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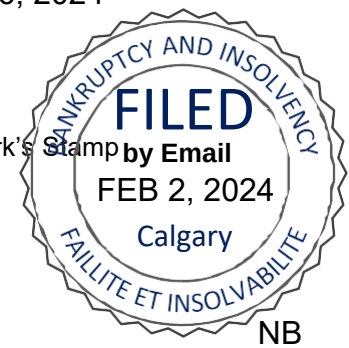


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| COURT FILE NUMBERS | B201-979735 / 25-2979735 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED<br><br>AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED |
| APPLICANTS | TRAFIGURA CANADA LIMITED and SIGNAL ALPHA C4 LIMITED |
| DOCUMENT | **BENCH BRIEF OF THE APPLICANTS,**<br>**Trafigura Canada Limited and Signal Alpha C4 Limited** |
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**Hearing via Webex before the Honourable Justice Johnston**
**on the Calgary Commercial List, on February 6, 2024, commencing at 3:00 p.m.**

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## I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, Trafigura Canada Limited ("**Trafigura**") and Signal Alpha C4 Limited ("**Signal**" and collectively, the "**Lenders**"), who are the largest and primary secured creditors in these proceedings (the "**NOI Proceedings**") commenced by Griffon Partners Operation Corp. ("**GPOC**"), Griffon Partners Capital Management Ltd. ("**GPCM**"), Griffon Partners Holding Corp. ("**GPHC**"), Spicelo Limited ("**Spicelo**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Ltd. ("**2437801**"), 2437799 Alberta Ltd. ("**2437799**"), and 2437815 Alberta Ltd. ("**2437815**") (collectively, the "**Debtors**").

2. The Lenders' priority secured interest arises from a Loan Agreement dated July 21, 2022, in which the Lenders advanced USD$35,869,565.21 (the "**Loan Agreement**") to GPOC to purchase certain oil and gas assets. As security for payment and performance of GPOC's obligations under the Loan Agreement, a total of seven corporate guarantees were entered into with the other Debtors. In the case of Spicelo, a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the "**Share Pledge**"), was entered into with respect to certain shares (the "**Pledged Shares**") in the capital of Greenfire Resources Ltd. ("**Greenfire**") owned by Spicelo.

3. In the event of default on the Loan Agreement, the Lenders are entitled to call upon the Share Pledge as a separate and distinct obligation. On August 16, 2023, the Lenders sent a demand to Spicelo (among others) following continued defaults on the Loan Agreement. On August 25, 2023, the Debtors commenced these NOI Proceedings in the hopes of producing a viable restructuring or sale that would see the Lenders paid out in full. The Debtors have since received three stay extensions, the latest of which is set to expire on February 6, 2024. Furthermore, the ultimate six-month limitation period for filing a proposal is set to expire on February 24, 2024.

4. In the face of these looming deadlines, the Debtors have applied to have these NOI Proceedings converted into proceedings under the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**") and to have Alvarez & Marsal Canada Inc. ("**A&M**") appointed as Monitor for the Debtors, with certain "enhanced powers" with respect to Spicelo. The Lenders take no position as to the filing of CCAA initial orders with respect to GPOC, GPCM, GPHC, Stellion, 2437801, 243779, and 2437815. However, the Lenders do not support the same with respect to Spicelo, nor do they support the appointment of A&M as a "super monitor" over Spicelo.

5. Spicelo is a distinct entity from the other Debtors, all of which form part of the same interconnected corporate family (the "**Griffon Corporate Family**"). As further set forth below, the Lenders do not

[1] RSC 1985, c C-36.

believe that Spicelo and the Pledged Shares will form part of any viable restructuring or sale, either through the continuation of the NOI Proceedings or through a CCAA proceeding.

6. The Pledged Shares were specifically pledged to the Lenders in the event of default on the Share Pledge. No other creditor in these NOI Proceedings has recourse to these assets. The Share Pledge provides, *inter alia*, that upon default of Spicelo, the Lenders are entitled to the appointment of a receiver over all of Spicelo's property, namely the Pledged Shares.

7. For this reason, the Lenders assert that the NOI Proceedings should be terminated in respect of Spicelo and Grant Thornton Limited ("**GT**") should be appointed as receiver over Spicelo. The Lenders assert that Spicelo should not be permitted to convert its NOI Proceeding into a CCAA proceeding.

## II. STATEMENT OF FACTS

### A. The Parties

8. The Lenders are the largest and primary secured creditors of GPOC, GPCM and GPHC (collectively, the "**Griffon Entities**"). The Lenders also have a priority secured interest in Stellion, 2437801, 2437799, and 2437815 (collectively, the "**Shareholder Entities**"), which are holding companies, and each legally or beneficially owned by one of the four directors of GPOC.[2]

9. GPOC is a small oil and gas company with a few producing assets in the Viking formation in Saskatchewan (the "**GPOC Assets**").[3] GPOC operates the GPOC Assets through a small group of contractors.[4]

10. Aside from GPOC, the other companies forming the Griffon Corporate Family are all holding companies with no significant assets other than shares in GPOC. Only one of the guarantors holds assets of any value – Spicelo.[5]

11. Spicelo is unrelated to the other debtors and does not form part of the Griffon Corporate Family.[6] Spicelo does not have employees or carry on any active business operations.[7] Spicelo's most significant asset is 1,125,002 common shares in the capital of Greenfire Resources Inc. (which are pending to be exchanged for 5,499,506 shares in the capital of Greenfire Resources Ltd. (before

[2] Affidavit of Dave Gallagher, sworn January 29, 2024 at Exhibit "A" [Gallagher Affidavit].
[3] *Ibid* at para 6.
[4] *Ibid*.
[5] *Ibid* at para 7.
[6] *Ibid* at para 8.
[7] *Ibid* at para 9.

and after such exchange being referred to as the "**Pledged Shares**"), a publicly traded company on the New York Stock Exchange ("**NYSE**").[8]

## B. The Indebtedness

12. On July 21, 2022, the Lenders entered into the Loan Agreement pursuant to which the Lenders agreed to loan the sum of USD$35,869,565.21 to GPOC (the "**Loan**") to fund the acquisition of the GPOC Assets from Tamarack Valley Energy Ltd. ("**Tamarack**") (the "**Transaction**"). The Transaction was fully financed by the Lenders and by the subordinate secured creditor, Tamarack, with the shareholders of GPOC contributing no cash equity to the Transaction.[9]

13. As the GPOC Assets were insufficient to fully collateralize the Loan, the Lenders received a security package that included the Share Pledge from Spicelo with respect to the Pledged Shares and the Special Divided (as defined below).[10]

14. The Loan Agreement went into default within four months of its advance. After several attempts to work with the Debtors, including allowing time for potential refinancing efforts and after proposing a forbearance agreement, on August 16, 2023, the Lenders issued formal demands for repayment from the Debtors (the "**Demands**") concurrently with notices to enforce security pursuant to section 244 of the *Bankruptcy and Insolvency Act*[11] (the "**BIA**"). In response, and without notice to the Lenders, the Debtors all filed Notices of Intention to Make a Proposal on August 25, 2023 (the "**Filing Date**").

15. As of August 16, 2023, the Lenders were owed USD$37,938,054.69, plus legal fees, costs, expenses and other charges which are due and payable pursuant to the terms of the Loan (collectively, the "**Indebtedness**"). The Indebtedness represents 68% (C$51,413,652.14 of C$75,681,542.85) of the claims of GPOC and substantially all the claims of the other Debtors in these NOI Proceedings. In particular, the Lenders represent 100% of the proven creditors of Spicelo.[12]

## C. Spicelo and the Pledged Shares

16. Spicelo's only significant asset is the Pledged Shares. No other creditor in these NOI Proceedings have recourse to the Pledged Shares.[13]

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[8] *Ibid* at para 10.
[9] *Ibid*.
[10] *Ibid* at para 11.
[11] RSC 1985, c B-3 [BIA]. **[TAB 1]**
[12] Gallagher Affidavit, *supra* note 2 at para 15.
[13] *Ibid* at para 16.

