterprises Ltd. (2023), 2023 ABKB 718, 2023 CarswellAlta 3107, 10 C.B.R. (7th) 305 (Alta. K.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

s. 244 — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — considered

Regulations considered:

Early Learning and Child Care Act, S.A. 2007, c. E-0.1

Child Care Licensing Regulation, Alta. Reg. 143/2008

Generally — referred to

APPLICATION by lender for receivership order over assets, undertakings and properties of SSLA.

***M.A. Marion J.*:**

Reasons for Decision

I. Introduction

1 Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

2 For the reasons set out below, the receivership order requested is granted.

II. Background

3 BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as "Special Purpose - Community Service (S-CS)", which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

4 BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of $8.2 million.

5 From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal's involvement in the potential childcare operator in March 2023.

6 SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

7 The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the "**Loans**".

8 By March 31, 2024, the amount outstanding on the Loans was over $9 million.

9 The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS's security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

10 SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

11 On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

12 On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to "collateralized debt" in the amount of approximately $900,000. SSLA did not obtain BNS' consent to this registration.

13 On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of $200,000. SSLA did not obtain BNS' consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was $164,487.56 (based on Mortgagequote's Statement of Claim against SSLA).

14 In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

15 On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

16 On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024. [1] Chahal's evidence is that the tenant is currently paying monthly rent of $28,200 [2] . SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

17 On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

18 On April 2, 2024, BNS filed a receivership application in respect of SSLA.

19 The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

20 In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of $9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

21 SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

22 SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

23 On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

24 As of December 30, 2024, the amount outstanding under the Loans was $10,170,652.26.

25 The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

26 The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

27 The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

28 The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty*, 2023 ABKB 499** at para 24.

29 As noted in ***Higgerty***, at para 25, which I adopt:

[25] A receivership order "should not be lightly granted": ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

30 Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd*, 2024 ABKB 635** at para 65 [***Mayfield***]**;** ***Worth Ventures Ltd v MegaSys Enterprises Ltd*, 2024 ABKB 385** at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd*, 2023 ABKB 718** at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137** at para 33; ***Schendel Management Ltd*, 2019 ABQB 545** at paras 44-45; ***Murphy v Cahill*, 2013 ABQB 335** at para 71; ***Kasten*** at para 13; ***Romspen Investment Corporation v Hargate Properties Inc*, 2011 ABQB 759** at para 20; ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430** at para 27. Those factors include:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver; and

(q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

31 In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: ***Mayfield*** at para 40. The applicable principles were summarized by Justice Lema in ***Servus Credit Union Ltd v Proform Management Inc*, 2020 ABQB 316** at paras 60-63 (footnotes omitted):

[60] On how to approach a consent order, the guiding principles are as follows:

- the Court is not obliged, from the mere fact of consent, to grant a consent order; and
- the Court must be satisfied (at minimum) that:
    - it has the jurisdiction to grant the order;
    - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
    - consent has actually been provided;
    - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
    - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
    - the proposed relief does not exceed that consented to; and
    - consent aside, the ordered relief is warranted in the circumstances.

[61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.

[62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

[63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

32 In assessing the effect of a debtor's consent to a receivership order, Justice Lema went on to point out in ***Servus***, at para 66 (emphasis in original): "by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*". In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

33 No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

34 BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

35 I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

36 BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in ***Paragon***, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

37 Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953** at para 43; ***Murphy*** at para 72.

b. Risk to Security

38 SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

39 SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

40 I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: ***Braile v Calgary (Police Service)*, 2018 ABCA 109** at para 23; ***Freyberg v Fletcher Challenge Oil and Gas Inc*, 2005 ABCA 46** at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was $6,790,000 (and the Property is in tax arrears of $359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

41 While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

42 It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

c. Nature of the Property

43 BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that

the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

44 SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

45 Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): ***Mayfield*** at para 40; ***Servus*** at paras 42-50; ***Royal Bank of Canada v Walker Hall Winery Ltd*, 2010 ONSC 4236** at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

46 I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

47 This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

48 SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

49 SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

50 A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

51 SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

52 BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: ***Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47** *[Haro-Thurlow Street Project]*at para 95.

53 In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: ***Haro-Thurlow Street Project*** at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

54 SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

55 SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

3. Conclusion re: Receivership

56 For those reasons, I find the appointment of a receiver is just and convenient.

57 Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

58 I grant the receivership order as proposed by BNS.

Application granted.

Footnotes

1 The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

2 The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

TAB 5

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, [2020] 10 W.W.R. 443, 1 Alta. L.R. (7th) 385, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
  IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
  VI.6 Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Pursuant to s. 50(12) of BIA, proposal would not likely be accepted by creditors, and was deemed refused — ATB had true veto, it intended to vote no, and proposal would necessarily fail — ATB would vote no because it regarded proposal as unsatisfactory — Focus was on existing proposal — None of identified ATB steps showed absence of good faith or showed commercial unreasonableness — ATB was not attempting to pursue improper purpose, and was pursuing its interests and asserting its rights within bounds of and for purposes squarely within Canadian insolvency system — Given its secured position, BIA provisions governing secured creditors and approval of proposals, and proposal itself, and ATB was entitled to oppose proposal and seek deemed refused ruling — ATB believed, on reasonable or defensible or arguable grounds, that it would fare better by receivership than under proposal — ATB was not acting perversely or vindictively or otherwise than in its own economic interests, and it was

not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50(12).

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

Table of Authorities

Cases considered by *M.J. Lema J.*:

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — distinguished

Hypnotic Clubs Inc., Re (2010), 2010 ONSC 2987, 2010 CarswellOnt 3463, 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) — considered

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Murphy v. Cahill (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — considered

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

Promax Energy Inc. v. Lorne H. Reed & Associates Ltd. (2002), 2002 ABCA 239, 2002 CarswellAlta 1241 (Alta. C.A.) — considered

Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc. (2005), 2005 NBQB 394, 2005 CarswellNB 635, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 290 N.B.R. (2d) 278, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 755 A.P.R. 278, 17 C.B.R. (5th) 244 (N.B. Q.B.) — considered

The Bank of Nova Scotia v. 1934047 Ontario Inc. (2018), 2018 ONSC 4669, 2018 CarswellOnt 12568 (Ont. S.C.J.) — considered

Toronto-Dominion Bank v. Rismani (2015), 2015 BCSC 596, 2015 CarswellBC 991, 25 C.B.R. (6th) 127 (B.C. S.C.) — considered

West Coast Logistics Ltd. (Re) (2017), 2017 BCSC 1970, 2017 CarswellBC 3014, 53 C.B.R. (6th) 68 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50(4) — referred to

s. 50(12) — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 62(2)(b) — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — considered

s. 244 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — considered
Personal Property Security Act, R.S.A. 2000, c. P-7
s. 66 — considered

APPLICATION by secured creditor for orders deeming refused joint proposal made by three related corporations, lifting proposal stay of proceedings, and appointing receiver and manager.

***M.J. Lema J.*:**

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the *Bankruptcy and Insolvency Act* (*BIA*) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

- Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

- after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

- the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

- Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

- however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

• on March 22, 2019 and in response, Schendel filed a notice of intention to file a proposal under s. 50.4(1) *BIA*, triggering a stay (under s. 69.1 *BIA*) of enforcement action by ATB and other creditors;

• on April 18, 2019, Mah J. granted a 45-day extension and dismissed an application by ATB to lift the stay and appoint a receiver or interim receiver;

• on June 3, 2019, Little J. granted an interim extension to allow time for a further extension application;

• on June 11, 2019, Yamauchi J. granted a further extension, to July 11, 2019;

• on July 10, 2019, Schendel filed a proposal to ATB and its other creditors;

• the proposal treats ATB's claim (approximately $22 million) in two segments: it gauges the secured portion of ATB's claim at $11.2 million and the unsecured portion at $11 million. ATB's secured claim is the sole occupant of Secured Class; its unsecured portion joins other unsecured creditors in steerage. (Various other secured creditors are excluded from the proposal);

• by virtue of the solo nature of its secured claim, ATB has a veto over the proposal i.e. if it votes no to the proposal, it will fail, per para 62(2)(b) *BIA*. (ATB does not contest that aspect);

• for whatever difference it makes, ATB may also have a veto in the unsecured class, at least for Mechanical;

• ATB contends that, with no order consolidating the affairs of the three Schendel companies for proposal purposes, Schendel was not authorized to file a joint proposal;

• assuming that a joint proposal is authorized, the creditors' meeting to vote on it is set for July 31, 2019;

• on July 12, 2019, ATB applied for the deemed-refusal and stay-lifting orders described at the outset and heard at the application on July 16, 2019;

• ATB intends to vote no at the meeting, based on having lost confidence in Schendel's management, on Schendel's ongoing losses, on concerns about preferential payments having been made to certain pre-NOI creditors, on losing access (under the proposal) to personal guarantees, and on its perception that it will fare better in a bankruptcy or receivership than under the proposal (among other grounds);

• it argues that, in light of that position, which it maintains is fixed, the failure of the proposal on July 31, 2019 is a foregone conclusion and that, accordingly, the proposal should be "deemed refused" under ss. 50(12) or the s. 69.1 stay should be lifted (or both), followed the appointment of PwC as receiver-manager; and

• as noted, Schendel is opposed, citing the possibility of an amended (and enhanced) proposal between July 16 and 31 and, more fundamentally, based on what is perceives as the commercial unreasonableness of and inequitable and improper conduct by ATB. It believes the proposal process should continue until July 31 at which time the proposal (existing or amended) can be voted on by all of its creditors.

C. Issues

4 The issues are:

1. whether the proposal should be deemed refused under ss. 50(12), which has three separate triggers (any one of which is sufficient):

• the debtor has not acted, or is not acting, in good faith and with due diligence;

• the proposal will not likely be accepted by the creditors; or

• the creditors as a whole would be materially prejudiced if the application under this subsection is rejected;

2. in any case, whether the s. 69.1 stay should be lifted under s. 69.4, which has two separate triggers (either of which is sufficient):

• the creditor is likely to be materially prejudiced by the continued operation of s. 69.1; or

• it is inequitable on other grounds to make such a declaration; and

3. if ss. 50(12) is satisfied (in which case Schendel will be deemed bankrupt and ATB, as a secured creditor, will be free to enforce its security) or if the stay is lifted (permitting the same thing), ATB intends to enforce its security, and the issue becomes whether PwC should be appointed receiver and manager of Schendel.

D. Analysis

5 I start by examining the second branch of ss. 50(12), namely, whether the proposal will not likely be accepted by the creditors. (I see ss 50(12) as the more fundamental provision: if it applies, the proposal proceeding is eclipsed. The "stay lift" application contemplates an ongoing proposal.)

6 The answer is yes: the proposal will not likely to be accepted — in fact, it is almost *guaranteed* not to be accepted.

7 My reasoning is outlined below.

ATB veto

8 ATB has a true veto, which Schendel acknowledges: if ATB votes no, the proposal will necessarily fail. (ATB is the only creditor in the "Affected Secured Creditors" class, and the proposal require a yes vote by ATB for the proposal to succeed: Article 9.1.)

9 ATB intends to vote no. Its evidence is that that position will not change i.e. it would necessarily vote no at the July 31 meeting (if it occurs).

10 It would vote no because it regards the proposal as unsatisfactory, for reasons including:

• it is effectively being asked to take a 50 per cent discount on its claim;

• the "secured" portion of its claim will be replaced by two unsecured promissory notes, the payment of one of which depends on the (uncertain) outcome of certain events;

• the unsecured portion of its claim may be effectively blocked by the proposal mechanics;

• ATB already has first-position security on the assets out of which Schendel proposes to pay it under the proposal;

• it undercuts ATB's recourse against five guarantees provided by individuals associated with the Schendel; and

• overall, ATB believes it will fare better under a bankruptcy.

Uncertainty over possible amendments

11 While Schendel's evidence includes the details of a potential deal with a third party, which it described as "possibly" leading to a sweetened amended proposal, the evidence does not disclose the (even estimated) timing of the deal, its potential terms, the likelihood of consummation, or by how much the proposal's terms might be enhanced as a result.

12 Pointing to almost 40 possible deals or other lifelines disclosed by the Schendel's evidence, none of which came to fruition and the vague details of the latest potential deal, ATB sees next-to-no chance of an enhanced proposal coming forward at this stage.

Focus of ss 50(12) BIA on proposal "as is"

13 In any case, the focus is on the existing proposal. Subsection 50(12) refers to "the proposal" being deemed refused if the court is satisfied that "the proposal" will not likely be accepted i.e. nothing in the provision contemplates an amendment or how it might be received by the creditors.

14 Where a creditor seeks to have the proposal deemed refused, it is effectively saying that:

• it does not support the proposal; *and*

• it sees no prospect of an acceptable amended proposal.

15 Otherwise, the creditor would presumably be prepared to wait, through to the vote meeting, to see if worthwhile amendments might be proposed.

16 Subsection 50(12) allows a veto creditor in such circumstances (opposed to proposal; no prospect of acceptable amendments) to fast-forward to the inevitable result i.e. the proposal's termination.

17 The proposal proponent's reaction, as here, may be to say "wait, there may be a better proposal soon." The answer to that is:

• this is the proposal it made;

• the focus of the ss 50(12) exercise is the proposal *as filed*;

• the proposal cannot be withdrawn (ss 50(4) *BIA*);

• the applicant creditor had the option of waiting, until the vote meeting, for proposal "sweetening";

• if the applicant perceived the likelihood or even a real possibility of worthwhile amendments, it would not have brought the "deemed refused" application;

• even if it had seen such likelihood or possibility, it is entitled to balance the potential upside of waiting against the downside e.g. the costs associated with waiting;

• if the debtor had needed more time (i.e. to put forward a different, and better, proposal), it had the option (as here) of seeking another extension of the notice-of-intention period (six-month maximum had not been reached);

• having not done so (instead, filing the proposal now under review), the debtor must live with that proposal. For the ss. 50(12) exercise, *that* proposal is the only slide under the microscope. The possibility of a different, and better, slide is *not* a factor;

• in other words, by laying down a proposal, the proponent takes the risk that a creditor (or group of creditors) will say "this is not good enough" and move for termination under ss 50(12). The section weighs who is supporting and who is not and whether the outcome at the voting stage is "likely" refusal; and

• here, with ATB having an effective veto, its "opposed" stance is determinative: *this* proposal will fail. The possibility of a different proposal down the road does not enter into the equation.

Subsection 50(12) exists for a reason

18 If Parliament had intended an "unabridgeable" period between the proposal filing and the vote meeting (whether to ensure "full consideration" by the creditors, an opportunity for the debtor to propose amendments, or otherwise), it would not have included the "deemed refused" element in ss 50(4).

Case law recognizes impact of veto in "deemed refused" scenarios

19 In materially identical circumstances to those here, LaVigne J. held in *Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc.* [1] :

> *Sport Maska* [the veto-position creditor] asserts that the Proposal will not succeed, as there is no chance [it] will accept this Proposal, or any Proposal made by RBI. It therefore submits that it is not necessary or indeed practical, that a meeting of creditors be held, since it is already known that [it] will vote to defeat the Proposal.
>
> *It is obvious that no plan of arrangement can succeed without [its] approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance it cannot succeed.*
>
> *It is apparent that Sport Maska is overwhelmingly opposed to the plan. No persuasive argument was put forward as to why the vote should proceed in those circumstances.*
>
> *I am of the view that it is fruitless to proceed to a further stage with this Proposal.*
>
> RBI argues that while it may be appropriate for the Court to use its discretion when the Proposal has not yet been tabled, the Court should not use its discretion in the present case since RBI has made its Proposal and a meeting date has been set. I find that *it is easier for the Court to make a finding as to what the creditors are likely to do when the terms of the Proposal are known, and the meeting of the creditors is set to occur in the very near future such as in situations contemplated in subsection 50(12)*, then when the terms of the Proposal are unknown and the date of the meeting of creditors is to happen sometime later.
>
> RBI also argued that it may obtain sufficient financing to pay off completely the debt actually owed to Sport Maska. In my view, that is highly unlikely considering the evidence presently before this Court.
>
> *A creditor does not have to show beyond certainty that a Proposal would be rejected in order to be successful on a Motion under subsection 50(12). A creditor simply has to show that the Proposal would not likely be accepted by the creditors.*
>
> Therefore, on a balance of probabilities, based on the evidence before this Court, I am satisfied that the Proposal that was filed by RBI will not likely be accepted by the creditors. [emphasis added]

20 *Sport Maska* is anchored on a body of case law (reviewed in the decision) taking the same approach: where the writing is on the wall (with a veto-position creditor steadfastly opposed), the proposal may be, and has been, deemed refused or the proceedings otherwise terminated.

Same approach taken under CCAA

21 The same approach has been taken under the *Companies' Creditors Arrangement Act*: see, for example, the analysis of Butler J. in *Marine Drive Properties Ltd., Re* [2] :

> The purpose of the ***CCAA*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident

that it is doomed to failure: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 1990 CanLII 529 (BC CA), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. *In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.* [emphasis added]

Good faith

22 Schendel argues that ATB has not acted in good faith or in a commercially reasonable way during their dealings relating to the fall-out of the halting, in September 2018, of work on the Grande Prairie Hospital project, through to mid-March 2019, when ATB demanded repayment. In particular it says that "ATB's conduct . . . was not consistent with it proposing to take immediate steps to enforce its security" (Schendel brief, p 4). On that aspect, it points to:

• its ATB account manager advising over the course of fall 2018 to spring 2019 that ATB would work cooperatively with Schendel to restructure its loan commitments;

• Schendel believing, in late February 2019, that its account with ATB was still in the hands of the account manager i.e. not under the effective control of ATB's special-credit group i.e. ATB did not make plain to it that the special-credit group was involved;

• an early March 2019 meeting where ATB advised that it was patient, was working through the issues, and was considering parking Schendel's debt;

• at a Schendel-ATB meeting on March 13, 2019, ATB outlining restructuring steps for Schendel with a three- to six-month horizon, starting later in March, once Schendel had provided certain information to ATB;

• at the same meeting, ATB advising Schendel that "this [was] not the end", instead, was part of the process and restructuring;

• at that meeting, and although ATB did disclose an intention to seek a receivership if certain conditions of the three- to -six month restructuring period were not achieved, it making no mention then of an intention to issue payment demands;

• ATB obtaining payables information requested at that meeting (understood by Schendel to assist in working through the restructuring period) and using it as evidence of Schendel's inability to carry on business; and

• later on March 13, 2019, ATB issuing demand letters and s. 244 *BIA* (intention to enforce security) notices.

23 Schendel maintains that, if it had known earlier that ATB had shifted to viewing the Schendel loans as seriously troubled, it would have taken more, and earlier, restructuring steps.

24 It also points to ATB demanding "commercially unreasonable" terms in proposed forbearance agreements (before the NOI was filed) that ultimately led nowhere.

25 On the issue of a creditor's entitlement to pursue loans in default and to enforce security to recover those loans without having to pass a "good-faith enforcement" test (i.e. beyond providing adequate notice), see, for example, *The Bank of Nova Scotia v. 1934047 Ontario Inc.* [3] and *Toronto-Dominion Bank v. Rismani* [4], as well as *Good Faith as an Organizing Principle in Contract Law: Bhasin v Hrynew — Two Steps Forward and One Look Back*, JT Robertson, [2015] 93 Cdn Bar Rev 809 at 842-844.

26 I note as well that academic commentary on the subject of creditors acting in good faith in insolvency proceedings has not suggested good-faith testing of creditors voting on proposals or arrangements i.e. outside of the "improper purpose" (i.e. abuse of system) contexts discussed below. In "*What Does "Good Faith" Mean in Insolvency Proceedings*?" [5], the authors suggest that imposing an explicit "vote in good faith" duty on creditors may "ultimately have a paralyzing effect on negotiations, add greater litigation costs, impair efficiency, and alter the carefully calibrated balance between the rights of creditors and their insolvent debtors."

27 See also Professor Janis P. Sarra's article "*Requiring Nothing Less than Good Faith in Insolvency Proceedings*" [6], where she proposes a good-faith duty for creditors, but not to the extent of weighing voting decisions beyond "improper purpose" contexts.

28 In any case, I find that none of the identified ATB steps, alone or collectively, show an absence of good faith or show commercial unreasonableness. ATB had no duty to advise Schendel who at ATB was running or reviewing its account at any particular time. ATB was indeed working with, and funding, Schendel through a financial crunch for many months before and even after the hospital-work halt. [7] It was entitled to intensify its scrutiny of Schendel's loans and overall business condition as it did, to obtain more information via that scrutiny, and to demand payment (in light of commitment-letter defaults and, in any case, the demand character of the loans here) when it did, and to notify Schendel of its intention to enforce security per the *BIA*-prescribed notice period. ATB had no duty to forbear from enforcing its rights.

29 As for whether Schendel might have been able to pursue restructuring earlier and more effectively, and assuming that to be so, Schendel knew its own financial condition throughout. It was not incumbent on ATB to guide Schendel's rescue efforts. In any case, Schendel pointed to no material difference that earlier restructuring efforts might have made.

30 In any case, Schendel ended up filing a proposal, regardless of any perceived difficulties with ATB's conduct. That filing triggered a right for ATB (in fact, any Schendel creditor) to apply under ss. 50(12) for "deemed refusal." The narrow test (as noted) is whether the proposal is unlikely to be accepted.

31 As Schendel acknowledges, ATB is the sole occupant of the secured class, and the support of that class is necessary for proposal approval. Those are just "givens" in the circumstance here i.e. reflect ATB's position as Schendel's principal lender, its security, and the *BIA*'s treatment of secured creditors in proposals i.e. are not a function of ATB's conduct in its dealings with Schendel.

32 As for how ATB is using its veto position derived from those circumstances (i.e. to seek a "proposal deemed refused" ruling), Schendel argues that that decision is commercially unreasonable and inequitable. In support it cites cases such as *West Coast Logistics Ltd. (Re)* [8] and *Laserworks Computer Services Inc., Re* [9]

33 The Alberta Court of Appeal endorsed the *Laserworks* approach to "improper purpose" in *Promax Energy Inc. v. Lorne H. Reed & Associates Ltd.* [10]:

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*

> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

34 Those cases are distinguishable. They deal with creditors attempting to use the insolvency system for an improper purpose e.g. attempting to drive a competitor out of business or escaping from a royalty regime.

35 No evidence here showed that ATB was attempting to pursue an improper purpose, whether within the meaning of those cases or otherwise. Instead, ATB was pursuing its interests and asserting its rights *within the bounds of, and for purposes squaring with, the Canadian insolvency system* i.e. recovering its loans.

36 In *Hypnotic Clubs Inc., Re* [11], Cumming J. held:

> The intent and policy underlying the BIA is that *creditors* should consider and *vote* upon a *proposal* advanced pursuant to a NOI as they see fit in their own *self interest*. . . .
>
> . . .
>
> . . . the underlying policy of the BIA [includes] letting creditors *vote* as they choose in respect of accepting or rejecting a *proposal* .... [emphasis added]

37 Given its secured position, the *BIA* provisions governing secured creditors and the approval of proposals, and the proposal itself, ATB is entitled to oppose the proposal and, on the basis of that opposition, seek a "deemed refused" ruling.

38 By ATB's calculations it foresees materially greater recoveries in a bankruptcy or receiver than via the proposal. The proposal trustee is currently reviewing the "bankruptcy versus proposal" outcomes and is due to report shortly on that. Schendel does not agree with ATB; it filed the proposal on the basis it would produce a more favourable outcome for all the creditors, including ATB, than bankruptcy. It points to recovery estimates showing that ATB may fare better under the proposal than its low-end estimate of receivership recovery and may even recovery (slightly) more than its high-end estimate.

39 I make no ruling on the respective anticipated recoveries i.e. what is the likely better avenue recovery-wise. I simply note that ATB believes, on reasonable, or at least defensible, or at least arguable, grounds, that it will fare better by a receivership than under the proposal i.e. ATB is not acting perversely or vindictively or otherwise than in its own economic interests i.e. it is not pursuing any ulterior purposes.

40 To summarize here, I find that ATB has been acting in good faith and in a commercially reasonable way, including in deciding to oppose the proposal and seek a "deemed refused" ruling.

Enirgi Group Corp. v. Andover Mining Corp. ***also distinguishable***

41 Schendel also cited this decision. [12] It too is distinguishable, concerning a clash between a request for more time to file a proposal and a creditor seeking to terminate the proposal proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down "sight unseen."

42 In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on "proposal deemed refused" application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the *Judicature Act*. Schendel opposes.

Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [13], Romaine J held:

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

> Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).
>
> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
  - the Proposal is not viable;
  - the Debtors operate at a loss;
  - the Proposal will not be approved by [ATB]; and
  - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";

• "jurisdiction to appoint a receiver ought to be exercised sparingly";

• per s. 66 *PPSA*, security-agreement rights "shall be exercised or discharged in good faith and in a commercially reasonable manner";

• ATB has not provided evidence to support its receiver-related arguments; and

• more fundamentally, "ATB is estopped and precluded from its conduct, particularized [in its application brief and as summarized above], from seeking the appointment of a receiver. Its position is "manifestly unreasonable from a commercial perspective, and it ought not to be permitted to take further steps to enforce its security."

Applying the "appointment of receiver" factors here

48 I find that appointing a receiver and manager (collectively "receiver" below) is warranted here. I first note that many of the factors identified above do not apply here, where Schendel is now bankrupt i.e. has lost the capacity to run its affairs.

In any case, I rely on these factors:

• Schendel is a large enterprise with complex construction projects underway;

• coordinating and managing the pursuit of its receivables, including determining whether further resources should be invested to complete any unfinished projects, requires the expertise and resources of an experienced receiver-manager;

• recovery that way is likely to be more efficient and effective than via enforcing ATB's individual security elements;

• ATB's security documents contemplate the Court appointing a receiver-manager on Schendel's default;

• Schendel has defaulted, and to the extent that ATB is almost certain to experience a shortfall;

• ATB's affidavit evidence plainly outlines the extent of Schendel's default, the state of its various projects, and the complex nature of the work required to complete, collect or otherwise harvest its receivables; and

• as for Schendel's fundamental objection, I have already found that ATB's conduct does not reflect commercial unreasonableness or an absence of good faith.

F. Conclusion

49 Schendel has worked extremely hard to find a lifeline that would allow it to make peace with ATB and continue in business. Unfortunately, those efforts did not succeed.

50 Canadian insolvency law recognizes that, in circumstances where a proposal or arrangement is likely doomed to fail, a veto creditor or group of creditors can accelerate the restructuring process to recognize that reality.

51 That applies here. ATB has established that Schendel's proposal is unlikely to be approved and that, in the circumstances, a "deemed refused" order is warranted, and also that a receiver-manager should be appointed.

52 ATB has nominated PwC to serve as receiver-manager. Schendel did not propose anyone else.

53 ATB seeks PwC's appointment on what it described as the template, or standard, receiver-manager order. I have reviewed the draft order attached to ATB's application and find it to be in order.

54 I note that, under section 33 of the draft order, "any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver . . . "

G. Closing note

55 I thank all counsel for their very helpful briefs and submissions.

56 On a final house-keeping note, I grant the order sought by Ms. Fisher in her July 17, 2019 email (concerning the sealing of a certain affidavit).

Application granted.

Footnotes

1 2005 NBQB 394 (N.B. Q.B.) at paras 36-43

2 2009 BCSC 145 (B.C. S.C.) at paras 31 and 32

3 2018 ONSC 4669 (Ont. S.C.J.) at paras 13-15

4 2015 BCSC 596 (B.C. S.C.) at paras 31-37

5 Rogers, LA, Sieradzki D, and Kanter M, Journal of Insolvency in Canada, Vol 4 [2015] 55 at 77

6 2014 Annual Review of Insolvency Law (ed Janis P Sarra)

7 Affidavit of Alex Corbett filed April 4, 2019, paras 31-41

8 2017 BCSC 1970 (B.C. S.C.)

9 1998 NSCA 42 (N.S. C.A.)

10 2002 ABCA 239 (Alta. C.A.)

11 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) at paras 33 and 36

12 2013 BCSC 1833 (B.C. S.C.)

13 2002 ABQB 430 (Alta. Q.B.) at paras 26-32

14 2013 ABQB 335 (Alta. Q.B.) at para 71

TAB 6

2013 BCSC 263
British Columbia Supreme Court

Cascade Divide Enterprises Inc. v. Laliberte

2013 CarswellBC 384, 2013 BCSC 263, [2013] B.C.W.L.D. 4186, [2013] B.C.W.L.D. 4463, [2013] B.C.W.L.D. 4466, 1 P.P.S.A.C. (4th) 10, 225 A.C.W.S. (3d) 996

Cascade Divide Enterprises, Inc. and Next Layer Inc., Plaintiffs and Benoit Laliberte, Communication Teliphone Navigata-Westel Inc., Fiducie Residence Jaam, 0865944 B.C. Ltd., Navigata Communications Ltd. and Teliphone Corporation, Defendants

Teliphone Navigata-Westel Communication Inc., Plaintiff and Cascade Divide Enterprises Inc., Defendant

Fitzpatrick J., In Chambers

Heard: January 31, 2013; February 1, 2013
Judgment: February 1, 2013
Docket: Vancouver S130606, S130592

Counsel: W.C. Kaplan, Q.C., R.W. Millen, for Plaintiffs in action S130606, Defendant in action S130592
K.E. Siddall, S. Boucher (A/S), for Defendants in action S130606, Plaintiff in action S130592

Subject: Insolvency; Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts

Related Abridgment Classifications

Bankruptcy and insolvency

IV Receivers

IV.1 Appointment

Remedies

II Injunctions

II.2 Prohibitive injunctions

II.2.c Interim and interlocutory injunctions

II.2.c.i Threshold test

II.2.c.i.A Serious issue to be tried

Remedies

II Injunctions

II.2 Prohibitive injunctions

II.2.c Interim and interlocutory injunctions

II.2.c.i Threshold test

II.2.c.i.B Irreparable harm

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Application by C., the plaintiff in one action, to appoint receiver over defendant T.N.W. and injunctive relief relating to sale agreements — Cross-application by T.N.W., the plaintiff in the second action, to stay enforcement of security granted in favour of C. — C. was involved in telecommunications business and used subsidiary N.L. to provide co-location services — C. sold part of business to T.N.W. for $6.41 million and T.N.W. provided general security agreement — T.N.W. acquired assets necessary to conduct business while C. retained assets relating to co-location services, shares in N.L. and certain leases — T.N.W. assumed obligations under certain contracts and agreed to pay C. $500,000 at closing, $940,000 on December 14, 2012, and $5 million balance in annual instalments — T.N.W.'s second payment was short $800,000, which it argued was warranted on basis one account receivable was bad debt — There was little evidence to support claim of fraudulent misrepresentation or any collection efforts by T.N.W. and s. 5.06 of asset purchase agreement provided T.N.W. was not entitled to set-off any claim against amounts payable — Allocation of profits to N.L. was also source of disagreement — A.P.A. had entire agreement clause and did not expressly delineate allocations, but referred to financial statements based on original allocation — While T.N.W. adduced some evidence in support of new agreement, C. had strong case in relation to original allocation — T.N.W. had moved headquarters from leased premises, resulting in $67,000 default that C. was liable for as principal obligant — T.N.W. had expressly denied N.L. access to certain information and data and failed to remit moneys under original allocation formula — There was also evidence T.N.W. was interfering with N.L. staff — Application allowed in part; cross-application dismissed -- There were substantial triable issues but interim relief necessary — T.N.W. had offered to pay $800,000 into court as compromise, so clearly had funds available — Funds to be paid to C., who had strong case given clear wording of agreement — Even if T.N.W. succeeded at trial, it would not be prejudiced by payment, given it still owed $5 million — If T.N.W. failed to make payment, receivership order would be granted — C. established serious issue to be tried on set-off, allocation and interference with N.L. — Survival of C. and N.L. was at issue, so irreparable harm established — T.N.W. appeared to have breached agreements and weakened T.N.W. and C. in its actions — Damages would not be sufficient remedy and there was no prejudice in ordering injunctive relief requiring T.N.W. to comply with terms of agreement .

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Irreparable harm

Application by C., the plaintiff in one action, to appoint receiver over defendant T.N.W. and injunctive relief relating to sale agreements — Cross-application by T.N.W., the plaintiff in the second action, to stay enforcement of security granted in favour of C. — C. was involved in telecommunications business and used subsidiary N.L. to provide co-location services — C. sold part of business to T.N.W. for $6.41 million and T.N.W. provided general security agreement — T.N.W. acquired assets necessary to conduct business while C. retained assets relating to co-location services, shares in N.L. and certain leases — T.N.W. assumed obligations under certain contracts and agreed to pay C. $500,000 at closing, $940,000 on December 14, 2012, and $5 million balance in annual instalments — T.N.W.'s second payment was short $800,000, which it argued was warranted on basis one account receivable was bad debt — There was little evidence to support claim of fraudulent misrepresentation or any collection efforts by T.N.W. and s. 5.06 of asset purchase agreement provided T.N.W. was not entitled to set-off any claim against amounts payable — Allocation of profits to N.L. was also source of disagreement — A.P.A. had entire agreement clause and did not expressly delineate allocations, but referred to financial statements based on original allocation — While T.N.W. adduced some evidence in support of new agreement, C. had strong case in relation to original allocation — T.N.W. had moved headquarters from leased premises, resulting in $67,000 default that C. was liable for as principal obligant — T.N.W. had expressly denied N.L. access to certain information and data and failed to remit moneys under original allocation formula — There was also evidence T.N.W. was interfering with N.L. staff — Application allowed in part; cross-application dismissed -- There were substantial triable issues but interim relief necessary — T.N.W. had offered to pay $800,000 into court as compromise, so clearly had funds available — Funds to be paid to C., who had strong case given clear wording of agreement — Even if T.N.W. succeeded at trial, it would not be prejudiced by payment, given it still owed $5 million — If T.N.W. failed to make payment, receivership order would be granted — C. established serious issue to be tried on set-off, allocation and interference with N.L. — Survival of C. and N.L. was at issue, so irreparable harm established — T.N.W. appeared to have breached agreements and weakened T.N.W. and C. in its actions — Damages would not be sufficient remedy and there was no prejudice in ordering injunctive relief requiring T.N.W. to comply with terms of agreement .