17. The Pledged Shares have significant value. The shares of Greenfire, including the Pledged Shares, recently participated in a transaction (the "**Greenfire Transaction**") whereby, among other things, these shares were arranged into new shares of a special purpose vehicle (the "**New Greenfire Shares**") pursuant to a statutory plan of arrangement and in connection with a business combination, and as of September 20, 2023, such New Greenfire Shares (including the Pledged Shares) were listed and posted for trading on the NYSE. On the day of the public listing on September 21, 2023, the estimated fair market value of the listed shares was USD$10.10/share, implying a Pledged Share value of USD$55,545,010.60.[14] The Pledged Shares are also entitled to a special dividend in the amount of USD $6,600,000 (the "**Special Dividend**"), and to which the Lenders are entitled to by virtue of the Share Pledge.[15]

18. As of September 21, 2023, the estimated value of the Pledged Shares and the special dividend was USD$62,200,000, or approximately C$84,900,000.[16] When the Lenders issued their demand for repayment in August 2023, a sale of the Pledged Shares alone would have been sufficient to see the Indebtedness paid off. However, since the commencement of these NOI Proceedings, the value of the Pledged Shares has fluctuated from a high of $10.10 USD/share (upon listing September 21, 2023) to just over USD$4.00 per share (October 3, 2023).[17] On January 26, 2024, the closing price of the Pledged Shares was USD$5.51 per share.[18] These fluctuations have raised concerns that the Lenders may be exposed to becoming undersecured, should the price of the Pledged Shares fall even further.

**D. NOI Proceedings**

19. Since the Filing Date, the Debtors have brought four applications – three applications for stay extensions and one application for approval of a sale and investment solicitation process (the "**SISP**"). The Lenders have brought two applications – one for the appointment of a receiver over Spicelo (which was never heard) and another with respect to the Pledged Shares (which proceeded by consent). With the exception of the first stay extension application (the "**First Extension Application**"), the Lenders have consented to all stay extensions for the Debtors.[19] However, the Lenders have always been of the belief that an NOI Proceeding tied to the sale of an operating oil and gas company like GPOC was an inappropriate forum for the sale of the Pledged Shares.

20. To that end, at the First Extension Application the Lenders opposed the stay extension with respect to Spicelo only. The Court ultimately decided to extend the stay of proceedings for all the Debtors

[14] *Ibid* at para 24.
[15] *Ibid*.
[16] *Ibid* at para 25.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid* at para 15.

so the Debtors could explore the possibility of a full refinancing using the Pledged Shares as part of the overall collateral package. As a result, the Lenders' receivership application did not proceed.[20]

21. In addition, at the First Extension Application the engagement of the Transaction Agent was also approved by the Court (which was recommended by the Proposal Trustee). The Transaction Agent's fees are based on their standard hourly rates to be reimbursed by the Debtors on a biweekly basis. In the 20 weeks since the Transaction Agent was originally engaged nearly $700,000 in fees have accrued.[21]

22. At the third extension application on December 15, 2023, the Lenders consented to the stay extension for the Debtors. On that same day, the Debtors also obtained an order (the "**Declaration Order**") which provided a declaration that the Lenders were not prevented from exercising their contractual rights pursuant to the Share Pledge against Spicelo in relation to the Pledged Shares. The Declaration Order was necessary due to the representations made by the Proposal Trustee and the Debtors' counsel in Court that the Lenders were somehow constrained from exercising their enforcement rights under the Share Pledge by virtue of the existence of a Lock Up Agreement (the "**LUA**") that the Lenders were not party to. Such representations resulted in considerable expense to the Lenders (including obtaining a legal opinion from Delaware counsel to opine on Delaware law). The Proposal Trustee and Debtors ultimately backed away from this position and consented to the Lenders' application for the Declaration Order.[22]

**E. SISP Process**

23. Upon application of the Debtors, the SISP was approved by this Court on October 18, 2023 (the "**SISP Application**"). In Appendix A to the SISP Application, the Debtors indicate that the SISP is intended to solicit interest in the following:

    (a) the purchase of some or all of the assets of the Griffon Entities;

    (b) an investment in the Griffon Entities, including through the purchase or acquisition of the shares of some or all of the Griffon Entities;

    (c) a refinancing of the Debtors through the provision of take out or additional financing in the debtors (a "**Refinancing Transaction**"); or

    (d) some combination thereof.

[20] *Ibid* at para 16.
[21] *Ibid* at para 17.
[22] *Ibid* at para 19.

24. Notably, the SISP specifically excluded the Pledged Shares as part of a potential asset or share transaction. In all cases, the shares and/or assets of Spicelo were limited to a Refinancing Transaction.[23]

25. In the Proposal Trustee's fourth report (the "**Fourth Report**"), the Proposal Trustee summarizes the progress of the SISP through to December 7, 2023. The Proposal Trustee notes that as part of the SISP, 228 parties were contacted regarding the SISP opportunity, and 41 NDAs were executed.

26. As of the date of filing this brief, the Lenders have not received the Proposal Trustee's fifth report detailing the outcome of the Final Bid Deadline, which expired on January 22, 2024.

27. It is the Lenders' belief that no proposals involving the Pledged Shares currently exist or will be put forward in the form of a Refinancing Transaction or otherwise. Further, the Lenders are advised that at least some portion of the Pledged Shares will need to be liquidated to resolve the Indebtedness.[24] Additional details surrounding the ongoing SISP and the Lenders' position related thereto can be found in the Confidential Affidavit of Dave Gallagher (the "**Confidential Affidavit**") for which a sealing order has been sought in this Application. As of the date of filing this brief, the Lenders have not received an updated SISP report or the fifth report of the Proposal Trustee. The Lenders expect that they will file the Confidential Affidavit outlining the results of the SISP upon receipt of these materials.

## III. ISSUES

28. The issues to be determined by this Court are as follows:

    (a) Whether the NOI Proceedings should be terminated with respect to Spicelo;

    (b) Whether GT should be appointed as receiver over the property, assets and undertakings of Spicelo;

    (c) Whether a sealing order should be granted with respect to the Confidential Affidavit;

    (d) Whether an initial order under the CCAA should be granted with respect to Spicelo; and

    (e) If an initial order under the CCAA is granted with respect to Spicelo, whether A&M should be appointed as "super monitor" with respect thereto.

[23] Gallagher Affidavit, *supra* note 2 at para 18.
[24] Affidavit of Daryl Stepanic, sworn on January 29, 2024 at para 97.

## IV. LAW AND ARGUMENT

### PART 1: TERMINATION OF NOI PROCEEDINGS & APPOINTMENT OF A RECEIVER

### A. Spicelo's NOI Proceedings should be Terminated

#### *i. The Law*

29. The Lenders seek relief from this Honourable Court to terminate the NOI Proceedings against Spicelo immediately to permit the Lenders to seek the appointment of a receiver.

30. Pursuant to Section 50.4(11) of the BIA, on application by a creditor the Court may terminate the period for making a proposal prior to its actual expiration if the Court is satisfied that:

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence;

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question;

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors; or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the Court declares the period in question terminated, paragraphs 50.4(8)(a) to (c) thereupon apply as if that period had expired.[25]

#### *ii. Application to the Facts*

31. The Lenders assert that Spicelo will not be able to make a viable proposal that will be accepted by the Lenders.

32. The Debtors first began engaging in refinancing efforts in January 2023. Those efforts were ultimately unsuccessful. The Debtors then filed NOIs on August 25, 2023 and were granted an initial stay period of 30 days to put forward a viable proposal. Since then, the Debtors have received three extensions of the initial stay period which is currently set to expire on February 6, 2024. These extensions were granted in order to facilitate the SISP which was believed may result in a viable proposal. As outlined in the Confidential Affidavit, the Lenders do not believe that there is or will be any proposal arising out of the SISP that includes the Pledged Shares in a Refinancing Transaction

[25] BIA, *supra* note 11, s 50.4(11).

or otherwise. There is no adequate reason for further delaying the Lenders' enforcement of their legitimate contractual rights.

33. Additionally, pursuant to section 50.4(9) of the BIA, the ultimate limitation period for any stay extensions following the initial 30-day stay is five months.[26] As such, regardless of whether the NOI Proceedings are terminated, the Debtors must file a proposal by February 24, 2024 or else they will be automatically assigned into bankruptcy. As the Debtors have already been engaged in various refinancing efforts since January 2023, the Lenders assert that there is no reason to believe that a viable proposal will materialize in the next two weeks.