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Strength of applicant's case

Application by C., the plaintiff in one action, to appoint receiver over defendant T.N.W. and injunctive relief relating to sale agreements — Cross-application by T.N.W., the plaintiff in the second action, to stay enforcement of security granted in favour of C. — C. was involved in telecommunications business and used subsidiary N.L. to provide co-location services — C. sold part of business to T.N.W. for $6.41 million and T.N.W. provided general security agreement — T.N.W. acquired assets necessary to conduct business while C. retained assets relating to co-location services, shares in N.L. and certain leases — T.N.W. assumed obligations under certain contracts and agreed to pay C. $500,000 at closing, $940,000 on December 14, 2012, and $5 million balance in annual instalments — T.N.W.'s second payment was short $800,000, which it argued was warranted on basis one account receivable was bad debt — There was little evidence to support claim of fraudulent misrepresentation or any collection efforts by T.N.W. and s. 5.06 of asset purchase agreement provided T.N.W. was not entitled to set-off any claim against amounts payable — Allocation of profits to N.L. was also source of disagreement — A.P.A. had entire agreement clause and did not expressly delineate allocations, but referred to financial statements based on original allocation — While T.N.W. adduced some evidence in support of new agreement, C. had strong case in relation to original allocation — T.N.W. had moved headquarters from leased premises, resulting in $67,000 default that C. was liable for as principal obligant — T.N.W. had expressly denied N.L. access to certain information and data and failed to remit moneys under original allocation formula — There was also evidence T.N.W. was interfering with N.L. staff — Application allowed in part; cross-application dismissed -- There were substantial triable issues but interim relief necessary — T.N.W. had offered to pay $800,000 into court as compromise, so clearly had funds available — Funds to be paid to C., who had strong case given clear wording of agreement — Even if T.N.W. succeeded at trial, it would not be prejudiced by payment, given it still owed $5 million — If T.N.W. failed to make payment, receivership order would be granted — C. established serious issue to be tried on set-off, allocation and interference with N.L. — Survival of C. and N.L. was at issue, so irreparable harm established — T.N.W. appeared to have breached agreements and weakened T.N.W. and C. in its actions — Damages would not be sufficient remedy and there was no prejudice in ordering injunctive relief requiring T.N.W. to comply with terms of agreement .

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British Columbia (Attorney General) v. Wale (1986), 1986 CarswellBC 413, 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331, 120 N.R. 212, [1987] 2 C.N.L.R. 36 (B.C. C.A.) — followed

British Columbia (Attorney General) v. Wale (1991), 1991 CarswellBC 15, 1991 CarswellBC 914, [1991] 2 W.W.R. 568, (sub nom. *Wale v. British Columbia (Attorney General))* [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189, 120 N.R. 208 (S.C.C.) — referred to

Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. (1985), 36 R.P.R. 259, 20 D.L.R. (4th) 689, 65 B.C.L.R. 31, [1985] 6 W.W.R. 14, 1985 CarswellBC 214 (B.C. C.A.) — considered

Edward Jones v. Voldeng (2012), 2012 BCCA 295, 2012 CarswellBC 1901, 35 B.C.L.R. (5th) 223, 26 C.P.C. (7th) 51, 351 D.L.R. (4th) 749, 553 W.A.C. 90, 325 B.C.A.C. 90 (B.C. C.A.) — considered

KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp. (2003), 2003 BCSC 164, 2003 CarswellBC 204, 8 R.P.R. (4th) 312 (B.C. S.C.) — followed

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RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

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s. 243 — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

s. 39 — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — referred to

s. 63(2)(d) — referred to

***Fitzpatrick J., In Chambers*:**

Introduction

1 These actions involve a number of disputes arising out of the conduct of the parties both prior to and after a significant transaction involving the sale of assets of a telecommunications business in late 2012 by Cascade Divide Enterprises, Inc. ("Cascade") to Communication Teliphone Navigata-Westel Inc. ("TNW").

2 TNW is one of the defendants in the action commenced by Cascade to enforce the security. There are also various subsidiary companies, the defendants 0865944 B.C. Ltd. and Navigata Communications Ltd., which were originally subsidiaries of Cascade until the closing of the transaction.

3 The defendant Mr. Benoit Laliberte is the president and principal of TNW. I understand that he is also now the president and principal of 0865944 B.C. Ltd. and Navigata Communications Ltd. Mr. Laliberte is an undischarged bankrupt. The final defendant is Fiducie Residence Jaam, which I understand is a family trust of which Mr. Laliberte is a beneficiary.

4 There are written agreements between the parties relating to the sale; they provide for the granting of security by TNW for obligations arising under those agreements. Cascade alleges that TNW is in default of the agreements and that the security can be enforced as a result.

5 There are two applications before me.

6 In the action commenced by Cascade, it seeks an order appointing a receiver over TNW. In addition, Cascade seeks certain injunctive relief relating to what are said to be obligations arising out of the sale agreements. In the action commenced by TNW, it seeks an order staying enforcement of the security granted by TNW in favour of Cascade pursuant to the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*PPSA*"). TNW says that there are *bona fide* triable issues regarding the allegations of default and that accordingly, the appointment of a receiver is not appropriate in the circumstances.

7 This application has been brought by both parties on an urgent basis, and on the basis of the evidence, I am satisfied that urgency has been made out. I am therefore giving these reasons orally so as not to delay matters. Despite the brevity of these reasons, I have considered all the evidence presented on the application, together with the extensive arguments and authorities advanced by both parties.

Factual Background

(a) Prior to the Asset Purchase Agreement

8 Cascade was formerly engaged in the provision of voice, data and broadband internet services. The plaintiff Next Layer Inc. ("Next Layer") is a wholly-owned subsidiary of Cascade and provides various co-location, network and data services, including cloud computing, for businesses across Canada. "Co-location" services are services provided to customers who co-locate their data servers in Next Layer's premises in a dedicated space provided by Next Layer, which is accessible either on a shared or exclusive basis to the customer.

9 The evidence regarding the operations and business of Cascade and Next Layer prior to the sale is of some importance on this application. Cascade formerly carried on the business of providing telecommunication services, including voice, data and internet services, to service providers and end users (the parties describe this as the "Business"). In addition, Cascade provided various co-location, network and data services to its customers directly.

10 In 2011, Cascade created a subsidiary, Next Layer, to separate the co-location services from the Business. In early 2012, Next Layer acquired the necessary assets from Cascade to provide the co-location services. Next Layer intended to expand its co-location business into a comprehensive data centre business that would complement the telecommunication service offerings

of Cascade. Over time, it was intended that it would be capable of standalone operations. At this time, Cascade continued to provide only telecommunication services to its customers through the Business.

11 The co-location services were very integrated with the Business due to the fact that Next Layer customers typically subscribed to internet conductivity services and, in some cases, voice services, all of which were provided by Cascade to Next Layer.

12 In January 2012, Cascade and Next Layer executed a Master Telecommunication Services Agreement whereby Cascade agreed to provide Next Layer with the necessary connectivity services on a wholesale bundled basis, which enabled Next Layer to provide the co-location services. The agreement provided that Next Layer would obtain services at the lowest price. The benefits under this agreement were mutual, in that Next Layer received wholesale telecommunication services for resale to its customers and Cascade received further sales by the marketing of those services by Next Layer along with its co-location services.

13 Cascade and Next Layer were also highly physically integrated. Next Layer and Cascade shared office space in Burnaby. Some of Next Layer's servers and other equipment were located in Cascade premises, and all were serviced by Cascade employees. One of the critical aspects of this integration was that Next Layer's billing system and information database, including customer contracts and billing records, were commingled with Cascade's billing and accounting systems.

14 In January 2012, Cascade and Next Layer also executed a Support Service Agreement. By this Agreement, Cascade agreed to provide various technical and general administrative support services to Next Layer for a three-year term for a flat fee of $10,000 per month. Cascade invoiced Next Layer for these services.

15 Pursuant to the Support Service Agreement, Cascade was responsible for all billing and accounting matters in respect of Next Layer customers. Next Layer was provided with customer receipt reports from Cascade on an as-needed basis. These reports were provided as requested by Next Layer employees, sometimes on a daily or weekly basis.

16 Customers were generally invoiced on the 1^{st} or the 15^{th} of the month, with payment due 30 days thereafter. The customers were sent a single monthly invoice by Cascade for both the co-location services and the telecommunication services. All amounts were remitted to Cascade. Cascade was also responsible for collecting all HST from Next Layer customers, holding it in a separate bank account and remitting amounts on a monthly basis to the Canada Revenue Agency ("CRA").

17 As part of the physical integration, the computer systems containing customer information, usage information and other information of Next Layer's business were operated by Cascade's employees. After January 2012, Next Layer had access to this information through Cascade on an as-needed basis.

18 In order to sort out how amounts collected by Cascade from customers would be allocable to Next Layer for its operations, the parties agreed to an allocation formula. This formula also addressed how to compensate Cascade for its costs associated with providing the telecommunication services to Next Layer customers.

19 In the first instance, all customer receivables were deposited into Cascade's accounts. Thereafter, what the parties have called the "original" formula provided that if a customer used co-location services, all revenue from that customer, whether for co-location or telecommunication services, was allocated to Next Layer. To the extent that the customers used telecommunication services, Next Layer would pay Cascade for the cost of providing those services plus 50% of the profit relating to those services.

20 Next Layer emphasized that its portion of the allocated revenue is its sole revenue source and that this allocated revenue was accounted for by Cascade on a monthly basis. The original allocation formula was primarily designed by Tim Sansom, Cascade's former Chief Financial Officer. Mr. Sansom, as CFO, also implemented the original allocation, and this revenue was reported in Next Layer's financial statements, the preparation of which was overseen by Mr. Sansom while he was at Cascade. Mr. Sansom is now an employee of TNW.

(b) The Asset Purchase Agreement

21 The central issues in this litigation relate to the sale by Cascade of a portion of the Business to TNW on November 30, 2012, pursuant to an Asset Purchase Agreement (the "APA"). By reason of that sale, Cascade sold to TNW certain assets " which essentially involved Cascade's operating assets relating to the Business " for $6.44 million. There was also substantial related documentation arising from the sale. In particular, certain parties were to provide to Cascade guarantees or indemnities supported by security against assets for payment of the purchase price and compliance with obligations arising under the various agreements. Most importantly, for the purposes of this application, TNW provided security to Cascade in the form of a general security agreement ("GSA"). That GSA has, as far as I am aware, been properly registered in this jurisdiction and perhaps others.

22 Pursuant to the APA:

a) TNW acquired the operating assets necessary to conduct the Business. Those assets were described in the preamble to the APA and included accounts receivable, leased premises, contracts, leased equipment, business records and pre-paid expenses;

b) Cascade retained the assets relating to the co-location services, which of course included Next Layer's business operations. Accordingly, Cascade retained all of its shares in Next Layer and the Business, assets of Next Layer, and Cascade's right and interest in certain leases and shares; and

c) TNW assumed all of the rights and obligations under certain contracts, including the Support Services Agreement. Various other agreements were also assigned by Cascade to TNW. One of the issues arising on this application related to a lease held by Cascade for the premises in Burnaby. These premises were used as Cascade's head office and were shared with Next Layer pursuant to the Support Services Agreement. Next Layer also located its facilities there.

23 The payment schedule under the APA provided for the purchase price to be paid in a number of periodic payments:

a) $500,000 at closing;

b) $940,000 on December 14, 2012; and

c) commencing December 15, 2013, the remaining balance of $5 million was to be paid annually by five equal instalments, together with interest.

24 The APA was originally scheduled to close on December 15, 2012. I understand that some urgency arose in respect of that closing, principally because Mr. Laliberte insisted that the financial health of Cascade was such that the closing had to occur as soon as possible so that efforts could be made to restructure the operations and return Cascade to better financial health.

25 As far as I understand, in the weeks leading up to the closing, there was some due diligence done by TNW's employees, including Sandeep Panesar and Mr. Laliberte himself. I also understand that in the weeks leading up to the closing, TNW employees worked closely with Cascade employees. Many of these employees, including Mr. Sansom, the CFO of Cascade who later became the CFO of TNW, have provided affidavits on this application. Mr. Sansom was part of a group of high-level management employees of Cascade who moved over to TNW immediately after the closing and presumably are now fully employed by TNW.

26 Given the shortened period of time in which the APA had to close, various documents that were intended to be exchanged between the parties were not prepared in time. Accordingly, there was also a further agreement between the parties called a Post-Closing Agreement, by which certain documents, including various security documents, were to be provided no later than December 18, 2012.

Disputes Between the Parties

27 There are many disputes between the parties. I will deal with them individually.

(a) The December 2012 Payment

28 The first dispute relates to the second payment due under the APA on December 14, 2012. As I indicated earlier, the amount due and owing at that time in relation to the purchase price was $940,000. There was an e-mail sent from Mr. Laliberte to Cascade just immediately prior to that date which indicated that payment would be made; however, only $140,000 was eventually paid by TNW on or just after the due date.

29 TNW later alleged that the short payment of $800,000 arose from a situation relating to one of Cascade's accounts receivable. As a result, there was substantial evidence on this application concerning the circumstances of the account receivable associated with TransPacific Telecom Group Inc. ("TransPacific").

30 I do not intend to review all of that evidence in detail, but I will generally describe the issue. It appears that TransPacific began doing business with Cascade in early 2012. Services were provided by Cascade and payments were made by TransPacific. I understand that as of the end of October 2012, which would have included billings to September, TransPacific had fully paid up or, in fact, had slightly overpaid. In any event, it appears that there were substantial services provided to TransPacific prior to the sale, in both October and November 2012, such that eventually, a receivable of approximately $718,000 was owing to Cascade at the time of the closing of the APA.

31 TNW points to certain clauses in the APA by which it says there was either an agreement or a representation by Cascade that all accounts receivable were "valid, enforceable and collectible accounts in full":

> **Section 3.01(11)**
>
> Financial Statements. The Financial Statements have been prepared in accordance with Canadian generally accepted accounting principles, are true, correct and complete in all material respects and present fairly the consolidated financial condition of the Vendor as of the respective dates indicated therein. Without limiting the generality of the foregoing, the gross revenue as set forth on the Financial Statements is equal to $32,000,000.
>
> . . .
>
> **Section 3.01(13)**
>
> Accounts Receivable. The accounts receivable included in the Purchased Assets arose from bona fide transactions in the ordinary course of the Business have not been discounted (except for customary, early payment discounts consistent with past practice and are valid, enforceable and collectible accounts in full (subject to set-off and a reasonable allowance, consistent with past practice, for doubtful accounts as previously disclosed in writing to the Purchaser).
>
> [Emphasis added.]

32 Evidence presented by TNW on this application from former employees of Cascade (who are now employees of TNW) is said to support the contention that it was well known by Cascade that the receivable owing from TransPacific was a "bad debt".

33 In light of that evidence, TNW now alleges that there was a breach of the representation in the APA concerning the TransPacific account being 'collectible account in full', or alternatively, that there was a fraudulent misrepresentation in respect of that debt. TNW now argues that the collectability — or rather, uncollectability — of this debt was not disclosed to TNW prior to closing. TNW also provided evidence that it had made unsuccessful efforts to collect the TransPacific debt in full.

34 I questioned counsel for TNW in terms of the interpretation of the words "collectible accounts in full". As I understand it, TNW takes the position that this phrase essentially amounts to a guarantee by Cascade that all accounts receivable owing

as at the end of November would be paid in full. Further, it contends that this "guarantee" relates to not only what might have been considered "bad" or problem debts prior to that date, but also to what might have been considered a good debt as of the closing but which later became a "bad" or problem debt for whatever reason.

35 Cascade says that TNW knew of the accounts receivable levels prior to the closing. There is evidence that Mr. Panesar did in fact receive an accounts receivable listing prior to the closing which, on the first entry, clearly identifies TransPacific as having a large amount due and owing to Cascade. There is also evidence that Mr. Panesar was involved in an e-mail exchange just prior to the closing, at which time he questioned certain Cascade employees about whether $200,000 that was to be paid by TransPacific had in fact been received.

36 I conclude from this evidence that it is abundantly clear that TNW was aware of the account receivable levels well before closing and that TNW was also aware of Cascade's efforts to collect the amounts outstanding from TransPacific. That evidence casts considerable doubt on TNW's ability to allege fraud on the part of Cascade by arguing that Cascade hid from TNW the true status of the TransPacific receivable. As counsel for TNW points out, I am not to make a determination in respect of those matters on this application, but I must at this time consider the merit, or perhaps lack of merit, of arguments that might be advanced at the end of the day.

37 I also note that, in support of TNW's contention that the TransPacific debt was considered a "bad debt", various TNW employees (who were formerly employed by Cascade) have taken pains to outline in detail what they say was happening at Cascade in respect of the TransPacific matter. It is quite curious that those same employees did not comment at all on the level of discourse between them and TNW employees during the due diligence period in respect of that same receivable.

38 Further, there is also little evidence from TNW in terms of its efforts to collect the TransPacific debt. There was evidence of a proposal by TransPacific to provide a promissory note, a proposal which was not satisfactory to TNW. But there was no further evidence from TNW on this application as to what happened after that point in time. There is, however, uncontradicted evidence from Cascade that a TNW employee has indicated fairly recently that TNW has had some success in collecting a substantial portion of the receivable owing by TransPacific.

39 The more significant argument on the part of Cascade relating to the TransPacific matter, the allegations of breach of contract or fraudulent misrepresentation, and the ability of TNW to set off any amounts owing as a result arise from the APA in Section 5.06. That clause provides:

> [TNW] shall not be entitled to set-off the amount of any Claim (whether submitted under Article 5 as damages or by way of indemnification or otherwise) against any other amounts payable by [TNW] to [Cascade] whether under this Agreement (including, without limitation, under Article 6) or otherwise.

40 The definition of "Claim" in the APA is very broad, meaning "any claim, demand, action, lawsuit, proceeding, arbitration or investigation, in each case, whether asserted, threatened, pending or existing." As earlier stated, the argument advanced by TNW is that there was a breach of contract, which, as Mr. Kaplan points out, would quite likely be squarely met by what I consider to be the plain meaning of Section 5.06. TNW asserts, however, that there are issues with respect to the interpretation of Section 5.06. In the first instance, it says that the clause does not apply to these circumstances (and by that, I take it to mean the ability of TNW to set-off claims). It is acknowledged that there is no claim for legal set-off, since TNW's claim is not a liquidated debt. TNW contends, however, that it has a claim for equitable set-off, in accordance with the principles set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.). I acknowledge if a valid claim exists, then generally speaking, equitable set-off may be available to TNW in these circumstances.

41 However, even if a claim for equitable set-off was available to TNW, again, I consider that the plain meaning of Section 5.06 would meet any such claim. TNW asserts that there is ambiguity in Section 5.06. But based on the plain meaning of the words in that Section, I quite frankly do not see it.

42 TNW's alternate argument is that even if Section 5.06 precludes the exercise of any right of set-off, the court may not enforce such a clause where fraud is involved. In that regard, TNW relies on the decision of *British Columbia (Attorney General)*

v. Malik, 2009 BCCA 202 (B.C. C.A.). At paras. 43-50, the court acknowledges that in certain circumstances, particularly in respect of an equitable claim such as fraud, courts may ignore the contractual arrangements between the parties.

43 Cascade argues that within a normal commercial situation, the court will not usually depart from the clear wording of the contract and, in particular, the court will enforce clauses by which the parties have expressly agreed that no set-off will be exercised, citing in support *KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp.*, 2003 BCSC 164 (B.C. S.C.) and *Royal Bank v. Parmar*, 2005 BCSC 1155 (B.C. S.C. [In Chambers]).

44 In this case, both parties are sophisticated parties. Further, this was clearly a situation where the parties had significant legal advice in the formulation of their agreement and, given the substantial documentation that accompanied the closing, also in the recording of their agreement. The allegations of fraud are advanced by TNW based on what I consider to be a fairly weak argument. In light of all the circumstances brought to light at this time, following *Parmar* and *KKBL*, I see no reason to depart from holding the parties to their bargain. There is no clear indication of fraud on which I might follow the *Malik* reasoning.

45 Accordingly, with respect to the $800,000 amount owing, I find that Cascade has presented a strong case.

(b) Allocation of Next Layer Revenue

46 I have already referred to the pre-existing arrangements between Cascade and Next Layer concerning the manner in which the revenue from the shared customers were to be recovered, paid and allocated between them.

47 Critical to the allocation was that if there were any co-location services provided to a shared customer, all of the proceeds would be paid to Next Layer and there was to be a remittance back to Cascade of the cost of providing the telecommunication services plus 50% of the profits relating to those services. It is also the case that if there were any receivables owing from Next Layer to Cascade, by reason of services being provided to Next Layer, there would be a billing of those expenses to Next Layer and then a later remittance by Next Layer back to Cascade.

48 This was the basis upon which Cascade and Next Layer operated prior to the closing of the transaction on November 30, 2012. Certain former employees of Cascade (now employees of TNW) gave evidence attempting to disparage the validity of that practice or method of allocation. I consider that whether this allocation was something that should have been done is rather beside the point; the fact is it was done.

49 Cascade submits that it was this very practice that was incorporated into the APA. Counsel for TNW submits, quite correctly, that there was no specific delineation of that allocation procedure in the APA. However, the APA did reference the financial statements and the assumptions on which those financial statements were created. The evidence is clear that those financial statements and the assumptions were on the basis of the original allocation formula that was in place prior to the closing of the transaction. Mr. Griffiths, the CFO of Next Layer, commented that it was on that basis that he expected that the allocation would continue simply as before.

50 TNW takes the position on this application that there was no agreement between the parties concerning the allocation of revenue to Next Layer as at the date of the closing, in accordance with the APA. TNW also made certain submissions that, in any event, even if there was an "original" allocation, sometime in November prior to the closing, the parties agreed to what is called the "new" allocation.

51 There are a number of difficulties with TNW's position. There is a suggestion in the evidence from Mr. Sansom to the effect that Mr. Laliberte alleges that he orally made this "new" agreement with the representatives of Cascade prior to the closing. That portion of the affidavit is very oddly worded; and while Mr. Samson says that Mr. Laliberte "advised" of such an agreement, there is no evidence as to *who* Mr. Laliberte is said to have advised of that agreement. I do, however, acknowledge that Mr. Panesar also says that this "new" agreement arose from a meeting between himself, Mr. Laliberte and two representatives of Cascade, including the Chairman.

52 Cascade and Next Layer very much dispute that they entered into any "new" agreement with TNW prior to the closing.

53 Another difficulty with this "new" agreement is that it is directly contrary to the financial statements that are expressly referenced in the APA and related documentation.

54 A further difficulty is that the APA included an "entire agreement" clause in Section 7.08 which expressly precludes any reliance on prior agreements, including any oral agreements; and as in the usual fashion, it indicated that whatever agreements the parties intended to and did make in respect of this transaction were in writing, as found in the APA. This is not an unusual clause. And again, there was a specific reference to the Next Layer financial statements in Section 3.03 of the APA and that TNW expressly acknowledged that the gross revenue set forth in those financial statements are at a certain level. The assumptions within those financial statements lead back to the original allocation that was in place between Cascade and Next Layer prior to the closing.

55 Perhaps the best response to TNW's current contention regarding this "new" agreement is the evidence from Mr. Laliberte himself. He sent an email to the Chairman of Cascade and Next Layer on the eve of the closing on November 29, 2012, stating:

> Don't worry about the intercompany we will follow the existing agreement. Revenue, asset and liability will be mutually agreed today in the agreement and nothing will change. Revenue of next layer and Oncall will be immediately forwarded to your account, but you will have to pay back to us the cost as per the agreement on a timely matter. Tim will deal with this for at least the next 6 months.
>
> John, AT THE END OF THE DAY IT IS A QUESTION OF TRUST AND GOOD FAITH!!

56 It is difficult to interpret the above statement by Mr. Laliberte, save and except that he understood that the allocation was to be exactly as was in place between Cascade and Next Layer just prior to the closing. That understanding would have not only included a calculation based on the original allocation; most importantly, it would have also included that there would be no set-off before that allocation was made and that there would be a billing addressed to Next Layer by TNW in the usual course of business, which would be paid by Next Layer.

57 Once more, I acknowledge TNW's argument on this issue, and I do not intend to resolve that issue on this interlocutory application. For the purposes of considering the relief sought today, however, I consider that Cascade has a strong case in support of its position that the allocation between the parties was to be in accordance with the original allocation.

(c) HST / Lease Obligations

58 There was some discussion during submissions regarding the amounts that are owed to the CRA for HST prior to the closing. I will not delve into that issue to any great degree because counsel for TNW indicated during argument that TNW now agrees that those amounts should have been, and will be, paid by TNW. I will, in any event, address this issue within the context of the court order to be granted.

59 The lease was also a very contentious matter. The evidence indicates that the lease in Burnaby where both Cascade and Next Layer had their head offices was to be taken over by TNW. Obligations under the lease were addressed within the context of the Assignment and Assumption Agreements.

60 Notwithstanding those agreements, almost immediately after the closing, Mr. Laliberte on behalf of TNW chose to take a different tack with the landlord. TNW moved from the premises shortly after the closing and indicated to the landlord that there would have to be negotiations on the outstanding obligations that remained under that lease.

61 I do not comment negatively on TNW's decision to move. There are often good reasons to move to less expensive accommodations towards lessening expenses. Counsel for TNW has explained that this decision was made to help rationalize or restructure Cascade's operations, in the hopes of improving the financial health of the Business.

62 Mr. Laliberte's approach in relation to the lease is a somewhat curious one, particularly in light of his comments to certain Cascade employees on December 2, 2012 that things were going to get "rocky" in the days following his taking over the operations of Cascade, addressing certain operational matters, and effecting the "turn around" of the Business.

63 The difficulty with his approach was that it brought about a default under the lease. A notice of default under the lease was issued by the landlord, noting defaults to the extent of $67,000. The consequences of those defaults have fallen upon the shoulders of Cascade, who of course remains the principal obligant under the lease at this time. Quite clearly, the substantial contractual obligations that were put in place between Cascade and TNW were intended to avoid this very result. TNW assumed liability for this contract so that Cascade would not be met with defaults under its contracts without having any resources to cover those obligations after having transferred the Business away to another party with only the promise of payment to come.

(d) Post-Closing Matters

64 Various documentation, including security agreements, was not provided at the time of the closing. There was, however, good reason for that, namely, the closing happened very quickly. In any event, the parties agreed to a later deadline of December 18, 2012 for providing these further documents. This deadline was not met, and the further security documents were not provided.

65 I did not take from TNW's submissions that there was any difficulty conceptually in providing those documents. Counsel for TNW referred to an ongoing dialogue between counsel towards having those documents put in a proper format, and once finalized, having those documents executed.

(e) Transition Issues

66 This is a critical issue from the point of view of Cascade and Next Layer, and it is principally driven by the circumstances of Next Layer and its interdependence on Cascade (and now TNW) in terms of continuing with its ongoing operations.

67 The interdependence that existed between Next Layer and Cascade was not an issue because they were run essentially by the same parties. The interjection of TNW in terms of Next Layer's operations has, however, introduced into the mix a level of vulnerability on the part of Next Layer that is being sorely tested.

68 Consistent with documenting the terms upon which the sale was to occur, the process of the transition was addressed by the parties in a written document called the Transition Agreement. Conceptually, the idea was that the parties would move "as soon as practicable" to provide Next Layer with the means of obtaining its documentation and information that was in the possession of Cascade (and now TNW) for the purpose of enabling Next Layer to move forward towards establishing its own standalone operation.

69 The overwhelming evidence from Cascade, which is supported to some extent by the evidence of TNW, is that the transition is happening neither as it should nor as quickly as it should.

70 There is considerable evidence from all the parties concerning the past and continuing dialogue regarding the outstanding matters. What particularly emerges from that evidence, and which is undisputed, is that TNW has been expressly denying Next Layer certain of its information and has been expressly denying Next Layer access to its information and data which it otherwise would have been able to obtain through its arrangements with Cascade. It was this past practice of access to the Next Layer information and data which was intended to be continued through the transition period.

71 A further issue arising in this transition period relates to TNW's failure to remit monies to Next Layer in accordance with the original allocation formula, as discussed above. The Transition Services Agreement provided that funds collected by TNW were to be held in trust for Next Layer and were required to be remitted within 72 hours.

72 Lastly, another troubling aspect of the transition is that there is evidence that TNW is interfering with Next Layer employees. Various Next Layer and Cascade employees recount a strange series of meetings in January 2013 which Mr.

Laliberte, Mr. Panesar and Mr. Stearman (also a former employee of Next Layer) attended. There is some dispute about what happened at those meetings, but there is no dispute on certain events at those meetings. What I take from that evidence is a clear indication that Mr. Laliberte was, at least, making various disparaging comments about Next Layer and Cascade to their employees, by which he questioned the solvency of Next Layer and Cascade and their ability to survive as a business. In addition, during some of those meetings, Mr. Laliberte was actively recruiting Next Layer employees to join TNW. The recruitment of Next Layer employees is somewhat curious in the sense that it does not appear that TNW was at all in the co-location business prior to the closing in November 2012. However, the inference from the evidence is that perhaps TNW sees that that is a business that it wishes to get into and that acquiring the Next Layer employees would assist it greatly in that respect.

73 Cascade advances the proposition that there is a strong inference from the evidence of the actions of TNW and its employees upon which to conclude that TNW, and particularly Mr. Laliberte, are engaged in a concerted campaign to weaken Next Layer and Cascade so as to allow TNW to pick off Next Layer's employees, and perhaps Next Layer's assets, for its own benefit. That is very much disputed by TNW. Taking all of the evidence on this application in its totality, however, I do consider that there is a strong inference from the evidence to suggest that this is, in fact, what is happening here. Again, I refer to the e-mail from Mr. Laliberte referring to the "rocky" road ahead that he anticipated by reason of his business strategies or tactics. The only thing that he perhaps forgot to mention is that, in addition to other parties, Cascade and Next Layer would also be asked to walk that same "rocky" road with him.

74 With respect to the transition issues, again, while there is some dispute between the parties on many of those issues, I intend to approach them on the basis of respecting the bargain between the parties as evidenced by the extensive documentation executed by them.

Receivership

75 As indicated earlier, the first action was commenced by Cascade and Next Layer seeking enforcement of the security given by TNW, which security is admittedly in place. The second action was commenced by TNW against Cascade on or about the same date as the first action. This latter action is more defensive in the sense of seeking a stay of enforcement of the acceleration of payment of the debt, which in fact was demanded by Cascade based on the alleged defaults. Alternatively, TNW seeks a stay of enforcement of the security held by Cascade. Based on submissions by Cascade's counsel, Cascade is not pressing that the security should be enforced based on an acceleration of the entire purchase price owing under the APA; rather Cascade seeks enforcement only in respect of the $800,000 that is owed from December 2012.

76 The statutory basis upon which to appoint a receiver is well set out by the parties. The *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39, allows the appointment of a receiver where it is just and convenient. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243 (the "*BIA*"), similarly provides for the appointment of a receiver on that basis.

77 Two decisions of this Court set out the factors that are to be considered in appointing a receiver: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]) and *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]). Although the factors referenced in *Maple Trade* and *Textron* may guide the court in terms of what is to be considered on such an application, the overarching is to consider all the circumstances in deciding whether it is just and convenient to appoint a receiver.

78 TNW's application for a stay of enforcement proceedings is brought pursuant to s. 63(2)(d) of the *PPSA*, which provides that the court may grant an order staying the enforcement of rights under security instruments. Similar to the *Law and Equity Act* and *BIA* provisions, this section allows the court to exercise its discretion in appropriate circumstances.

79 I will note at the outset that there are substantial triable issues. They have been advanced by both TNW and Cascade, and as counsel for TNW says, they have not been tested at trial. There have been no cross-examinations on the affidavits presented. However, I approach this application on the basis that certain circumstances have emerged, and I am satisfied that interim relief is necessary in those circumstances.

80 The first factor set out in para. 25 of *Maple Trade* is whether irreparable harm might be caused if no receivership order were made. I should say at the outset that TNW has proposed what it considers a compromise in terms of the receivership sought by Cascade in respect of the $800,000 that was due on December 14, 2012. TNW has offered to pay that amount into court, which it says will provide security for that amount until the matter of its TransPacific set-off/fraud claim is determined. Accordingly, TNW says that no irreparable harm will be caused to Cascade for that reason and that it is fair to pay the amount into court.

81 I do not intend to go through each of the *Maple Trade* factors in detail, although an important consideration is that a receivership is extraordinary relief which should be granted cautiously and sparingly. Accordingly, if the court can fashion a remedy that avoids receivership, then that is certainly something that should be considered. Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.

82 Given the positions of the parties, in my view, the issue comes down to this: should the $800,000 stay in court or should it be paid to Cascade in accordance with the terms of the APA? I have decided in the circumstances that it should be paid to Cascade. I say that because, in my view, to do otherwise is not fair in the circumstances, where such payment was to be made in accordance with the APA and in light of the clear wording of Section 5.06 of the APA. In addition, if TNW should succeed in its arguments at the end of the day, there is no prejudice that will be suffered, because TNW will still owe $5 million to Cascade even after this amount is paid. The $5 million receivable can stand as substantial security in respect of the claim relating to the TransPacific receivable should TNW prevail at the end of the day.

83 Accordingly, I am ordering that: (i) TNW pay the $800,000 to Cascade, and I will later address by what date; and (ii) failing payment, a receivership order is granted. TNW apparently has the money, and as I said, there is no prejudice in the event of payment. TNW and Mr. Laliberte can decide in fairly stark terms whether the payment is to be made, which will dictate what consequences flow from any default.