34. The Lenders are the sole secured creditors of Spicelo and represent 100% of the proven creditor claims of Spicelo and no other creditor has recourse to the Pledged Shares. As such, any potential proposal that includes Spicelo would require the support of the Lenders. The Lenders are not prepared to support any proposal that does not see them paid out in full when they otherwise have exclusive recourse to the Pledged Shares.

35. The SISP has served only to unnecessarily delay repayment of the Indebtedness by almost six months and excessively prime the Lenders' collateral with exorbitant professional fees. As outlined in the Proposal Trustee's third report (the "**Third Report**"), GPOC's cash flow variance report for the 18 week period beginning August 25, 2023 and ending December 29, 2023 (the "**December Cash Flow Variance Report**"), and GPOC's cash flow variance report for the 20 week period beginning August 25, 2023 and ending January 12, 2024 (the "**January Cash Flow Variance Report**"), over $2,000,000 has been incurred in professional fees throughout the NOI Proceedings, representing over half of GPOC's net revenue in that time period:

| **Cash Disbursements** | **Actuals (Rounded)** |
|---|---|
| Pre-filing expenses | $199,000[27] |
| Expenses related to the affidavit of Ken Morris | $90,000 |
| Debtors' counsel fees | $541,000 |
| Proposal Trustee's fees | $409,000 |
| Proposal Trustee's counsel fees | $216,000 |
| Transaction agent fees | $691,000 |
| **TOTAL** | $2,146,000 |

[26] *Ibid*, s 50.4(9).
[27] This is the amount noted for pre-filing expenses in the Third Report and the December Cash Flow Variance Report. However, this same line item is listed as $292,000 in the January Cash Flow Variance Report. The Lenders are unsure which amount is accurate. If the actual number is $292,000, then the total comes to $2,239,000.

36. The Lenders' position will continue to be prejudiced and primed by excessive fees and delays if Spicelo is allowed to continue under a form of Debtor in Possession proceeding using the same set of professionals.

## B. The Appointment of a Receiver over Spicelo is Just and Convenient

### *iii. The Law*

37. The Lenders seek the appointment of a Receiver over all assets, undertakings and property (the "**Property**") of Spicelo. Spicelo is separate and distinct from the other Debtors which form part of the Griffon Corporate Family. Spicelo's only asset is the Pledged Shares. For the reasons set forth below, it is just and appropriate to appoint a receiver to liquidate the Pledged Shares.

38. This Court has the discretion to appoint a receiver pursuant to both section 243(1) of the BIA and section 13(2) of the *Judicature Act*.[28] Under either legislation, the test to be applied by the Court is whether a receiver is "just or convenient."[29]

39. Although the BIA does not provide any factors to determine under what circumstances the appointment of a receiver would be "just or convenient", it is well-recognized that the purpose of the appointment of a receiver pursuant to section 243 of the BIA is to enhance and facilitate the preservation and realization of a debtor's assets for the benefit of all its creditors.

40. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*,[30] Justice Romaine held that in analyzing whether a receiver is "just or convenient" the Court may consider the factors enumerated in *Bennett on Receiverships*. The applicability of those factors depends on the particular factual matrix. These factors include, *inter alia*:

(a) the risk of harm to the secured lender if a receiver is not appointed;

(b) the risk of the secured lender suffering a sizeable deficiency;

(c) the fact that the creditor has a contractual right to appoint a receiver;

(d) the balance of convenience;

(e) the likelihood of maximizing return to the parties; and

(f) the secured lender's good faith, commercial reasonableness and the equities.[31]

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[28] RSA 2000, c J-2. **[TAB 2]**
[29] *Ibid*, s 13(2); BIA, *supra* note 11, s 243(1).
[30] 2002 ABQB 430. **[TAB 3]**
[31] *Ibid* at para 27.

41. Moreover, although Canadian courts have recognized that in general, the appointment of a receiver will be regarded as an extraordinary equitable remedy, the same courts have also recognized that such is not the case where the relevant security document permits the appointment of a receiver:

> …while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.[32]

42. While some authority indicates that the Court must apply the tripartite test for injunctive relief when considering a receivership application, these requirements are only mandatory when the applicant is not a security holder.[33]

### *iv. Application to the Facts*

43. In the present case, having regard to all the circumstances, the Lenders respectfully submit that it is both just and convenient for this Court to appoint a receiver over the Property of Spicelo for the following reasons:

(a) Spicelo is in default of its obligations under the Spicelo Guarantee;

(b) the Lenders are secured creditors and delivered Section 244 notices and have met the procedural requirements to appoint a receiver;

(c) the Debtors have been in default since November 2022 and the have been engaged in the SISP since October 18, 2023, providing more than sufficient time for the Debtors to consider any strategic options, but have been unsuccessful in doing so;

(d) the Lenders have lost faith in the Debtors' ability to implement any strategic or restructuring alternative, which would allow for the payment of the Indebtedness;

(e) the Lenders have, at all times, acted in good faith and have given the Debtors more than ample time to remedy the defaults;

(f) the Spicelo Guarantee allows for the appointment of a receiver in the event of default;

(g) the immediate appointment of a receiver will allow for orderly realization of the Pledged Shares in the most efficient and value maximizing manner;

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[32] *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866 at para 27. **[TAB 4]**
[33] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at paras 16-17. **[TAB 5]**

(h) the social and economic costs of liquidating the Pledged Shares are minimal based on the fact that they are Spicelo's only asset and Spicelo does not carry on any business, nor does it have any employees;

(i) the Pledged Shares are publicly traded on the NYSE and do not require any special expertise to expose to the market or find a potential buyer;

(j) the Lenders are not constrained by any share restrictions in relation to the Pledged Shares, including the terms of the LUA, and as a result, a receiver is able to quickly realize on the Pledged Shares as part of a Court Order;

(k) there is no other acceptable process available to the Lenders that would enable them to adequately protect their interests;

(l) the Lenders' position as primary secured creditor is being unnecessarily primed by excessive professional fees, administrative charges and protracted delays;

(m) there is a risk of harm and losses to the Lenders such that they will suffer a shortfall if a Receiver is not appointed to liquidate the Pledged Shares forthwith, especially as the Lenders do not have faith in the ability of the Proposal Trustee or the Debtors to act quickly and effectively should they remain in control of the Pledged Shares;

(n) the balance of convenience supports the appointment of a receiver;

(o) the draft order sought by the Lenders is based on the Alberta model receivership order and the terms respecting the stay of proceedings and receiver's charge are appropriate in the circumstances; and

(p) GT has consented to act as a receiver.

44. Furthermore, it is important to emphasize that what is being sought by the Lenders is the appointment of a receiver over Spicelo, not GPOC or any other member of the Griffon Corporate Family. If a receiver is appointed over Spicelo and the Pledged Shares are liquidated to satisfy the Indebtedness, this will free up significant value in GPOC for the other creditors, especially Tamarack. It is not appropriate to continue lumping Spicelo together with the other Debtors when there is no corporate relationship between them. Additional professional fees and costs associated with the other Debtors' pursuit of restructuring and strategic options should not be borne by Spicelo's assets, namely the Pledged Shares. Though it is possible for these fees and costs to be allocated between the different Debtors, the whole exercise is unnecessary as the Lenders are the sole creditor with recourse to the Pledged Shares and have the contractual right to appoint a

receiver over the Pledged Shares. By doing so, the Lenders will be able to finally see repayment of the Indebtedness after more than a year of continued defaults from the Debtors.

45. Lastly, in the Debtors' brief submitted on January 31, 2024 in support of their Application (the "**Debtors' Brief**"), they assert that the Lenders already applied to this Court to appoint a receiver on September 22, 2023 and were rejected on the basis that they were overcollateralized. The Debtors then go on to assert that, since nothing has materially changed in the interim, there is no reason that a receiver should be appointed now.[34] Respectfully, this is a mischaracterization of what was decided by this Court. At the time that the initial receivership application was heard, the NOI Proceedings were still in their infancy and the SISP had not yet commenced. As such, the Court was convinced that there was still a chance that a successful refinancing proposal involving Spicelo and the Pledged Shares may arise. Since then, much has changed. The Debtors have received two additional stay extensions and commenced the SISP. In pursuing this elusive refinancing proposal, the Debtors have expended over $2,000,000 in professional fees. Despite this, no viable proposal has arisen to date and, as further outlined in the Confidential Affidavit, the Lenders do not believe that one is forthcoming.

46. Considering the above circumstances, the Lenders respectfully submit that it is both just, convenient, and in the best interest of all stakeholders to appoint GT as receiver over the Property of Spicelo in order to maximize recovery in an effective and efficient manner.

## C. A Sealing Order Should be Granted

### *v. The Law*

47. Pursuant to Part 6, Division 4, of the Alberta Rules of Court, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.[35]

48. The test to be applied to determine whether a sealing order is appropriate is set out in *Sierra Club of Canada v Canada (Minister of Finance)*,[36] as recast in *Sherman Estate v Donovan*:[37]

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

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

[34] Brief of the Debtors, filed January 31, 2024 at paras 86-88 [Debtors' Brief].
[35] *Rules of Court*, AR 124/2010, Part 6, Division 4. **[TAB 6]**
[36] 2002 SCC 41 [*Sierra Club*]. **[TAB 7]**
[37] 2021 SCC 25 [*Sherman Estate*]. **[TAB 8]**

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[38]

49. The Supreme Court has explicitly recognized that a party's legitimate commercial interests constitute an "important public interest" for purposes of this test.[39] An important commercial interest includes preserving information that is intended to be confidential, and where disclosure would frustrate the promotion and protection of competition.[40] Whether a sealing order should be granted is ultimately a matter of judicial discretion.[41]

50. It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc v Look Mobile Corporation*,[42] Justice Newbould explained the reasons for such confidentiality:

> [17] It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd*, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.[43]

### *vi. Application to the Facts*

51. The Confidential Affidavit meets the test for a sealing order. The Confidential Affidavit is limited to information pertaining to the SISP that is of a confidential and highly sensitive commercial nature, as further outlined within the Confidential Affidavit. Public disclosure of this information could serve

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[38] *Ibid* at paras 37-38; *Sierra Club*, *supra* note 36 at para 53.
[39] *Sherman Estate*, *supra* note 37 at para 41; *Sierra Club*, *supra* note 36 at paras 60-61.
[40] *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2015 ABQB 81 at paras 50-51, 54 **[TAB 9]**; see also *Lewis v Uber Canada Inc*, 2023 ONSC 5134 at para 12. **[TAB 10]**
[41] *Dow Chemical*, *supra* note 40 at para 36.
[42] 2009 CanLII 71005 (Ont Sup Ct J). **[TAB 11]**
[43] *Ibid* at para 17.

to undermine the SISP and any potential sale or reorganization and jeopardize the timely and efficient repayment of the Debtors' creditors.

52. Overall, the salutary effects of the sealing order, which will maintain confidentiality over a party's legitimate commercial interests, outweigh the deleterious effects of restricting the accessibility of court proceedings. It is reasonable and appropriate in the circumstances to grant the requested sealing order over the Confidential Affidavit.

## PART 2: PROPOSED CCAA PROCEEDING & SUPER MONITOR

### A. Spicelo should not be granted an initial order under the CCAA

#### *vii. The Law*

53. The Lenders do not oppose the granting of an initial order under the CCAA with respect to the Griffon Corporate Family. However, the Lenders submit that CCAA relief is not appropriate for Spicelo and the Spicelo NOI Proceedings should therefore not be continued under the CCAA.

54. In *Alberta Treasury Branches v Tallgrass Energy Corp*[44] ("***Tallgrass***"), Justice Romaine held:

> [A] section 11 order under the CCAA is not granted merely upon the fact of its application. [The Applicant] must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence.[45]

55. In *Tallgrass*, Justice Romaine held it was key for the debtor to show there was "any reasonable possibility that it will be able to restructure its affairs."[46] While the burden is admittedly low, and some courts have accepted "a germ of a plan" as sufficient, Justice Romaine added that "there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring."[47] As confirmed in *Tallgrass*, the purpose of the CCAA is "remedial, not preventative", and is not intended to be the "last gasp of a dying company."[48]

56. In *9354-9186 Québec Inc v Callidus Capital Corp*,[49] the Court noted that while the CCAA confers broad authority, such discretion is not boundless: "This authority must be exercised in furtherance of the remedial objectives of the CCAA."[50] In considering whether appropriate circumstances exist for a court to grant an initial order under the CCAA, courts have referred to the purpose of the

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[44] 2013 ABQB 432. **[TAB 12]**
[45] *Ibid* at para 13.
[46] *Ibid* at para 14.
[47] *Ibid*.
[48] *Ibid*.
[49] 2020 SCC 10. **[TAB 13]**
[50] *Ibid* at para 49.

CCAA, being a statute designed 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."[51]

57. In *Marine Drive Properties Ltd, Re*,[52] the Court set aside a CCAA initial order, finding that the debtors "sought CCAA protection to buy time to continue their attempts to raise new funding" and "sought DIP financing so that they can do this at the expense of their creditors."[53] The Court held that due to the debtors' business and financing arrangements, it was extremely unlikely that a compromise or arrangement would be reached and that this matter was "not an appropriate use of the extraordinary remedy offered by the CCAA."[54]

58. With these requirements in mind, Spicelo bears the onus of satisfying this Court that granting of an initial order under the CCAA is appropriate. Spicelo cannot satisfy this onus based on the evidence before the Court.

### *viii. Application to the Facts*

59. In their Originating Application seeking the conversion of the NOI Proceedings into an initial order under the CCAA (the "**Originating Application**"), the Debtors assert that in light of the looming expiration of the NOI stay period, it is necessary to continue the NOI Proceedings under the CCAA in order to facilitate the ongoing SISP. The Debtors state that they "do not have enough time to conclude the SISP and subsequently close a transaction."

60. The Lenders acknowledge that the SISP is ongoing and do not wish to jeopardize any potential resulting transactions. This is why the Lenders do not oppose the granting of an initial order for the Griffon Corporate Family. However, as previously detailed, Spicelo is <u>not</u> part of the Griffon Corporate Family. Spicelo has no business operations and no employees. Spicelo is a holding company, and its sole asset is the Pledged Shares.

61. As outlined in the Confidential Affidavit, the Lenders do not believe that there is or will be any proposal arising out of the SISP that includes Spicelo and the Pledged Shares in the form of a Refinancing Transaction or otherwise. As such, there is no risk that appointing a receiver over Spicelo will in any way jeopardize the SISP.

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[51] *Marine Drive Properties Ltd, Re*, 2009 BCSC 145 at para 31 **[TAB 14]**; *Octagon Properties Group Ltd, Re*, 2009 ABQB 500 at para 9 **[TAB 15]**; *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 at paras 26-27 **[TAB 16]**.
[52] 2009 BCSC 145.
[53] *Ibid* at para 38.
[54] *Ibid*.

62. More importantly, a CCAA proceeding is not the appropriate venue for dealing with a holding company like Spicelo. Spicelo is not a business in need of restructuring since, as previously outlined, Spicelo has no business operations. Spicelo is separate from the other Debtors and does not need to be included in an initial order under the CCAA and the Lenders, unlike any other creditor, have exclusive recourse to the Pledged Shares which could potentially see at least a substantial portion of the Indebtedness repaid. Dragging Spicelo into a new CCAA proceeding with a host of unrelated companies does not make sense when all that is required for Spicelo is a straightforward sale of shares.

63. Furthermore, in the Originating Application, the Debtors propose that A&M be granted "enhanced powers" with respect to Spicelo, creating what is sometimes referred to as a "super monitor." These "enhanced powers" include, *inter alia*, powers akin to those of a receiver, namely the power to take possession and liquidate the Pledged Shares. This is expressly acknowledged in the Debtors' Brief where they state that the "enhanced powers" are powers typically given to a receiver and are being sought to "ensure an orderly and efficient liquidation of Spicelo's assets."[55]

64. It appears that, in seeking these powers solely in respect of Spicelo, the Debtors are attempting to sidestep the Lenders' contractual right to appoint a receiver and instead place the liquidation of the Pledged Shares into the hands of a Monitor of their choosing. This is not an appropriate use of the CCAA. Since the Debtors acknowledge in their Brief that what is intended for Spicelo and the Pledged Shares is a straightforward liquidation, there is absolutely no need to drag Spicelo into a new CCAA proceeding.