Injunctive Relief

84 The request for injunctive relief principally arises from the transition issues that I have already discussed. The well-known authorities that govern the test to be applied on this aspect of the application are *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) and *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), aff'd [1991] S.C.J. No. 7 (S.C.C.). The three-part test includes considering: firstly, whether there is a serious question to be tried; secondly, whether the applicant will suffer irreparable harm if the application were refused; and thirdly, whether the applicant will suffer greater harm from the refusal of the remedy than the respondent would suffer from the granting of the remedy. In *Wale*, the court chose to collapse the second and third aspects of the test into one, considering together the balance of convenience and the issue of irreparable harm.

85 I have already stated my conclusions with respect to the two major issues, that is, the set-off issue and the allocation issue. In my view, Cascade has more than met the low burden of showing that there is a serious issue to be tried. I also find that Cascade has shown that there is a serious issue to be tried with respect to its cause of action relating to the interference with Next Layer employees.

86 Turning to the irreparable harm and balance of convenience tests, the Court in *RJR-MacDonald* indicates that the factors will vary from case to case and that there is no set formula by which to decide the matter. TNW submits that this is just a matter of money and that money will solve the problems at the end of the day. That is in stark contrast to the position of Cascade and Next Layer, who submit that this is not about money. Rather, they say that Next Layer's very survival depends on a quick resolution of these transition issues, so that they can continue their efforts to separate the two operations and finish the transition

so as to reduce and ultimately eliminate the current interdependence with TNW which places both Cascade and Next Layer in a vulnerable position.

87 I do note that Next Layer employees have given evidence that had they known how the transition period would be dealt with by TNW, as they know now, they would have taken more serious steps to address the transfer of information and documentation prior to the closing date. I return to Mr. Laliberte's comment about the trust that was intended to be in place between the parties, which given the way things have turned out, was not worthy of consideration.

88 The authorities are clear that the survival of a business is a factor that will be considered in the context of irreparable harm. This was particularly addressed in the *RJR-MacDonald* decision. This issue was also recently considered in *Edward Jones v. Voldeng*, 2012 BCCA 295 (B.C. C.A.) at para. 41, where the court refers to *RJR-MacDonald*, stating that "irreparable harm refers to the nature of harm suffered rather than its magnitude." However, Mr. Justice Chiasson goes on to say that:

> [41] ...if an applicant were able to show that its business potentially would be destroyed by the conduct of a defendant it might be open to argue that such "magnitude" of damage would be irreparable.

89 It goes without saying that it is advantageous to have a weak opponent. I would reiterate the submissions of Cascade concerning its allegations of a campaign on the part of TNW to put Cascade and Next Layer in as vulnerable a position as possible. Again, I consider that there is a fair inference to be taken from the evidence that that is, in fact, what is happening here.

90 There is substantial evidence to support that TNW is in breach of the various agreements: (i) the failure to pay the $800,000; (ii) the failure to pay the CRA; (iii) the failure to pay the landlord, and the issues with the landlord which have negatively affected Cascade; (iv) the admitted refusal by Mr. Panesar to provide to Next Layer certain information and documents and access to that information; and (v) the refusal to pay Next Layer in accordance with the original allocation.

91 Furthermore, there are the negative representations to employees that were admittedly made by Mr. Laliberte. In addition, there were efforts by TNW to recruit Next Layer employees. TNW did not deny this, but suggested that the employees it was trying to entice across were not in fact that valuable. This begs the question, however, as to why it was trying to entice them across in the first place.

92 All of these factors suggest that TNW made these efforts in an attempt to intentionally weaken Next Layer and Cascade, and it is evident that they had that effect to some degree.

93 In particular, I would note affidavit #1 of Mr. Williams at para. 35, as to the harm that he says is being suffered by Cascade and Next Layer by reason of the actions or inactions taken by TNW. I agree with Cascade and Next Layer that the harm that has been brought to bear on the operations of Next Layer has more than adequately established that there is the risk of irreparable harm being visited upon Next Layer and hence, Cascade.

94 I do not agree with TNW's submissions that damages would be an adequate remedy at the end of the day. It is evident that if Next Layer does not survive, then TNW would more than likely be dealing with the trustee in bankruptcy or perhaps a receiver. For TNW, from a negotiating point of view, this would clearly be better than dealing with Cascade and Next Layer directly.

95 On the other hand, there is no prejudice to TNW by abiding by the bargain that it made in respect of the transition, which was clearly addressed by the parties in the documentation before me.

96 I acknowledge that the allocation issue remains somewhat of an issue from TNW's point of view with respect to this so-called "new" agreement. But the evidence before me today strongly indicates that the parties agreed to the original allocation that was in place between Cascade and Next Layer. As I said, that was more than evident from Mr. Laliberte's own e-mail. I would emphasize again that if there is any issue in that respect at the end of the day, the $5 million still yet to be paid under the APA will stand as more than adequate security in respect of any recovery that TNW may be entitled to.

97 I conclude that there is no prejudice if Next Layer is able to enforce the Transition Agreement. This transition can take place as soon as possible and in accordance with the bargain of the parties.

98 There has been some discussion on this application concerning the *status quo*. TNW is not able to assert on this application that the *status quo* is that which arises from a departure from the agreements. That is simply an untenable position. The *status quo* that must be respected at this time, until such time as the parties establish something to the contrary, is the bargain. That bargain, as I said, is evident from the substantial written documentation and agreements that the parties have taken time, trouble and expense to put together to evidence their agreement. Accordingly, the *status quo* is in accordance with that documentation, not with any other agreements which TNW may allege are in place. I do not accept that breaches of the agreements — which appear to be the basis upon which Mr. Laliberte prefers to do business — are the basis upon which to establish the *status quo*.

99 If this transition can be done as soon as possible, which is no doubt the intention of Next Layer at this point in time, the allocation issue will become less important as that matter is sorted out.

Disposition

100 Accordingly, I am granting the orders sought by Cascade and Next Layer on this application. Cascade has produced draft forms of the orders which TNW's counsel has reviewed. Both parties have made submissions on changes to the drafts. I have considered submissions on these further changes to the draft orders and the changes are approved.

TAB 7

2024 BCSC 47
British Columbia Supreme Court

Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership

2024 CarswellBC 78, 2024 BCSC 47, 11 C.B.R. (7th) 57, 2024 A.C.W.S. 155

Bank of Montreal (Petitioner) and Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd., Harlow Holdings Ltd., 1104227 B.C. Ltd., Cloudbreak Holdings Ltd., CM (Canada) Asset Management Co. Ltd., Forseed Haro Holdings Ltd., 1115830 B.C. Ltd., Terrapoint Developments Ltd., Kang Yu Zou, Wei Dong, Wei Zou, Xia Yu and Treasure Bay HK Limited (Respondents)

Fitzpatrick J.

Heard: December 22, 28, 2023
Judgment: January 11, 2024
Docket: Vancouver H230802

Counsel: K. Jackson, M. Gill, for Montreal
S. Turner, D. Han, for Haro-Thurlow Street Project Limited Partnership, Harlow Holdings Ltd., Haro and Thurlow GP Ltd., 1104227 B.C. Ltd., Cloudbreak Holdings Ltd., CM (Canada) Asset Management Co. Ltd., 1115830 B.C. Ltd. and Kang Yu Zou
R. Clark, K.C., for Forseed Haro Holdings Ltd.
C. Brousson, for Terrapoint Developments Ltd.
D. Fitzpatrick, for Wei Dong, Wei Zou and Xia Yu
D. Shouldice, for Treasure Bay HK Limited
C. Hildebrand, for Proposed Receiver, Deloitte Restructuring Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient
Debtor owned tenanted commercial and residential complex which was unique development property — Secured creditor owed over $82.2 million in principal and interest which was in default — Debtor secured no concrete offers to refinance debt — Gross monthly interest cost under debt was $620,000 per month and net monthly revenue from property was $175,000 per month, resulting in shortfall of $445,000 per month — Debtor wanted another six months to refinance debt — Secured creditor commenced proceeding to enforce its mortgage and personal security — Secured creditor brought application to appoint receiver to arrange sale of property to repay debt — Application granted — It was just and convenient to appoint receiver — Receiver was appointed as of January 12, 2024, but would not be empowered to undertake sales efforts until after February 23, 2024 and would be unable to file application for approval of sale until after April 26, 2024 — Receiver was to be granted ability to access property and debtor's books and records and had ability to manage and operate business — It was appropriate to allow debtor 12 months to redeem — Receiver was not authorized to exercise shareholder, partnership, joint venture or other rights that debtor held because it might restrict ability to refinance.

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Ward Western Holdings Corp. v. Brosseuk (2022), 2022 BCCA 32, 2022 CarswellBC 212, 67 B.C.L.R. (6th) 280 (B.C. C.A.) — considered

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s. 39 — referred to

APPLICATION by secured creditor for appointment of receiver.

***Fitzpatrick J.*:**

INTRODUCTION

1 The petitioner, Bank of Montreal ("BMO"), is a secured creditor of the respondent limited partnership who owns a development property in downtown Vancouver, BC. BMO is owed over $82.2 million in principal and interest (the "Debt"). BMO's Debt has been in default since July 2023.

2 In October 2023, BMO commenced this proceeding, seeking to enforce its mortgage and personal security against the property, the debtors and the guarantors of the Debt. On this application, BMO seeks the appointment of a receiver of the real and personal property secured in its favour, effective in early 2024, with the principal purpose of arranging a sale of the property by spring 2024 to repay the Debt.

3 All of the respondent debtors/guarantors, with one exception, oppose the appointment of a receiver, particularly one having the power of sale. The opposing respondents seek further time - to June 2024 - to arrange a refinancing of the lands, asserting that they are entitled to and need this further time to allow them an opportunity to redeem their equity of redemption.

BACKGROUND FACTS

4 There is little controversy about the facts as relevant to the issues.

The Parties

5 The respondent, Haro-Thurlow Street Project Limited Partnership ("HTLP"), is the beneficial owner of the development property in Vancouver (the "Property"). The respondent, Harlow Holdings Ltd. ("Harlow Holdings"), is the legal owner of the Property. The respondent, Haro and Thurlow GP Ltd. ("HTGP"), is the general partner of HTLP. I will refer to all of these respondents collectively as the "Borrowers".

6 HTLP is beneficially owned by its limited partners, the respondents, 11044227 B.C. Ltd. ("110"), as to 45%; Forseed Haro Holdings Ltd. ("Forseed"), as to 45%; and Terrapoint Developments Ltd. ("Terrapoint"), as to 10%. 110, Forseed and Terrapoint are collectively called the "Partners".

7 110 is beneficially owned by the respondent, 1115830 B.C. Ltd. ("111"), which is, in turn, beneficially owned by the respondent Kang Yu Canning Zou ("Mr. Zou"). Mr. Zou is a director of HTGP, Harlow Holdings, 110 and 111. He is also a director of the respondents, Cloudbreak Holdings Ltd. ("Cloudbreak") and CM (Canada) Asset Management Co. Ltd. ("CM"). I will refer to all of these respondents collectively as the "CM Group".

8 Forseed, the members of CM Group and Terrapoint are guarantors of the Debt.

9 The respondent Wei Dong is Mr. Zou's wife. The respondents, Wei Zou and Xia Yu, are Mr. Zou's parents (the "Parents").

10 The shareholders of HTGP (111 and Forseed being majority), and Intracorp Projects Ltd. ("Intracorp"), an entity related to Terrapoint, a minority shareholder, are parties to a shareholders' agreement dated September 26, 2018 (the "SH Agreement"). The SH Agreement provides, in essence, that 111 and Forseed shall at all times have a majority of four out of five directors on the board of directors. In addition, the SH Agreement provides that "Major Decisions" by HTLP can be made by majority rule, with any dissenting shareholders having the right to seek arbitration.

11 In Section 1.1(s) of the SH Agreement, "Major Decisions" include (vi) Incurring any indebtedness in connection with the Lands or Project other than indebtedness under the land and pre-development loan . . . ". I assume this means any indebtedness other than the Debt and would include any refinancing of the Debt.

The Property

12 In August 2018, HTLP was formed for the purpose of purchasing the Property, which is currently a mixed commercial and residential rental building located at the south-east corner of the intersection of Haro and Thurlow Streets in Vancouver.

13 The Property comprises a rectangular-shaped parcel of land with a total gross surface area of about 43,250 square feet. The Property includes a seven-story residential strata building and a low-rise commercial building over a common underground parking structure.

14 The overall plan was to redevelop the existing buildings and construct a 55-story residential condominium tower on the site.

15 The rental of the buildings on the Property is managed by FirstService Residential BC Ltd. ("First Service"). FirstService manages the buildings, collects the residential and commercial rents and remits the net monthly rental revenue to HTLP's account at BMO. The Borrowers have undertaken to continue this practice through any redemption period.

16 Net monthly revenue from the Property is about $175,000 per month. Although these funds are paid to BMO, the amount is insufficient to service the monthly interest expense of the Debt. Historically, this shortfall was paid by some or all of the Partners to BMO.

17 The Borrowers have carried out extensive pre-application work for the proposed high-rise building or buildings on the Property. Apparently, they have paid more than $4 million for this work to Intracorp, the development manager of the Property.

Financing of the Property

18 In August 2018, the Property was purchased for a total cost of $172,750,000, which includes the purchase price of $164,750,000, property transfer taxes, commissions and other expenses.

19 The acquisition costs on closing were financed by the Debt from BMO of approximately $94 million. In addition, the Partners provided the remainder of the necessary funds by advancing loans totalling approximately $84.5 million to HTLP.

20 By January 1, 2023, the Partners had advanced over $18 million to fund ongoing costs of HTLP. Further contributions by the Partners, or some of them, to HTLP continued into 2023. As of December 2023, the Partners' total contributions to HTLP exceed $106 million.

BMO Debt / Security

21 BMO's security against the Borrowers is set out in a credit agreement dated August 21, 2018 (the "Credit Agreement"). The security includes both a first ranking mortgage against the Property and a general security agreement against the Borrowers' personal property.

22 The Credit Agreement required $50 million guarantees from Cloudbreak and CM and a $10 million guarantee from Terrapoint. In addition, the Credit Agreement required the deposit of cash collateral and CM Group and Forseed provided some of this collateral to BMO to secure the Debt, as I will discuss below.

23 The original term of BMO's loan was to have been for two years, from August 2018 to August 2020.

24 110, Forseed and another company have a second mortgage against the Property that was registered in October 2018 (the "Forseed Mortgage"). There is no evidence as to the amount owed, if any, under the Forseed Mortgage.

25 The Borrowers say that, for many reasons, they have not met the requirements of the City of Vancouver (the "COV") to proceed with the development of the Property, despite substantial efforts to do so over the last five years. The Borrowers have not yet formally applied for a development permit for the Property.

26 As a result of these delays, the Borrowers and BMO negotiated several amendments to the Credit Agreement. In September 2022, the last amendment to the Credit Agreement provided for an extension of the "Outside Date" to August 31, 2023, which is when the term of the Debt ended.

27 Various iterations of the Credit Agreement also provided for guarantees to a maximum of $50 million from 110, 111, CM, Cloudbreak and Mr. and Ms. Zou and guarantees to a maximum of $7 million from the Parents. The guarantees from the individuals are secured against various lands held by them, by way of a first mortgage or undertakings not to encumber those lands. The value of the lands held by the individual guarantors, Mr. and Ms. Zou and the Parents, is said to be approximately $16.9 million.

28 In early 2023, BMO advised the Borrowers that it would not grant any further extensions of the Debt beyond August 31, 2023. The Debt has now matured and is fully owing.

The Borrowers' Sale / Refinance Efforts

29 In the face of BMO's refusal to further extend the Loan, in early spring 2023, the Borrowers retained CBRE Limited to solicit offers to purchase the Property.

30 In May 2023, the Borrowers received six different offers, ranging in value from $81.5-100 million. Incentives were built into some of the offers which might have resulted in higher purchase prices if certain conditions subsequent had been met. 110 signed a letter of intent ("LOI") in respect of one offer for almost $93 million (the "Chard Offer"), which was supported by Terrapoint. Forseed refused to approve the Chard Offer and 110 also backed away from its support of it.

31 Ultimately, none of these offers was accepted by the Borrowers. Mr. Zou states that, while these offers would have generated sufficient proceeds to pay the Debt in full, even with incentives for potential price increases based on favourable development approvals by the COV, all of the offers would have resulted in the Partners, collectively, suffering tens of millions of dollars of losses on their investments.

32 Terrapoint asserts that the majority partners of HTLP (111 and Forseed) did not provide any "good faith" reason for refusing to proceed with the Chard Offer.

33 The CM Group and Forseed deny that their rejection of the Chard Offer was done in bad faith. They say that, rather than accepting the loss that would have occurred, they decided to attempt a refinance of the Debt. They acknowledge that, in the long run, this may prove to be a "bad decision" or "bad business decision".