65. It must also be noted that the CCAA is a debtor in possession statute. Even with the engagement of a "super monitor", Spicelo is able to maintain control of its assets and the process under CCAA proceedings. CCAA proceedings involving multiple parties result in duplication of costs and difficulty in allocating those costs between the different asset pools. CCAA proceedings are also time limited in nature and time and money must be expended to bring stay extension applications. Receiverships incur none of these complications. Power and control over the assets would be taken out of Spicelo's hands, which is precisely what should occur when enforcing a share pledge agreement. Spicelo made the deliberate choice to pledge the Pledged Shares as security for the Loan Agreement and further agreed to include in the Share Pledge the remedy to appoint a receiver in the event of default. Costs are easily tracked in the hands of a receiver and there will be no duplication or overlap. Receivership is the correct tool to be used in this situation. Any suggestion otherwise reflects a last-ditch attempt from Spicelo to maintain control over the Pledged Shares.

[55] Debtors' Brief, *supra* note 34 at para 73.

66. In their Brief, the Debtors outline multiple reasons for why Spicelo should be granted an initial order under the CCAA. None of these arguments hold any merit.

67. The Debtors assert that dealing with Spicelo's assets in a CCAA proceeding is preferable as it will "preserve value in Spicelo for the benefit of all stakeholders, which includes the Spicelo shareholder."[56] To be clear, the only stakeholders are the Lenders, as the sole secured creditors with recourse to the Pledged Shares (which is the sole asset of Spicelo) and Jonathan Klesch, the sole shareholder of Spicelo who expressly agreed to pledge the Pledged Shares to the Lenders. It is unclear how granting Spicelo an initial order and appointing A&M as super monitor would preserve value for all stakeholders. If anything, it would only serve to further erode value with the accumulation of exorbitant professional fees. The Debtors argue that A&M is already familiar with the Debtors and the relevant issues and if a new receiver were brought on, they would have to "incur significant costs" to get up to speed.[57] This is not compelling as the receiver would only be appointed over Spicelo, a holding company with no business operations, no employees, and only one asset (the Pledged Shares). Respectfully, there is very little that a receiver would have to become familiarized with for this straightforward sale of shares. The Lenders have interviewed GT as proposed receiver and are confident that they can familiarize themselves quickly. Any costs associated with GT getting up to speed will be substantially less than what A&M would charge in a "super monitor" role.

68. Furthermore, the Lenders have lost faith in A&M's ability to effectively manage expenses and maximize value for the stakeholders for several reasons.

69. First, at the First Extension Application, counsel for each of A&M and the Debtors made certain representations to the Court that the Pledged Shares were subject to the LUA, which was subject to Delaware law. Based on those representations, the Lenders were required to expend significant time and money to obtain a legal opinion from Delaware counsel and bring an application regarding the applicability of the LUA (the "**LUA Application**"). This expenditure was ultimately rendered unnecessary as, notwithstanding their earlier representations, upon being served with the LUA Application, A&M and the Debtors' each conceded that the LUA had no application to the Lenders' ability to exercise their contractual rights with respect to the Pledged Shares. The LUA Application proceeded by way of consent.

70. Second, at the First Extension Application, A&M also made representations related to the necessity of making payments to certain pre-filing unsecured creditors. The Proposal Trustee and its counsel advised the Court that payments needed to be made to two critical suppliers – Sproule and Steel

[56] *Ibid* at para 81.
[57] *Ibid* at para 84(a).

Reef – in the approximate amount of $700,000. Upon review of the Cash Flow Variance Report, it is unclear to the Lenders whether such amounts were ultimately paid to Sproule and Steel Reef. However, what is clear from the December Cash Flow Variance Report is that $199,000 was paid towards legal and financial advisory fees incurred prior to commencement of the NOI Proceedings. These payments to unsecured creditors should never have been approved in advance of the secured creditors being paid out in full.

71. Third, as already previously outlined, the professional fees that have accrued in the NOI Proceedings have been excessive and consumed over half of GPOC's net revenues in the last 20 weeks. As such, the Lenders have no faith that A&M will be able to effectively manage its fees going forward to prevent the Lenders' collateral from being further primed.

72. The Debtors have also asserted that the Lenders "cannot point to any significant prejudice they would face by granting Enhanced Powers to the Monitor as opposed to appointing a receiver."[58] This is not true. Despite having exclusive recourse to the Pledged Shares, which if liquidated could see the Lenders receive repayment of much of the Indebtedness, the Lenders have, to date, received no payment for any portion of the Indebtedness. The Lenders have had their enforcement rights stayed for nearly six months while the Debtors have accumulated over $2,000,000 in professional fees, all of which have been paid in advance of the Lenders receiving any payment and all of which have proven to be unnecessary as NOI Proceedings have failed to produce any bids involving Spicelo and the Pledged Shares or that would see the Lenders paid out in full.

73. Furthermore, the Pledged Shares are listed on the NYSE and their price is therefore volatile. The lock up period considered in the LUA will soon come to a close on or about March 19, 2024, at which point all parties to the LUA will be able to freely trade their shares. There could be a significant fluctuation in the price of the Pledged Shares when this occurs. Full repayment to the Lenders is not an inevitability as the Debtors intimate. Delaying enforcement on the Pledged Shares any further could jeopardize the Lenders' chances of being repaid in full if the share price fluctuates. Allegations that the Lenders are overcollateralized are based on optimistic estimates of the value of the Pledged Shares that may not hold true, especially once the LUA expires. Similarly, allegations that "the Lenders will soon be paid in full" ring hollow when there is no proof that this is the case, especially in the face of an extensive history of repeatedly delaying repayment.

**B. If Spicelo is granted an initial order under the CCAA, A&M's appointment should be subject to certain conditions**

74. In the alternative, if Spicelo is granted an initial order under the CCAA and A&M is granted enhanced powers as "super monitor" over Spicelo, the Lenders assert that certain restrictions must

[58] *Ibid* at para 82.

be placed on A&M. The Lenders assert that, as the sole proven creditor of Spicelo and as the sole party with recourse to the Pledged Shares, they must be meaningfully consulted regarding any decisions affecting Spicelo and the Pledged Shares. Specifically, the Lenders request that the following conditions be in place:

(a) that any steps taken with regard to the Pledged Shares, including any sale of the Pledged Shares, be subject to approval from the Lenders;

(b) that the Transaction Agent's engagement be terminated after the final bid for the SISP is selected;

(c) that A&M be required to seek consent from the Lenders if it intends to engage a broker or additional sales professionals;

(d) that A&M be required to submit a proposed budget outlining the estimated costs for liquidating the Pledged Shares, including the costs of any additional professionals that may be approved by the Lenders; and

(e) that the CCAA proceedings with respect of Spicelo be limited to 30 days, at which point Spicelo may apply for an extension.

## V. CONCLUSION

75. The Debtors have been pursuing refinancing options since January 2023, including the ongoing SISP that commenced in October 2023. The ultimate limitation period for the NOI stay of proceedings is set to expire on February 24, 2024. To date, no viable proposals that include Spicelo and the Pledged Shares have been put forward and it is the Lenders' firm belief that no such proposals will materialize. In the meantime, extensive professional fees totaling more than $2,000,000 have accrued and unnecessarily primed the Lenders' collateral.

76. Spicelo is a holding company with no business operations and no employees. Spicelo's sole asset is the Pledged Shares. Spicelo shares no corporate relationship with the other Debtors. As such, Spicelo cannot be "restructured" and is not suitable for a CCAA proceeding. The Lenders are Spicelo's sole secured creditor and are the only party with recourse to the Pledged Shares, which have been pledged to the Lenders pursuant to the Share Pledge. Upon an event of default by Spicelo, the Share Pledge grants the Lenders the right to appoint a receiver. Spicelo has defaulted on the Share Pledge and remains in default to date.

77. In summary, the Lenders assert that there is no viable proposal that will be accepted by the Lenders regarding Spicelo and they have been and will continue to be prejudiced by delays to their

enforcement and excessive fees related to the NOI Proceedings and the SISP. As such, the Lenders assert that the NOI Proceedings should be terminated with respect to Spicelo and GT should be appointed as receiver over the Property of Spicelo.

78. For the foregoing reasons, the Lenders respectfully submit that this Court should grant the form of Orders appended as **Schedule "A"** and **Schedule "B"** to the Notice of Application dated January 29, 2024.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS DAY OF 1 FEBRUARY 2024.**

**STIKEMAN ELLIOTT LLP**

By: _____

Karen Fellowes, K.C.
Lawyer for the Applicants,
Trafigura Canada Limited and Signal Alpha C4 Limited

**TABLE OF AUTHORITIES**

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| 1 | *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. |
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| 4 | *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866. |
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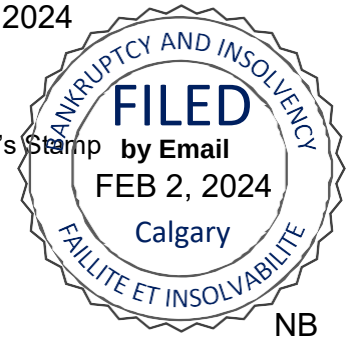
| 15 | *Octagon Properties Group Ltd, Re*, 2009 ABQB 500. |
| 16 | *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327. |

COM Feb 6, 2024

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IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED

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|---|---|
| APPLICANTS | TRAFIGURA CANADA LIMITED and SIGNAL ALPHA C4 LIMITED |
| DOCUMENT | **BOOK OF AUTHORITIES TO THE APPLICANTS BENCH BRIEF** |

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File No.: 137093.1011

**Hearing via Webex before the Honourable Justice Johnson**
**on the Edmonton Commercial List, on February 6, 2023, commencing at 10:00 a.m.**

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# TAB 1

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

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

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

Current to December 31, 2023

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**(i)** with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

**(ii)** with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

**(c)** shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

**(i)** auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

**(ii)** auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

**c)** envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

### Where assignment deemed to have been made

**(8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

**(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

**(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

**(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

**(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

### Cas de cession présumée

**(8)** Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

**a)** la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

**b)** le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

**b.1)** le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

**c)** le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

### Extension of time for filing proposal

**(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

### Prorogation de délai

**(9)** La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

**(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;

**(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

**(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

**Court may not extend time**

**(10)** Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

**Court may terminate period for making proposal**

**(11)** The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

**(a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,

**(b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

**(c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

**(d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

**Trustee to help prepare proposal**

**50.5** The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

**Order — interim financing**

**50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

**a)** la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

**b)** elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

**c)** la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

**Non-application du paragraphe 187(11)**

**(10)** Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

**Interruption de délai**

**(11)** À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

**a)** la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

**b)** elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

**c)** elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

**d)** le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

**Préparation de la proposition**

**50.5** Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

**Financement temporaire**

**50.6 (1)** Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

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

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

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

## PART XI

# Secured Creditors and Receivers

## PARTIE XI

# Créanciers garantis et séquestres

### Court may appoint receiver

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

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

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

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

### Nomination d'un séquestre

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

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

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

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

### Restriction on appointment of receiver

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

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

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

### Restriction relative à la nomination d'un séquestre

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

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

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

### Definition of *receiver*

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

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

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

### Définition de *séquestre*

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

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

**b)** soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

### Advance notice

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

**(a)** the inventory,

**(b)** the accounts receivable, or

**(c)** the other property

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

### Period of notice

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

### No advance consent

**(2.1)** 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).

### Exception

**(3)** 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.

### Idem

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

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

### Receiver to give notice

**245 (1)** A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

**(a)** in the case of a bankrupt, to the trustee; or

### Préavis

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

### Délai

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

### Préavis

**(2.1)** Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

### Non-application du présent article

**(3)** Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

### Idem

**(4)** Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

### Avis du séquestre

**245 (1)** Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

**a)** s'agissant d'un failli, au syndic;

# TAB 2


Province of Alberta

# JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

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**General jurisdiction**

**8** The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

**Province-wide jurisdiction**

**9** Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

## Part 2
## Powers of the Court

**Relief against forfeiture**

**10** Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

**Declaration judgment**

**11** No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

**Canadian law**

**12** When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

**Part performance**

**13(1)** Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

**(2)** An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

**Interest**

**14(1)** In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

**(2)** Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

**Equity prevails**

**15** In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

**Equitable relief**

**16(1)** If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

**(2)** If a defendant claims to be entitled

# TAB 3

**Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430**

Date: 20020429
Action No. 0101 05444



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

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REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

---

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

**INTRODUCTION**

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. (3rd) 179 (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, 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

# TAB 4

**CITATION:** Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866
**COURT FILE NO.:** CV-13-10320-00CL
**DATE:** 20131127



**SUPERIOR COURT OF JUSTICE – ONTARIO**
**(COMMERCIAL LIST)**

**APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED**

**RE:** **ELLEWAY ACQUISITIONS LIMITED, Applicant**

**AND:**

**THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.COM) AND 7500106 CANADA INC., Respondents**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Jay Swartz and Natalie Renner, for the Applicant**

**John N. Birch, for the Respondents**

**David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver**

**HEARD & ENDORSED:** **NOVEMBER 4, 2013**

**REASONS:** **NOVEMBER 27, 2013**

## ENDORSEMENT

[1] At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

[2] Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"),

[26] In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. 5088 at para. 10 (Gen. Div.)

[27] Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*., 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

[28] Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

[29] Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

[30] It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

# TAB 5

# Court of Queen's Bench of Alberta

**Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43**



**Date:** 20160121
**Docket:** 1501 12220
**Registry:** Calgary

Between:

**Alberta Treasury Branches**

Applicant

- and -

**COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc.**

Respondents

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**Oral Reasons for Judgment**
**of the**
**Honourable Madam Justice K.M. Eidsvik**

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## Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

corporation or any of its affiliates

(a) Any act or omission of the corporation or any of its affiliates effects a result,

(b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

**Analysis**.

***Serious issue to be tried***

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.

# TAB 6


# ALBERTA
# RULES OF COURT



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## Division 4
## Restriction on Media Reporting and Public Access to Court Proceedings

### Application of this Division

**6.28** Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

### Restricted court access applications and orders

**6.29** An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

### When restricted court access application may be filed

**6.30** A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

### Timing of application and service

**6.31** An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

### Notice to media

**6.32** When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

**Judge or applications judge assigned to application**

**6.33** A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

**Application to seal or unseal court files**

**6.34(1)** An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

**(2)** The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

**(3)** The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

**Persons having standing at application**

**6.35** The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

**No publication pending application**

**6.36** Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

# TAB 7

**Atomic Energy of Canada Limited** *Appellant*

*v.*

**Sierra Club of Canada** *Respondent*

and

**The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada** *Respondents*

**Énergie atomique du Canada Limitée** *Appelante*

*c.*

**Sierra Club du Canada** *Intimé*

et

**Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada** *Intimés*



**INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)**

**Neutral citation: 2002 SCC 41.**

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

**RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)**

**Référence neutre : 2002 CSC 41.**

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.*

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.*

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l'exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu'ils ont été « recueillis dans l'expectative raisonnable qu'ils resteront confidentiels », par opposition à « des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la *LCÉE*, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

# TAB 8


**SUPREME COURT OF CANADA**



**CITATION:** Sherman Estate *v.* Donovan, 2021 SCC 25

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

**BETWEEN:**

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

and

**Kevin Donovan and Toronto Star Newspapers Ltd.**
Respondents

- and -

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

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

# TAB 9

# Court of Queen's Bench of Alberta

**Citation: Dow Chemical Canada ULC v Nova Chemicals Corporation, 2015 ABQB 81**



**Date:** 20150205
**Docket:** 0601 07921
**Registry:** Calgary

Between:

**Dow Chemical Canada ULC and Dow Europe GmbH**

Plaintiffs/Defendants by Counterclaim

- and -

**Nova Chemicals Corporation**

Defendant/Plaintiff by Counterclaim

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**Reasons for Decision**
**of the**
**Honourable Madam Justice B.E. Romaine**

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## I. Introduction

[1] The plaintiffs/defendants by counterclaim Dow Chemical Canada ULC and Dow Europe GmbH and the defendant/plaintiff by counterclaim Nova Chemicals Corporation both apply for orders restricting access to certain documents and records to be entered as evidence at trial and the court proceedings involving those documents and records. They disagree, however, over the nature and extent of such sealing and protective orders. These competing applications raise the issue of whether the documents and proceedings proposed to be preserved as confidential from all but opposing counsel, expert witnesses and certain designated employees of the opposing

thus the more onerous test for a sealing order set out in ***Sierra Club*** will have to be met in any case. In my view, the better approach is to apply the test to both types of orders at least at the trial stage.