34 In late August 2023, the Borrowers' provided the only firm evidence of their efforts to refinance the Debt to BMO. This amounted to a very "high level" brief one-page document delivered on August 29, 2023 that provided for a $80 million first mortgage, which is, of course, not even sufficient to repay the Debt.

35 Even Terrapoint, a minority stakeholder in HTLP, has little information regarding this proposed refinancing and no information as to any other refinancing options. Terrapoint is not prepared to be a part of any refinancing of the Property. This may or may not prove to be a sticking point, since Terrapoint, through Intracorp, has been involved in the management of the development and construction of the Property to the present time.

BMO Default / Forbearance

36 In July 2023, the Borrowers defaulted in payment of the interest amount, when BMO received the rent amounts from First Service, but the shortfall was not remitted by the Partners. There is no evidence from Forseed or Mr. Zou as to what caused the default. Terrapoint offers an explanation, as I will discuss below.

37 On August 29, 2023, BMO made demand for payment. At that time, the Debt was outstanding at $95,520,027.39. BMO also made demand on the guarantors. BMO gave notice of its intention to enforce its security against the Borrowers' property, including the Property, and the collateral security provided by the guarantors.

38 In August/September 2023, the Borrowers engaged in discussions with BMO with a view to entering into a forbearance agreement. BMO negotiated a forbearance agreement that it understood was acceptable to the Borrowers. Ultimately, in early October 2023, the Borrowers refused to sign the agreement.

39 On October 23, 2023, BMO filed this proceeding.

Treasure Bay

40 One significant circumstance relating to the Property and any potential refinancing of the Debt is Mr. Zou's dispute with Treasure Bay HK Limited ("Treasure Bay").

41 On November 12, 2021, Treasure Bay filed an action in this Court against 111, 110, Mr. Zou, Harlow Holdings and GM International Holding Limited ("GMIH"). Treasure Bay is a minority shareholder of GMIH. Treasure Bay alleges that Mr. Zou breached his fiduciary obligations to GMIH by causing GMIH to advance $30 million to himself, 111 and 110 without adequate security (the "TB Action"). Treasure Bay alleges that the monies were intended to assist Mr. Zou in purchasing the Property.

42 On November 12, 2021, Treasure Bay also filed a certificate of pending litigation ("CPL") against the Property, asserting that GMIH is entitled to an equitable mortgage or alternatively, is entitled to trace its loan into the Property pursuant to a remedial constructive trust.

43 Since March 2022, Treasure Bay and the defendants in the TB Action have been engaged in resolving what the parties call the "pleadings dispute", namely whether Treasure Bay is entitled to proceed with its derivative action without leave of the Court. After this Court's finding that no leave was required (2022 BCSC 761), that decision was upheld in *1115830 B.C. Ltd. v. Treasure Bay HK Limited*, 2022 BCCA 380. On July 20, 2023, leave to the SCC was dismissed: 2023 CanLII 64850 (SCC).

44 The defendants have now filed an application to remove Treasure Bay's CPL against the Property, arguing that Treasure Bay is not asserting any interest in the Property to support the filing of the CPL as against an interest in land. That application is scheduled for late January 2024.

Further Refinancing Efforts

45 In Mr. Zou's affidavit sworn December 12, 2023, he provides the only update on the Borrowers' refinancing efforts in the face of BMO's foreclosure.

46 Mr. Zou states:

> In late September 2023, at or about the time forbearance negotiations with the petitioner came to an end, the Borrowers retained consultants to assist them in securing take-out financing.
>
> These consultants have identified a syndicate of three lenders who have indicated a strong willingness to provide the Borrowers with a loan or loans in amounts sufficient to fully repay the Petitioner's loan.

> However, the Borrowers' consultants have identified the CPL registered against title to the property in favour of the Respondent Treasure Bay HK Ltd. ("Treasure Bay") as an impediment to the new lenders proceeding to finalize their commitments and provide funding. Accordingly, Borrowers are proceeding with an application to have the Treasure Bay CPL discharged from title. That application is set for January 22, 2024.
>
> The Borrowers are confident that they will be able to secure take-out financing by no later than June 30, 2024.

47 BMO emphasizes that absolutely no documents have been provided by the Borrowers to support any of Mr. Zou's statements, including the identity or involvement of the "three lenders" or their "strong willingness" to provide financing sufficient to repay the Debt.

48 As can be seen from Mr. Zou's evidence, the Borrowers are still facing significant headwinds in achieving any refinancing. They could only do so by removing Treasure Bay's CPL or obtaining Treasure Bay's consent. In addition, even assuming that occurs, they have not secured any concrete offers to refinance the Debt.

49 They are, at best, "hoping" that they will be able to refinance by June 2024.

BMO Present Position / Concerns

50 In July 2023, BMO held $23.6 million of cash collateral as follows:

> a) $13,625,000 pledged by Forseed;
>
> b) $1,375,000 pledged by 110; and
>
> c) $8.6 million pledged by CM Grouse Mountain (LP) Ltd. ("CM Grouse"), which is a company related to the CM Group. Although it is somewhat unclear, the $8.6 million seems to be comprised of $5.6 million in CM Grouse's account and $3 million in 110's account.

51 Subsequent to the interest default and the maturity of the Debt, BMO applied the amounts pledged by Forseed and 110 to the principal owing under the Debt.

52 BMO continues to hold the deposit made by CM Grouse. BMO has not applied that amount to the Debt as BMO has identified some issues that may impede its ability to do so. One of those issues is that Treasure Bay is a minority shareholder of CM Grouse and holds a position on the board of directors. Treasure Bay refuses to consent to BMO applying the cash pledged by CM Grouse against the Debt.

53 In addition, BMO continues to hold the balance in 110's account of approximately $3 million. 110 placed those funds in the account pursuant to the Credit Agreement, which required that 110 maintain a cash balance of not less than $3 million as cash collateral security for repayment of the Debt. However, BMO's counsel states that Treasure Bay has indicated that it may potentially have claims against the $3 million on deposit for 110. In light of that potential difficulty, BMO has declined to apply those funds to the Debt.

54 Accordingly, despite the CM Group's attempts to free up further cash in the various accounts at BMO to service the Debt going forward, or pay down outstanding interest, so as to attenuate the risk to BMO going forward, the offered amounts are not issue free and readily available to be used for that purpose.

55 Currently, the gross monthly interest cost under the Debt is approximately $620,000 per month. Net monthly revenue from the Property is about $175,000 per month, resulting in a monthly shortfall of about $445,000.

56 As of December 19, 2023, the principal amount owing under the Debt was $78,256,373.16. Accrued interest amounted to just under $4 million, resulting in a total amount owing in excess of $82.2 million.

57 Peter Mullin, BMO's director of the Special Accounts Management Unit, states that the Borrowers' failure to list or market the Property or pay the monthly interest shortfall has caused BMO to lose confidence that they are working to repay the Debt. In addition, Mr. Mullin is concerned about BMO's position eroding given the accruing interest amounts and the risk of deterioration in the market.

58 By June 2024, the Debt will be at approximately $85 million.

POSITIONS OF THE PARTIES

59 BMO seeks declarations of its mortgage and personal property security and declarations as to their priority. BMO also seeks judgment against the Borrowers. BMO has agreed not to seek any judgments or declaration of security at this time in respect of any of the guarantors.

60 In addition, BMO seeks the appointment of a receiver of the Borrowers' property that is secured in its favour, including the Property. BMO points to the fact that the Borrowers have now been in default for five months. BMO says that the Borrowers are simply seeking more time for a market reversal or "miracle", all the while disregarding the delay and prejudice that is being visited upon BMO in the face of their unsupported hope that the Property may be worth more than what is owed on the Debt. BMO has lost confidence in the Borrowers' ability to repay the Debt.

61 BMO wants a timely sale of the Property to be arranged by the receiver. BMO says that it is unreasonable to allow the Borrowers another six months (to June 2024) within which to possibly find the solution to their financing woes, beyond the five months already provided to them, over which time no sale or refinancing has occurred.

62 After some negotiations with Terrapoint, BMO's proposed order would appoint the receiver effective January 10, 2024. This date would notionally result in the Borrowers having had six months from default to refinance or sell. The proposed order would include the power to manage, although BMO has indicated that it does not wish the receiver to address the collection of monthly rents, which is currently being done by First Service.

63 In addition, BMO has agreed that, save with the consent of Terrapoint, the receiver would not set down any application for sale approval until after March 16, 2024, which would allow the Borrowers a total time to redeem of eight months.

64 Terrapoint supports the relief sought by BMO, stating that it is concerned that BMO is not well secured and may be facing a shortfall, such that it will be called upon its guarantee. Terrapoint wishes to restrict any receiver's ability to manage the Property, given the current arrangements, presumably to reduce costs.

65 Treasure Bay would like to see a sale of the Property, but it takes no position on the appointment of a receiver.

66 The Borrowers, the Partners and guarantors (with the exception of Terrapoint) want more time to refinance the Debt - i.e., another six months to June 2024. They dispute that the appointment of a receiver is appropriate, particularly one having a power to sell the Property. They rely on their continued cooperation in remitting the monthly rents to partially pay the interest and in responding to any other request for documentation or information by BMO.

67 In addition, the Borrowers assert that they are entitled to a six-month redemption period following this hearing prior to any order being granted to authorize a sale of the Property.

DISCUSSION

68 BMO seeks the appointment of a receiver pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which allows a court to do so if it is "just or convenient" in the circumstances.

69 BMO does not seek an appointment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as it initially did, so as to avoid any finding that the Borrowers are insolvent.

Receiverships Generally

70 As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte,*2013 BCSC 263 at para. 81, the granting of a receivership order is "extraordinary relief which should be granted cautiously and sparingly".

71 I have been referred to what seems to be most of the BC jurisprudence addressing receiverships.

72 As is well-known, for at least over a decade now, those authorities have invariably endorsed the Court's consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* 2009 BCSC 1527 [*Maple Trade*] at para. 25; *Textron Financial Canada Limited v. Chetwynd Motels Ltd.* 2010 BCSC 477 [*Textron Financial*] at para. 50 and many other cases.

73 The *Maple Trade* factors include:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

74 In *Bank of Montreal v. Gian's Business Centre Inc.* 2016 BCSC 2348 [*Gian's*] at para. 23, I stated that all relevant factors should be viewed holistically. Recently, Justice Gomery commented to the same effect: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc*, 2023 BCSC 514 at para. 9.

75 In *Ward Western Holdings Corp. v. Brosseuk* 2022 BCCA 32 [*Ward Western BCCA*] at para. 49, the court upheld this Court's reasons indexed at *Ward Western Holdings Corp. v. Brosseuk*, 2021 BCSC 919, and confirmed that the above approach remained valid in relation to whether a receiver should be appointed.

76 Below, I discuss the various circumstances relevant here. While I have not done so for each of the specific *Maple Trade* factors listed above, I have considered them all. Those factors can be considered conveniently within the following headings.

Borrowers' / Forseed's Equity of Redemption

77 The main plank of the Borrowers' and Forseed's argument is that BMO is attempting to do an "end run" around the usual foreclosure practice so as to defeat their equity of redemption. They stridently object to the appointment of a receiver. In addition, they object to any receiver having a power of sale until after the expiry of a six-month redemption period.

78 They contend that they are entitled to a six-month redemption period because BMO has failed to establish any "special circumstances" to shorten the "usual" period. Finally, they say that BMO should be denied any relief at this time and be required to return to the Court for any appropriate relief only after that six-month redemption period which should begin to run from the time of this hearing (i.e. to June 2024).

79 Both the Borrowers and Forseed have referred to many of the well-known foreclosure authorities that have been applied in BC for decades. In addition to numerous case authorities, this includes Chief Justice McEachern's "On Foreclosure Practice", (1983) 41:6 The Advocate (Vancouver Bar Association) 583. As the Chief Justice states, the "usual" case is that, in the absence of special circumstances, a six-month redemption period will be set, which recognizes the right of the mortgagor to seek either a sale or refinance of the debt in a foreclosure. The onus of proving any special circumstances rests on the mortgagee, usually said to arise from a lack of equity or wasting of the property.

80 McEachern C.J. was intending by his remarks to bring about consistency in foreclosure proceedings in what were then difficult financial circumstances, a result that was undeniably achieved. However, it is worth noting that he emphasized that his remarks were not "authoritative" and that judges were required to exercise their discretion based on the facts of each case and with regard to the law.

81 In support of their position, the Borrowers and Forseed refer to *Bank of Nova Scotia v. Mrazek* 1985 64 B.C.L.R. 282 (C.A.) [*Mrazek*], where the court upheld an immediate order for sale in foreclosure in light of what this Court found were special circumstances. In *Federal Business Development Bank v. F.J.H. Construction Ltd.* 1988 24 B.C.L.R. (2d) 100 (C.A.), the court discussed the usual procedures in foreclosures.

82 They also refer to *Royal Bank v. Astor Hotel Ltd.* 1986 3 B.C.L.R. (2d) 252 (C.A.) [*Astor Hotel*] where the court stated:

> [34] In a case like the present, where the fixed charge forms a significant part of the debenture security, I see no reason why the usual rules commonly followed in the foreclosure of real property should not apply. These rules require that except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale in a mortgage until the expiry of the normal redemption period (six months): see *South West Marine Estates Ltd. v. Bank of B.C.* (1985), 65 B.C.L.R. 328 at 332, 37 R.P.R. 137 (C.A.), where my judgment reads as follows:
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>> If I am wrong in concluding that the courts of equity would intervene to prevent the exercise of a contractual power of sale during the redemption period, it appears to me that this is a proper case for bringing the rules of equity into accordance with modern practice. Firstly, in order that there be certainty in commercial matters it is, in my opinion, necessary that the same principles apply to all proceedings whether by way of foreclosure or by way of exercise of a contractual power of sale. This rule is as follows:

> "Except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale until the expiry of the normal redemption period (6 months)."
>
> Secondly, the courts should intervene to protect the equity of redemption. To distinguish between a sale in foreclosure proceedings and a sale made pursuant to a contractual power of sale as a means of permitting the mortgagee to effectively eradicate the equity of redemption is not in accordance with the basic tenets of equity.

[Emphasis added.]

83 Another authority referred to is *Sun Life Assurance Co. of Canada v. 535401 B.C. Ltd.*, 2001 BCSC 605, where the Court set a six-month redemption period and denied the first mortgagee conduct of sale. Conduct of sale was granted in favour of the second mortgage effective five months into the redemption period.

84 In *Textron Financial* , Justice Willcock, as he then was, was addressing relief sought by a secured lender, similar to what BMO seeks in this action. That secured creditor sought the appointment of a receiver over a hotel property. It was not a foreclosure. In reviewing the *Maple Trade* factors, at paras. 57-74, Willcock J. considered whether there should be an order for sale before judgment. He referred to the well-settled case law in relation to foreclosures, the power of sale and the right to redeem, including *Mrazek* and *Astor Hotel*. In particular, at para. 57, he referred to the law being clear that an immediate order for sale can only be made in "exceptional circumstances". I need not repeat his extensive discussion of those case authorities, other than to note that many of them have also been referred to me on this application.

85 In *Textron Financial* , Willcock J. then framed the issue as being whether a receiver of a business should be appointed with power to sell, given the "general rule" in foreclosures:

> [63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

86 The Borrowers and Forseed also rely on *IMOR Capital Corp. v. Bullet Enterprises Ltd.* 2012 BCSC 899 [*IMOR Capital*]. In that case, the secured creditor sought to enforce its debenture security and appoint a receiver with power of sale. The debtor did not oppose the appointment, but disagreed that the receiver should have the power to sell.

87 In *IMOR Capital*, Justice Burnyeat reviewed many of the foreclosure authorities. At para. 24, he stated that he was satisfied that a redemption period should be set. He found that the secured creditor was "amply" secured. He then set a six-month redemption period and adjourned the application to empower the receiver to sell.

88 Arguments similar to those advanced by the Borrowers - concerns about truncating a redemption period - were considered by Justice Horsman, as she then was, in *Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Inc* 2021 BCSC 2449 [*Prospera*] at para. 27. In that foreclosure, Order *Nisi* had been granted and a redemption period set. Prior to the expiry of the redemption period, the petitioner applied to appoint a receiver with power of sale. At paras. 34 and 40, Horsman J. addressed these concerns by granting the receivership order but adjourning the application with respect to the power of sale, with liberty to apply after the expiry of the redemption period.

89 The Borrowers and Forseed refer to the granting of a sale power to a receiver as negatively affecting their ability to redeem. They point to the comment in *Textron Financial* at para. 86 that:

> As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

90 In making the above comment, Willcock J. appears to have been referring to *Mrazek* , where the court stated:

> [13] The law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances. See *Devany v. Brackpool* (1981), 31 B.C.L.R. 256, 21 R.P.R. 100, 127 D.L.R. (3d) 498 (S.C.) where a number of authorities are reviewed by Taylor J. See also *Canlan Invt. Corp. v. Gibbons*, 42 B.C.L.R. 199, [1983] 3 W.W.R. 226 (S.C.) and, in particular at p. 228, where the judgment of van der Hoop L.J.S.C. reads in part as follows:
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>> The petitioner may be granted an order for sale in lieu of an immediate order absolute at the hearing of the petition where the facts set out in the material justifies such an order. If a sale is approved, the mortgagor then loses the right to redeem, except in very unusual circumstances, but is still liable for any deficiency outstanding on the judgment on the personal covenant to pay. *It is therefore only under very clear circumstances that an immediate order for sale should be granted.* [The italics are mine.]