[31] Counsel for Dow has cited cases such as ***GasTOPS Ltd v Forsyth***, 2011 ONCA 186, where the Court found that disclosure of a business plan containing marketing strategy, revenue information and cost structure posed a serious risk to GasTOPS' commercial interest, despite the dated nature of the documents.

[32] In ***Allerex Laboratory Ltd. v Dey Laboratories L.P.,*** [2002] O.J. No. 3168, the Master was satisfied that a sealing order was appropriate, but not a protective order between the parties, apparently on the basis that the parties were not competitors.

[33] Nova cites ***Fairview Donut Inc. v The TDL Group Corp.***, 2010 ONSC 789. That case relies heavily on pre-***Sierra Club*** authority that imposed a "societal values of superordinate importance" hurdle that was not adopted in ***Sierra Club***. The Court also stressed the fact that the litigation was class action litigation, which attracted public attention and interest and the putative class' direct interest in observing and understanding the proceedings.

[34] The Court in ***Fairview Donut*** was clearly unimpressed by the notion that harm would ensue if competitors of Tim Horton's learned "that you must bake a frozen lump of ingredients for a particular length of time at a particular temperature in order to make a muffin".

[35] The disparity in the cases illustrates that the ***Sierra Club*** test must be applied flexibly and contextually.

[36] What is clear is that a decision with respect to whether a sealing or protective order should be granted is an exercise in judicial discretion. The ***Dagenais*** (and thus ***Sierra Club***) test is not meant to be applied mechanically: ***Toronto Star Newspapers Ltd. v Ontario,*** [2005] S.C.J. No. 41 at paras 4, 8 and 31.

[37] Even if the parties have agreed on the scope of a sealing or protective order, where there is no intervener present to argue the interests of the public to free expression, it is incumbent on the Court to take account of these interests without the benefit of argument: ***R v Mentuck***, [2001] S.C.J. NO. 73 at para 38.

## V. Application of the Sierra Club Test in this Case

### A. Ethane Purchase and Ethylene Sales Agreements

[38] The parties agree that a sealing order and a protective order are appropriate with respect to certain ethane purchase agreements and certain ethylene sales agreements. The difference is that Nova would restrict these orders to agreements with third parties that include a confidentiality provision and that are not "stale" in the sense of still being in force and effect.

[39] Despite their agreement, I must still consider whether these documents meet the ***Sierra Club*** tests of necessity and proportionality, taking into account the public interest.

1. *Necessity*

[40] Nova's submissions are based on Justice Iocobucci's comment in ***Sierra Club*** that, if exposure of information would cause a breach of a confidentiality agreement, the commercial interest can be characterized more broadly as the general commercial interest of preserving

> prices that have been paid in the past is information that would allow one of the parties to have an advantage over the other.

[48] I am satisfied from a review of the type of information contained in the ethane purchase agreements and ethylene sales agreements presented in evidence, together with Ms. Deutscher's evidence and the previous assertions and submissions of Nova, that the proprietary and commercial interests of Dow could reasonably be harmed by the unrestricted disclosure of these agreements.

[49] However, the evidence is not so clear with respect to agreements that were short in term or dated many years in the past and are no longer in effect, the "stale" information that Nova submits should not be protected. It is difficult to determine at this point of the trial what allegedly "stale" documents may be sought to be produced in evidence by either party, and difficult given this lack of context to impose any rule regarding continued need for confidentiality that may cover all such documents. I will therefore allow submissions to be made on the continued requirement of confidentiality as a result of stale dating or lack of a document's current effect on a document by document basis as the trial proceeds.

[50] In summary, I find as a general rule that the information contained in ethane purchase agreements and ethylene sales agreements is information of a sufficiently important commercial interest to pass the necessity branch of the ***Sierra Club*** test, subject to objections that may be made on the basis of the "staleness" of the documents**.**

[51] In the event that I am wrong, and the information in the agreements does not pass the "important commercial interest" test on the basis of the general commercial interest of preserving confidential information, Dow submits that such disclosure would frustrate the promotion and protection of competition, thus involving a public interest in confidentiality.

[52] Dow notes that confidentiality orders governing both pre-hearing processes and hearings involving competition law are routinely issued by the Competition Tribunal and in litigation involving the Commissioner of Competition. As noted in ***Canada (Commissioner of Competition) v Chatr Wireless Inc.,*** 2011 ONSC 3387 at para 13, in such cases:

> ... the maintenance of confidentiality is important because the disclosure of confidential and competitively-sensitive information to competitors can frustrate the goal of the *Competition Act*, which is the promotion and protection of competition. [This risk] if established, is a "serious risk to the proper administration of justice."

[53] According to the Competition Collaboration Guidelines (Competition Bureau at page 27), competitors exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables raise concerns about damage to competitive markets.

[54] It is clear that the promotion and protection of competition is a matter of public interest, and that Dow and Nova are competitors. Dow submits, therefore, that disclosure of confidential information such as that referred to in the Competition Collaboration Guidelines would undermine this public interest.

# TAB 10

**CITATION:** Lewis v. Uber Canada Inc., 2023 ONSC 5134
**COURT FILE NO.:** CV-21-00659095-00CP
**DATE:** 20230912

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lewis

**AND:**

Uber Canada Inc. et al.

**BEFORE:** J.T. Akbarali J.

**COUNSEL:** *Lucy Jackson*, for the plaintiff

*Dana Peebles and Geoff Hall*, for the defendants

**HEARD:** September 11, 2023

**Proceeding under the *Class Proceedings Act, 1992***

**ENDORSEMENT**

## Overview

[1] The plaintiff in this putative class action seeks damages because, he alleges, the defendants, which operate the food delivery platform UberEats, improperly charge sales tax on the regular purchase price of food orders when promotional discounts are applied. The plaintiff's certification motion is scheduled to be heard on September 27 and 28, 2023.

[2] In advance of the filing of the certification motion material, the defendants seek a protective order. Specifically, they seek a protective order to protect their best evidence about the number of members in the class, which includes evidence about different promotions the defendants offered in different time periods, and the take up of those promotions. The evidence at issue is evidence that the defendants are required to give by virtue of s. 5(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[3] The plaintiff does not oppose the motion.

## Legal Principles Relevant to a Protective Order

[4] In *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 1, the Supreme Court of Canada wrote:

who are brought into litigation are able to maintain confidentiality over commercially sensitive and confidential information that they are compelled to divulge in order to defend themselves or comply with discovery obligations": see *MediaTube SCJ*, at para. 34.

[12] Defendants have no choice but to be joined in litigation. In class proceedings, defendants have no choice but to adduce their best evidence about the number of class members. To the extent that this requirement forces a defendant to divulge commercially sensitive information, I am satisfied that there is a strong public interest in keeping that information confidential, to promote the integrity and fairness of class proceedings.

[13] In this case, the evidence the defendants seek to protect includes data demonstrating the relative success of different types of promotional offers, which is data a competitor could use to its advantage, and to the defendants' disadvantage.

[14] I also note that the record establishes that the defendants take significant measures to maintain confidentiality over this information, including by maintaining technical and administrative controls to protect the information. These controls limit access to the data to only those employees who require it to do their work. They also require employees to sign confidentiality agreements to keep the data confidential both during and after their term of employment. They monitor access to the data and investigate violations of their data policy. Violations are cause for termination.

[15] The defendants also maintain physical security measures at their headquarters, including through the use of proximity cards, requiring visitors to sign in and taking their photographs, and requiring visitors to sign non-disclosure agreements.

[16] In my view, the first branch of the test is met, in that the principle of court openness poses a serious risk to the strong public interest in keeping confidential commercially sensitive information that the defendants are forced by statute to disclose. I am satisfied that the information at issue is commercially sensitive, and the commercial interests of the defendants could reasonably be harmed by disclosure of it.