91 However, a reading of the cases referred to in *Mrazek* confirms that the order that results in an extinguishment of the equity of redemption - or "precludes" it - is not one for "conduct of sale", but an order *approving* a sale, which has the same effect as the one arising from the granting of an order absolute of foreclosure.

92 This result is in accordance with well-established BC law which follows *Pew v. Zinck*, [1953] 1 S.C.R. 285, as was recently described in *Accepted Financial Corporation v. 1225614 B.C. Ltd.*, 2022 BCSC 942 by Justice Weatherill:

> [34] Accepted Financial points to the general rule that an owner cannot redeem, and the court has no jurisdiction to order the redemption of, a mortgage after an order approving sale has been made: *Montreal Trust Company v. Brown et al.*, 1974 CanLII 1108 (B.C.C.A.) [*Montreal Trust*]; *Farmers & Merchants Trust Company v. Church*, 1977 CanLII 312 (B.C.S.C.).

See also *Galway Capital Corp. v. Nikolov*, 2005 BCCA 375 at para. 6; *Pollard v. Regional District of Central Okanagan*, 2005 BCCA 159 at para. 30.

93 Accordingly, a redemption can take place at any time prior to a sale being approved by the Court on application by any receiver.

94 Here, even if the receiver was granted the power to sell, and with BMO having undertaken not to apply for any sale approval until after March 15, 2024, there could not be any extinguishment of the equity of redemption until court approval of a sale. Having said that, I accept that any power to sell does affect the Borrowers' equity of redemption in terms of shortening the time allowed to the debtor to refinance or sell.

95 The issue could be considered through the lens of either foreclosure or receivership, as both are paths that a secured creditor, such as BMO may follow. As many cases illustrate, even within a foreclosure, receivership appointments may be sought. A secured creditor is entitled to elect the means by which the security will be enforced, as provided in the Credit Agreement, subject of course to the Court granting any relief sought from it.

96 In foreclosure law, the Court is able to exercise its equitable jurisdiction to fashion a redemption period. The practice in most cases is to set a six-month redemption period, save in special or extraordinary circumstances. The onus in establishing that a shortened redemption period should be set rests on the mortgagee to prove such "extraordinary" or "special" circumstances. In most cases, those circumstances will be a proven risk by a lack of equity (either presently or over the redemption period) or some jeopardy to the property that requires immediate attention.

97 In this case, BMO has chosen to pursue a receivership, not a foreclosure.

98 In receivership, as I stated above, a secured creditor also bears the onus of establishing the appropriateness of the appointment, again recognizing that it is "extraordinary relief which should be granted cautiously and sparingly". If the appointment is appropriate, the Court will then proceed to consider what powers should be granted to the receiver, including whether there should be a power of sale and, if so, when any sale powers should be effective.

99 To that extent, there is great similarity in the test to be applied in both paths - whether foreclosure and/or receivership - in that the onus rests of the secured creditor/mortgagee to show special circumstances or justify the extraordinary relief sought.

100 BMO does not dispute that there is an equity of redemption, although at this point, it is technically held by Forseed given that the Borrowers transferred their equity of redemption to Forseed under the Forseed Mortgage which is registered after BMO's mortgage. BMO also does not dispute the equity of redemption is a relevant consideration here.

101 In my view, the above case authorities support the proposition that the Court should consider the debtor's equity of redemption in terms of whether a receiver will be appointed and, if so, whether that receiver will be granted the power of sale and when. Such a consideration is clearly relevant to the question as to whether any such appointment and power is "just or convenient", again having regard to the nature of the relief sought. In addition, a consideration of any equity of redemption also comes within the *Maple Trade* factors - factor (k) - in relation to the "effect of the order upon the parties".

102 I respectfully agree with the comments of Justice Gomery in *Kruger v. Wild Goose Vintners Inc.*,, 2021 BCSC 1406 emphasizing that procedures in receivership, perhaps more so than in foreclosures, are flexible. This is consistent with the needs and often complexity of insolvency scenarios which require consideration of many factors. He stated:

> [73] The procedure in receivership proceedings is flexible. There is no requirement that a creditor obtain an order nisi before applying for an order for sale, for example. However, deference is still afforded to a debtor who wishes to redeem. *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, involved a sale by a court-appointed receiver/manager in which the debtor sought to tender the amount owing and redeem at the hearing of an application to approve a sale of the debtor's assets. At paragraph 27, Justice Tysoe, as he then was, observed that:
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>> Whenever there is a court-ordered-sale process, it is always implicit that the conduct of sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court. I am aware of no authority to the effect that the granting of conduct of sale precludes the debtor from redeeming the property. Allowing a redemption of the mortgaged property in these circumstances does not blemish the integrity of the court process but, rather, it represents the court process at work.

103 Seen in that light, and recognizing that an equity of redemption exists, even in a receivership, the true issue in that event is what amount of time should be afforded to the Borrowers and/or Forseed to redeem BMO's mortgage, in the context of whether BMO has established sufficient factors to justify whatever period of time is sought. Again, that will be a decision of the Court taking all of the circumstances into account.

104 The Borrowers also assert that, since a redemption period should be set, it should be six months from the date of order, citing *Dass v. Rumball*, 2015 BCSC 343 at para. 70 and *Century Services Corp. v. LeRoy*, 2021 BCSC 1285 at para. 192. Both cases allowed a six-month redemption period in foreclosure proceedings, as there was no basis to shorten the period. These cases illustrate the usual procedure, but do not stand for the proposition put forward by the Borrowers in the sense of *requiring* that a redemption period run from the date of the hearing.

105 In any event, what BMO proposes is the receiver having the power of sale in the near future, which effectively amounts to recognizing a six-month redemption period from the date of default (July 2023) or a shortening of the time for redemption, which is open to the Court to consider.

Nature of the Property

106 Attempts by the Borrowers and Forseed to minimize the complexity of the property secured in favour of BMO, including the Property, are without merit.

107 The Property is not a residential home that can be easily listed on the MLS.

108 The Property is a tenanted commercial and residential complex, i.e. an operating business. It is also a unique development property, which will attract only a certain cohort of potential purchasers. It is well taken on this application that the Borrowers' own lack of success in advancing the development over the last five years may be relevant to any purchaser who would similarly seek to develop the Property.

109 I agree with BMO that selling the Property will require the specialized expertise of a receiver to competently list and market the property. This may include the receiver retaining a commercial real estate brokerage, just as the Borrowers did in spring 2023.

110 Any receiver will have to undertake certain investigations and complete due diligence to prepare an appropriate sales process. I would expect that financial information would be reviewed as part of that process. I expect that there will be the need to prepare complex sale documentation, such as teasers, non-disclosure agreements and the like. I expect a data room will be set up and populated to assist prospective buyers with the necessary due diligence to make an informed offer.

111 It is uncertain whether the Borrowers will be cooperative in the context of a sales process, although I acknowledge their counsel's submission that they have not refused to satisfy any request to date.

112 All of this is to say that a sales process for the Property can be expected to take some time, perhaps months. Toward that end, it will be necessary to grant an order appointing a receiver with appropriate powers relating to access to the Property.

BMO's Security

113 Under the *Maple Trade* factor (g), BMO has the right to appoint a receiver under the documentation provided for the loan. BMO has not appointed a receiver; rather, BMO seeks a court appointment, as it is entitled to do in the Credit Agreement, particularly since any sale would require court approval and a vesting order.

114 As was stated in *Prospera* at para. 24, where a secured party is entitled to appoint a receiver, the "extraordinary nature of the remedy is less central to the inquiry".

115 The undisputed fact is that BMOs' Debt and security have been in default since July 2023 and demand for payment in full was made in August 2023.

116 Nevertheless, I accept that this factor is but one factor to be considered and no presumption of entitlement to a court appointment arises from the fact that the Credit Agreement allows for such an appointment: *Textron Financial* at para. 55; *Prospera* at para. 24; *Ward Western BCCA* at paras. 62-66; *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, 2023 BCSC 1158 at paras. 76-80.

Risk to BMO / Terrapoint

117 The parties very much disagree as to whether or not BMO is at risk in terms of recovering the Debt.

118 The amount of the Debt is significant. Further, the ongoing increase in the debt is also significant, with over $4 million of accrued interest already owed.

119 The Borrowers refer to an appraisal dated July 31, 2023 prepared by L.W. Property Advisors. This document indicates an appraised value of $192 million as at July 31, 2023. However, this valuation is based on the Property's development potential, not its current value as is. In my view, this appraisal is more aspirational, than real, particularly since the Borrowers have been singularly unsuccessful in advancing their development efforts over the last five years and no doubt significant funds must be spent in the future toward creating the development that is being "appraised".

120 Further, there is no evidence that any lender would consider this appraisal as supporting lending value in respect of any refinancing.

121 The 2023 BC Assessment indicates that, as of July 2021, the Property had a value of $107,980,400; as of July 2022, the Property had a value of $98,042,000. BMO emphasizes that this represents a 9% decline from 2021-2022.

122 The sales process conducted in spring 2023 is undeniably the most reliable indication of value, assuming no change in the market has taken place since then.

123 In addition to the BMO default, HTLP is also in default of paying its 2023 property taxes. As of December 2023, the amount owed is $355,850.09.

124 The only evidence, such as it is, concerning refinancing, indicates a lending value of $80 million, suggestive of the fact that the value of the Property is not as high as the Borrowers would suggest.

125 Evan Allegretto, Terrapoint's representative, states in his affidavit sworn in December 2023 that the real estate market has changed considerably since August 2023, likely resulting in a lower value for the Property than even the Chard Offer. He points to: higher interest rates; weaker sales data; increased tightening of credit; increased rates of foreclosures reducing overall valuations; limited number of potential purchasers who are able to purchase the Property due to its size, price and development requirements; and, increased construction costs.

126 Forseed objects to Mr. Allegretto's evidence as being impermissible expert evidence and not properly before the Court as such. I agree that no expert evidence is before me, however, Mr. Allegretto's evidence is not put forward as expert evidence of value; rather, it represents his actual observations of factors which are well taken as being relevant to the real estate market, particularly in relation to development lands, such as the Property.

127 Terrapoint supports the appointment of a receiver to sell the Property. It does not believe that BMO is well secured and it is concerned that any delay of repayment will be result in BMO suffering a shortfall, which could result in Terrapoint being called upon under its guarantee.

128 The Borrowers' position, that BMO should be delayed in being granted any right of sale until after June 2024, would significantly expose BMO to more risk. When one considers that any sales approved after that time would further delay repayment, any sale would have to achieve *in excess of* $85 million (to account for a further six-months interest ($2.7 million)) and pay outstanding and accruing property taxes, commissions on a sale and receiver expenses.

129 Even if one accepts that the real estate market is not declining, but remaining stable, this scenario puts BMO into a far riskier recovery situation that even what presently exists.

130 I reject the Borrowers' submission that there is "sufficient equity" in the Property to justify further delay to June 2024.

131 I conclude that BMO is at some risk now and faces increasing risk of being under-secured in respect of the Property if there is any further delay. It is no answer that the guarantors point to their own risk under the guarantees and the collateral security that some of them have given. At this stage, BMO is entitled to relief in respect of the assets of the Borrowers that secure the Debt. This risk is not mitigated by the exposure of the guarantors who have their own real assets and properties at risk, particularly given Mr. Zou's own refusal to fund 110's capital contributions to HTLP since 2022.

Dysfunction of HTLP?

132 Terrapoint asserts that the management of HTLP is dysfunctional.

133 Terrapoint states that Forseed has, since August 2022, failed to make required capital contributions to HTLP. Currently, Forseed owes approximately $3.4 million. 110 has also failed to make required capital contributions to HTLP and currently owes approximately $360,000.

134 To avoid default in the Debt, Terrapoint made capital shortfall loans of approximately $1.4 million to May 2023. When that funding stopped, the default in the Debt occurred.

135 The CM Group and Forseed acknowledge that they have not made certain contributions to HTLP when required. They defend that position by pointing to the $15 million cash collateral that they provided to BMO, which has now been applied to the Debt.

136 Terrapoint remains frustrated by the fact that all of the Partners agreed on the sales process in spring 2023 and 110, at least initially, signed the LOI for the Chard Offer. Only later did 110 and Forseed vote against proceeding with any sale.

137 I agree that the see-sawing of actions on the part of 110 is puzzling. Mr. Zou's stated reason to reject the offers given that substantial losses would occur is understandable, but only to a point. It is difficult to see that the Borrowers could have deluded themselves into thinking that the Property was worth the same or more than they had invested in it some years ago.

138 The Property is worth what third parties will pay for it. The Property is not worth what an owner may have initially paid for it. Further, any refinancing of the Property by a lender will inevitably be tied to what the Property is worth now, not what it might be worth in the future.

139 The only way to avoid the potential difficulty of a delta arising between what the property is worth and what amount can be secured by way of refinance is to offer financial resources from other persons - such as the guarantors - to backstop the loan. There is also the difficulty of servicing the debt, and the fact that the current rents from the Property do not service the Debt. No lender would advance funds without this shortfall being addressed.

140 Here, all of this difficulty would have been avoided if 110 and Forseed had continued to make their capital contributions so as to allow ongoing interest payments to BMO to August 2023, during which time they should have arranged for refinancing to repay BMO in August 2023. Presumably, such contributions would also have allowed HTLP to make property tax payments.

141 It is telling that the CM Group and Forseed are unwilling to make any further payments to BMO to cure the interest defaults, which may have alleviated risk to BMO and may have allowed them more time to address the CPL issue and refinance the Debt. This is contrast to the debtor's proposal to make significant payments to delay the receivership in *Maple Trade* (paras. 3 and 27) and *Textron Financial* (para. 17), which were both factors considered by the Court in delaying either the receivership or granting the receiver the power of sale.

142 What is also concerning is the apparent sequential approach of the Borrowers to resolving what was a well-known financial deadline in August 2023 when the Debt matured. In April 2023, the decision was to only pursue a sale, not a sale or refinance in tandem. Only after the sale efforts were abandoned, were some efforts made in August 2023 to refinance. By any measure, those were completely inadequate to even pay out BMO.

143 Now, four months later, the Borrowers are still only suggesting some refinancing efforts, without providing anything concrete to support their bald statements. Those supposed refinancing efforts are, to use BMO's counsel's word, "opaque" and not illuminating at all in terms of what has been tentatively done and what results, if any, achieved: *Textron Financial* at para. 78; *Gian's* at paras. 30-32.

144 I agree that BMO and Terrapoint's concerns about the ability of the Borrowers to refinance are valid. No credible term sheet has been provided to date, even one that assumes the removal of Treasure Bay's CPL. There is nothing to indicate what financing might be available to the Borrowers, including whether other financial supports are required and, if so, whether those are available. There is some uncertainty as to whether the Borrowers can even refinance without the involvement of Terrapoint, who point blank now refuses to be a part of any such effort.

145 Further, there is a complete lack of evidence as to how the Borrowers and Forseed intend to address the Forseed Mortgage in terms of any refinancing. As the saying goes, you foreclose down, redeem up. There is no information even as to what is

owed under the Forseed Mortgage, let alone any comment by Forseed as to it having any intention to redeem the Property in respect of the Debt, which it is entitled to do.

146 The Borrowers and Forseed have known since September 2022 that the Debt was going to mature in August 2023. Since at least that time, they have had the ability to redeem the Property, but they had failed to do so. It can hardly be suggested that they have acted with any sense or urgency, or even timeliness, toward resolving the issue with BMO.

147 While I would not necessarily agree with Terrapoint that the management of HTLP by the Partners is "dysfunctional", it is certainly challenged and somewhat in disarray in terms of direction and results.

Balance of Convenience to the Parties

148 The CM Group and Forseed's response to Terrapoint's concerns regarding the lack of any sale or lack of support that a refinance is even possible is that, if it turns out that their decisions were "bad business decisions", they will suffer greater losses than Terrapoint.

149 At bottom, the CM Group and Forseed now seem keenly focussed on seeking to minimize their own downside, and hope for an upside, while remaining unconcerned about the risks faced by BMO and Terrapoint as the matter is delayed.

150 The Borrowers also allege that a receivership will result in prejudice to them arising from the stigma associated with the appointment of a receiver such they will be unable to secure new financing. They cite *Korion Investments Corporation v. Vancouver Trade Mart Inc.*, [1993] B.C.W.L.D. 2928 (S.C.) at para. 12, which was referenced in *Southern Cone Capital Ltd. v. EmVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385 at para. 44.

151 BMO disagrees, referring to *Prospera* at para. 32, where Horsman J. found that the reputational impacts of the appointment of a receiver would not significantly impair a debtor's ability to refinance, beyond the impairment that had already accrued at the outset from the foreclosure proceedings themselves.

152 BMO's legal proceedings have already begun and the result has been that the Borrowers' financial difficulties have now been fully disclosed to the public. In light of this, I agree with BMO that any receiver appointment is unlikely to give rise to any further "stigma" or difficulties. In some quarters, the appointment may be seen as beneficial toward maximizing value for the Property in the sense of telling the market that professionals who have expertise in the real estate market will be addressing the matter.

153 BMO says that the Borrowers and Forseed have been given substantial time already to remedy their default. After the July 2023 interest was not paid, BMO engaged in good faith discussions with them upon which BMO would forbear from any enforcement action.

154 That forbearance agreement was not signed. This resulted in further delay in filing the action and now a five months delay after the first default. BMO says that the Borrowers have had time to address the Debt, by either paying the interest, securing a financing commitment, even a conditional one, or list the Property for sale.

155 The Borrowers object to any suggestion that they have deliberately delayed BMO in taking steps under its security. Somewhat surprising, they say that there was nothing to prevent BMO from commencing proceedings sooner than it did and that BMO could have commenced proceedings in July 2023.

156 I agree with the Borrowers that they have not deliberately delayed BMO in proceeding under its security. However, on the other hand, BMO has acted in commercially reasonable manner in entering into further negotiations with the Borrowers by agreeing to terms upon which the Borrowers would be given more time to solve their financial difficulties. It cannot be doubted that this negotiation process was for the benefit of the Borrowers, particularly given their current allegations that the proceedings are publicizing their financial difficulties to the world, including prospective lenders.

157 At bottom, the Borrowers cannot have it both ways. Having effectively asked BMO to delay matters while a potential forbearance agreement was pursued, they cannot now suggest that the ensuing delay is irrelevant to a consideration of the issues relating to the receivership. I agree with BMO that it would be a perverse situation to do so, and would encourage lenders to immediately commence proceedings and disregard any potential negotiated interim solutions. Generally speaking, in insolvency proceedings, a solution without litigation is one that benefits all stakeholders.

158 I acknowledge that a receivership, including one that entails sale powers, will have an effect on the Borrowers. However, that must be balanced against the interests of BMO that is entitled to appoint a receiver and is entitled to realize on its security, failing repayment, within a reasonable period of time, after default (here, July 2023) and where risk of repayment exists.

CONCLUSION

159 I conclude from all the circumstances that BMO has met its burden to establish that it is just and convenient to appoint the receiver. I agree with BMO that it is necessary to have the receiver appointment effective as of January 12, 2024 so as to allow the receiver to investigate the circumstances of the Property and the rental business with a view to considering how a sales process might be implemented.

160 I am also satisfied that the receiver should be granted the ability to access the Property and the books and records of the Borrowers. The receiver will also have the ability to manage and operate the business (para. 2(c) of the initial draft order), although it is my intention that the receiver will seek to maintain the current operations as much as possible, so as to minimize receivership costs. This would include continuing to allow for the collection of rents by First Service, as before. I do so on the basis that some oversight by the receiver is appropriate given the ongoing leaseholds, particularly as to how those might affect any sale or refinance in the future.

161 I would also expect that, if the receiver considers that changes to the current management of the Property are required to be made, advance notice will be given to the Borrowers and the Partners so that they may provide input or, if necessary, apply to the Court.

162 In light of the somewhat minimal, and what are described as "hopeful" efforts on the part of the Borrowers to refinance, I intend to allow them more time to do that, before the receiver embarks on a sales process.

163 I have concluded that the further time to be allowed to the Borrowers will be more than what was sought by BMO, but less than what was sought by them. I cannot conclude that it is appropriate to allow the Borrowers and Forseed to delay matters until after June 2024, which would effectively allow them a total period of 12 months to redeem. During that time, there would be increasing risk to BMO, particularly given the additional $2.7 million in interest that would accrue.

164 The receiver is appointed as of January 12, 2024, but will not be empowered to undertake any sales efforts until after February 23, 2024. In addition, the receiver will be unable to file any application for approval of any sale until after April 26, 2024.

165 Forseed made certain submissions in relation to the provisions in the draft order regarding the execution of documents by the receiver. As that provision is in relation to the Property only, and not relating to the Borrowers generally, that is appropriate. I agree that amendments are necessary to the order with respect to the initiation or management of legal proceedings in relation to the Borrowers, which would include their ability to defend this proceeding and also the TB Action. That provision regarding the powers of the receiver should be amended to exclude those legal proceedings.

166 Finally, I decline to authorize the receiver to exercise shareholder, partnership, joint venture or other rights that may be held by the Borrowers. Such a provision may restrict their ability to refinance. Generally speaking, nothing in the receivership order should be taken as restricting the ability of the Borrowers to pursue refinancing of the Debt. The receiver has liberty to apply to exercise any such rights as may be appropriate beyond what is already granted.

Application granted.

TAB 8

2020 ONSC 1953
Ontario Superior Court of Justice [Commercial List]

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

2020 CarswellOnt 5156, 2020 ONSC 1953, 317 A.C.W.S. (3d) 533, 78 C.B.R. (6th) 299

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

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

Koehnen J.

Heard: March 27, 2020
Judgment: March 30, 2020
Docket: CV-20-00637301-00CL, CV-20-00637297-00CL

Counsel: David Bish, Adam M. Slavens, Jeremy Opolsky for Applicants, BCIMC Construction Fund Corporation
Steven Graff, Ian Aversa, Jeremy Nemers for Respondents
Virginie Gauthier, Allan Merskey, Peter Tae-Min Choi for Otera Capital Inc.
See Schedule A for complete list of counsel

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
  IV.1 Appointment
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Receivership applicants advanced loans to three residential condominium projects and each of three projects was affiliated with C Group, debtors, which owned each project through individual, single asset, special purpose corporations — Applicants became aware of statement of claim against C Group, by former officer of C Group, alleging financial irregularities — As result, applicants appointed P and A Group to investigate and results of investigation raised three issues showing lack of transparency and forthrightness by debtors — Applicants lost all confidence in debtors and no longer wanted to be involved with projects, they demanded payment on loans, and debtors could not comply with demand — Applicants brought application to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects — Application granted — In case at hand, there was breakdown in relationship that was caused by persistent and deliberate wrongdoing by debtor — There were no significant differences to outcome for other stakeholders between receivership or Companies' Creditors Arrangement Act proceeding, there were no material employment concerns, accordingly there was no reason to restrain exercise of applicants' contractual rights — It would be preferable to have receiver acting as officer of court who could act without being hamstrung by closing transaction that favours equity over creditors.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company
Receivership applicants advanced loans to three residential condominium projects and each of three projects was affiliated with C Group, debtors, which owned each project through individual, single asset, special purpose corporations — Applicants became aware of statement of claim against C Group, by former officer of C Group, alleging financial irregularities — As result, applicants appointed P and A Group to investigate and results of investigation raised three issues showing lack of transparency and forthrightness by debtors — Applicants lost all confidence in debtors and no longer wanted to be involved with projects, they demanded payment on loans, and debtors could not comply with demand — Applicants brought application to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects — Application granted — Circumstances in this case rendered receivership preferable to Companies' Creditors Arrangement Act (CCAA) procedure — This was situation where debtors had acted in manner which charitably would be described as lacking in transparency from inception of its relationship with creditor — In those circumstances, any reputational damage was of debtors' own making — Vast majority of jobs associated with projects were construction jobs, and construction personnel were not employed by debtors but were employed by arms-length contractors that debtors had retained to build projects — As result, there was little marked difference between receivership and CCAA proceeding with respect to either immediate or long-term employment.

Table of Authorities

Cases considered by *Koehnen J.*:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — considered

Confederation Life Insurance Co. v. Double Y Holdings Inc. (1991), 1991 CarswellOnt 1511 (Ont. Gen. Div.) — followed

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — referred to

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — referred to

Octagon Properties Group Ltd., Re (2009), 2009 ABQB 500, 2009 CarswellAlta 1325, 58 C.B.R. (5th) 276, 486 A.R. 296 (Alta. Q.B.) — considered

RMB Australia Holdings Ltd. v. Seafield Resources Ltd. (2014), 2014 ONSC 5205, 2014 CarswellOnt 12419, 18 C.B.R. (6th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

s. 244 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

APPLICATION by receivership applicants to appoint receiver and manager over all of undertakings, properties and assets of three residential condominium construction projects.

***Koehnen J.*:**

Overview

1 This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O.

1990, c. C-43, as amended and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

2 The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

3 At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

4 In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

5 The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

6 The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

7 The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

8 The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

9 The Debtors are special-purpose, project-level entities for the development of each of the three projects.

10 Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

11 Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

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

13 The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of $172,616,007 and $37,450,668 and a non-revolving letter of credit facility of up to $3,000,000.

14 As of March 2, 2020, the Receivership Applicants had advanced $107,668,017.82 under the Clover Facilities. In addition, $3,000,000 in letters of credit have been extended. The Receivership Applicants also extended a mezzanine mortgage on Clover, with $34,035,878.69 in principal outstanding.

15 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

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

(b) The Halo Project

17 The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

18 The Halo Commitment Letter provides for two non-revolving construction loans in amounts of $156,850,7747 and $29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to $2,000,000.

19 As of March 2, 2020, the Receivership Applicants have advanced $47,429,211.83 in principal. In addition, $1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with $25,725,159.27 in principal outstanding.

20 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

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

(c) The Yorkville Project

22 The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

23 The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to $571,300,000 and $83,000,000, respectively.

24 As of March 2, 2020, the Receivership Applicants had advanced $122,432,764.85 under the Facilities. In addition, $79,592,744.24 in letters of credit have been extended.

25 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

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

27 There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately $38,000,000 registered against the properties.

B. Deterioration of the Relationship

28 In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

29 First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

30 Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately $10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

31 Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately $ X of increased costs were hidden in this manner.

32 In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

33 Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over $ X in discounted sales fall into this category.

34 The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

35 Cost overruns on the three projects come to more than $ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately $ X were construction costs that were hidden from the lenders. The amount hidden on Clover was $ X; on Halo $ X and on 33 Yorkville, $ X.

36 Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is $ X over budget. The Debtors say PWC's number is overstated by $ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by $ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

37 In addition to the foregoing breaches, approximately $3.5 million in interest payments to the Receivership Applicants are overdue.

38 On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

39 The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

40 Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

41 In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

42 A receiver may be appointed where it is just and convenient equitable to do so.

43 Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Ont. S.C.J. [Commercial List]), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]) at para. 27.

44 The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. Gen. Div.) at para. 20.

45 In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

(a) The lenders' security is at risk of deteriorating;

(b) There is a need to stabilize and preserve the debtors' business;

(c) Loss of confidence in the debtors' management;

(d) Positions and interests of other creditors.

46 All four factors apply here.

47 *Security at risk of deteriorating*: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The lenders are concerned about the risk of further

deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

48 *The need to stabilize the business*: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

49 *Loss of confidence in management*: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

50 *Position and interests of other creditors*: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

51 In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

52 The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

53 The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

54 The share sale to Concord would close on payment of one dollar. An additional $38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

(a) Court approval of CCAA protection for Clover and Halo.

(b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo

(c) Completion of construction financing either with the existing lenders or new lenders.

55 As part of the CCAA process Concord states that it will

(a) provide $20,000,000 of debtor-in-possession financing at a rate of 5%. $7,000,000 would be advanced during the first 10 days.

(b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

56 The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

57 With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

58 Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

59 I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

60 In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]) at para. 61.

61 The factors addressed in argument frelevant to this exercise were as follows:

(a) Payment of the Receivership Applicants

(b) Reputational damage

(c) Preservation of employment

(d) Speed of the process

(e) Protection of all stakeholders

(f) Cost

(g) Nature of the business

(a) Payment of the Receivership Applicants

62 During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

63 It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

64 Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the CCAA proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

65 Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

66 The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

> We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

67 As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants. Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

68 Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

69 From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

70 I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

71 At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

72 The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

73 One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

74 This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

75 In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

76 The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a

corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

77 The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

78 There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

79 The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

80 The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

81 As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

82 The Debtors submit that the CCAA is faster than a receivership.

83 During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

84 In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financer would probably want to see a certain percentage of units sold before committing to financing.

85 It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

86 If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

87 The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive $38,000,000 in a transaction beyond

the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive $38,000,000 in cash.

88 There has been no explanation in the materials before me to justify the receipt of $38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

89 In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

90 Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of "discount" and of "current market value" are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

(f) Costs

91 The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC's fees. Regardless of whether Concord does or does not charge fees, the risk of PWC's fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

92 The costs of financing a receivership or a CCAA proceeding are similar. Concord has offered a DIP loan of $20,000,000 at 5% interest. The Receivership Applicants have offered a loan of $29,000,000 at 5% interest.

93 CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

94 Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put $38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

95 During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

96 In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

97 More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

98 In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.) the British Columbia Court of Appeal stated at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

99 Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

100 The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61; *Dondeb Inc., Re*, 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), at para.16; *Octagon Properties Group Ltd., Re*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Alta. Q.B.), at para. 17.

101 The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

102 As Justice Kent pointed out in *Octagon*, as para 17,

> ...if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

103 Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

104 Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

105 In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

106 The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

107 By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

108 In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier. Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

109 More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

110 The Debtors also point to *Re 2607380 Ontario Inc.*, a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that *260* is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

111 In my view *Re 2607380 Ontario Inc.* does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.*, two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

112 With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

113 For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

114 For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

Schedule A — COUNSEL SLIP

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation

Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.

Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents

Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.

Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Haddon Murray for Tarion Warranty Corporation

David Gruber for Concord Group

Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc,, Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

Application granted.

End of Document

TAB 9

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 CSC 41, 2002 SCC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
  XII.2 Discovery of documents
    XII.2.h Privileged document
      XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
  XII.4 Examination for discovery
    XII.4.h Range of examination
      XII.4.h.ix Privilege
        XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
  XIV.8 Public interest immunity

XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when 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 includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer 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. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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s. 486(1) — referred to

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R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1 re inst.)), qui avait accueilli en partie la demande.

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 issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("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.

4 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.

5 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.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant 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 Dr. 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 R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

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.

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.

9 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 Dr. 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.

10 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

11 *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 of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 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 respondents would be prejudiced by delay, but since both parties had brought 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 appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 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.

18 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.

19 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.

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 R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 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 R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 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 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.

24 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 & Welfare)*, [2000] 3 F.C. 360 (Fed. 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. 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.

25 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.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without 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 (S.C.C.). 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.

31 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.

32 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.

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 R. 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 (S.C.C.) [hereinafter *New Brunswick*], 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 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.

37 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 (S.C.C.). 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.

38 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 R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, 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 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 (S.C.C.). 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* 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*, *supra*, at para. 33; 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.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). 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.

44 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 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 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.

47 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 "reflect . . . 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.

48 *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. 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 (S.C.C.), 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 demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 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.

52 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*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 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 R. 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
>
> (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.

54 As in *Mentuck*, *supra*, 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.

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 *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

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 branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 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

58 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.

59 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.

60 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 & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed 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" (para. 14) 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 (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 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.

64 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.

65 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 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 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

70 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.

71 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.

72 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 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. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *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*, *supra*, at pp. 760-761. 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.

76 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, *per* Wilson J., at pp. 1357-1358. 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.

77 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 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, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would 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.

81 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.

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.

82 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.

83 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 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. 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."

86 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. 1353-1354:

> 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.

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 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.

90 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

91 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.

92 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 R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

TAB 10

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
  XXIII.13 Powers and duties of appellate court

XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files
Headnote
Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files
Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.
Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence
Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers
Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.
Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve
A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.
The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.
The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.
Held: The appeal was dismissed; the motion was dismissed as moot.
Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness

was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could 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 was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was 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. 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 had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

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 properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. 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 was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. 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, 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. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed 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 intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. 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.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir 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 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 ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. 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.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver 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, 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 demandeur doit 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. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de 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 semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. 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. 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 en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère 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. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

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 pourra dûment être rendue. Contrairement 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. La raison d'être fondamentale de la publicité des débats 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. 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. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. 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 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. 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 coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

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, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait 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. 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. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée.

Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. 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. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait 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. 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 aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. 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.

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A.B. v. Canada (Citizenship and Immigration) (2017), 2017 FC 629, 2017 CarswellNat 3046, 2017 CF 629, 2017 CarswellNat 3604 (F.C.) — considered

C. (R.) c. Gourdeau (2004), 2004 CarswellQue 1804 (C.A. Que.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

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X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

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

I. Overview

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

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

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

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

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

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

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

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

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

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

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

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

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

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

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

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

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

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

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

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

C. Subsequent Proceedings

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

IV. Submissions

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

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

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

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

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

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

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

V. Analysis

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

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

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

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

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

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

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

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

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

A. The Test for Discretionary Limits on Court Openness

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

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

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

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

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

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

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

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

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

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

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

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

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

B. The Public Importance of Privacy

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

various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

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

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

50 In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289

C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.* 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev*. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

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

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson*(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid

important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*2017 FC 629, at para. 9 (CanLII),) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

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

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

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

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland* 2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

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

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

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

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

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

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

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

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

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

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

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

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

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.