**Will reasonably available alternative measures prevent the risk?**

[17] In my view, no other available alternative measures will prevent the risk in this case. The protective order proposed by the defendants is narrowly tailored to focus only on the commercially sensitive information. The information proposed to be redacted is not at the heart of the contest between the parties on the certification motion, and forms only a small part of the record. The second branch of the test is met.

**Is the sealing order proportionate?**

[18] At this stage in the analysis, the court asks whether the benefits of granting the sealing order outweigh any deleterious effects: *Sherman Estate*, at para. 106.

# TAB 11

**COURT FILE NO.:** 08-CL-7877
**DATE:** 20091218



**SUPERIOR COURT OF JUSTICE – ONTARIO**
**COMMERCIAL LIST**

**RE:** IN THE MATTER OF LOOK COMMUNICATIONS INC.

Applicant

LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P.

Respondent

AND IN THE MATTER OF AN APPLICATION BY LOOK COMMUNICATIONS INC. UNDER SECTION 192 OF *THE BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C.44, AS AMENDED

**BEFORE:** Justice Newbould

**COUNSEL:** *John T. Porter*, for Look Communications Inc.

*Aubrey E. Kauffman*, for Inukshuk Wireless Partnership

**DATE HEARD:** December 17, 2009

## E N D O R S E M E N T

[1] Look Communications Inc.(Look) moves for an order extending a sealing order under which bids made in a court approved sales process were sealed. The order is opposed by Inukshuk Wireless Partnership which is a joint venture between Rogers Communications Inc. and Bell Canada.

[16] Look points out that it is not a private company. It is a public company with stakeholders, being public shareholders. It is not the kind of private corporation that Iacobucci J. was discussing in *Sierra*.

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

[18] This case is a little different from the ordinary. Some of the assets that were bid on during the sales process were not sold. However, because the assets that were sold constituted substantially all of the assets of Look, the arrangement under section 192 of the CBCA was completed. Those assets that were not sold remained, however, to be sold and it is in the context of that process that Rogers has been discussing purchasing one or more of these assets from Look.

[19] In this case, had the closing of the sale of the Spectrum and the License been drawn out to the maximum three year period provided for in the sale agreement, these remaining assets in all likelihood would have been sold before the maximum period ran out and during a period of time in which the Receiver's First Report remaining sealed. In those circumstances the effect of the sealing order would have been to protect the later sale process, a process which originally involved a sale of all of the assets of Look. While the remaining sales will not take place under

# TAB 12

# Court of Queen's Bench of Alberta

**Citation: Alberta Treasury Branches v Tallgrass Energy Corp, 2013 ABQB 432**

**Date:** 20130806
**Docket:** 1301 08759; 1301 08497
**Registry:** Calgary



Between:

**Alberta Treasury Branches**

Plaintiff

- and -

**Tallgrass Energy Corp.**

Defendant

1301 08497

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

**And in the Matter of the *Alberta Business Corporation Act*, R.S.A. 2000, c. B-9, as amended**

-and-

**Tallgrass Energy Corp.**

Defendant

---

**Reasons for Decision**
**of the**
**Honourable Madam Justice B.E. Romaine**

---

[8] On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining $100,000 available under the line of credit.

[9] Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to $50,000 of the line of credit to pay certain critical suppliers.

[10] In its application, Tallgrass represented that it currently has assets of $28,829,874 and liabilities of $28,896,371. The secured lenders are owed approximately $18 million and Tallgrass has unsecured accounts payable in the amount of roughly $3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately $7.4 million and a financing contract under which approximately $484,000 is outstanding as of March 31, 2013.

[11] The company values its property, plant and equipment, including undeveloped land, at approximately $21.6 million.

**Analysis**

[12] As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

[13] As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

[14] A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. However, there must be some evidence of what Farley J. in *Re*

*Inducon Development Corp.*, 1991 CarswellOnt 219 referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon* at para 13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

[15] While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

[16] The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

[17] I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

> 1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;
>
> 2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;
>
> 3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

# TAB 13

**9354-9186 Québec inc. and 9354-9178 Québec inc.** *Appellants*

*v.*

**Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier** *Respondents*

and

**Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals** *Interveners*

- and -

**IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)** *Appellants*

*v.*

**Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier** *Respondents*

and

**9354-9186 Québec inc. et 9354-9178 Québec inc.** *Appelantes*

*c.*

**Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier** *Intimés*

et

**Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation** *Intervenants*

- et -

**IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada))** *Appelantes*

*c.*

**Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier** *Intimés*

et

*Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

**Good faith**

**18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

**Good faith — powers of court**

**(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

**Bonne foi**

**18.6 (1)** Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

**Bonne foi — pouvoirs du tribunal**

**(2)** S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

# TAB 14

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Marine Drive Properties Ltd. (Re),***
2009 BCSC 145

Date: 20090210
Docket: S090306
Registry: Vancouver



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

**And**

**In the Matter of the *Business Corporations Act*,**
**S.B.C. 2002, c. 57**

**And**

**In the Matter of Marine Drive Properties Ltd.,**
**Wyndansea Hotel Inc. and 0707624 B.C. Ltd.**

Before: The Honourable Mr. Justice Butler

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners | Mary I.A. Buttery<br>Owen J. James |
| Counsel for Ernst & Young Inc. | E. Jane Milton, Q.C. |
| Counsel for Bancorp Financial Services Inc., Bancorp Balanced Mortgage Fund Ltd., Cooper Pacific Mortgage Investment Corporation, and Liberty Holdings Excell Corp. | John I. McLean<br>V. Florianova |
| Counsel for Liberty Holdings Excell Corp. | Mark M. Davies |
| Counsel for CareVest Capital Inc. | Peter Vaartnou |
| Counsel for Gulf and Fraser Fishermen's Credit Union | Gordon M. Elliott |

Purpose of the ***CCAA***

[31] 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), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (C.A.).

[32] 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,

Wyndansea Lands, was completed some time ago. On those properties, the Petitioners are attempting to sell either serviced lots or completed strata lots.

[38] To put it bluntly, the Petitioners have sought ***CCAA*** protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the ***CCAA***.

[39] In ***Redekop Properties Inc. (Re)***, 2001 BCSC 1892, 40 C.B.R. (5th) 62, Sigurdson J. came to the same conclusion while considering the applicability of a ***CCAA*** proceeding to a company that was effectively a real estate holding and development business. He stated as follows at para. 63:

> It is also a factor that this type of company is not the classic ongoing business to which ***C.C.A.A.*** protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

[40] Similar observations were made by Tysoe J.A. in ***Cliffs*** at para. 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

# TAB 15

# Court of Queen's Bench of Alberta

**Citation: Octagon Properties Group Ltd. (Re), 2009 ABQB 500**

**Date:** 08282009
**Docket:** 0901 12182
**Registry:** Calgary



IN THE MATTER OF THE *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF OCTAGON PROPERTIES GROUP LTD., 1096907 ALBERTA LTD., 880512 ALBERTA LTD., 5448710 MANITOBA LTD., and 5433801 MANITOBA LTD.

---

**Reasons for Judgment**
**of the**
**Honourable Madam Justice C.A. Kent**

---

[1] Octagon Properties Group Ltd. and related entities apply for relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 as amended (*CCAA*). Octagon is the parent company and sole shareholder of the remaining applicants. Throughout these reasons reference to Octagon will include the subsidiaries. Octagon is a real estate company which purchases, holds and sells property. It is not a development company. Currently, it owns 20 properties, all of which would fall under the *CCAA* proceedings if granted. In addition, there is a property entitled Blackfalds which Octagon proposes not fall under the *CCAA* proceedings.

[2] Each of the 20 properties has at least one mortgage on it and in some cases a second and third mortgage. At the application, counsel for the mortgagees appeared and made representations. The majority of the first mortgagees opposed the application for relief under the *CCAA*. One mortgagee, Canada ICI, which has mortgages on 2 properties supported the application and one mortgagee, ATB, was essentially neutral but applied for an adjournment to deal with issues arising out of the proposed DIP financing.

there is no proposed explanation for how the DIP financing would be allocated amongst the various properties.

[8] The mortgagees also argue that *CCAA* relief is a drastic remedy and unprecedented in the context of a business where reasonable commercial remedies are available. There is no public policy reason such as a business that is crucial to the economy or where there is a large group of employees affected that would require that *CCAA* proceedings trump those ordinary commercial remedies.

[9] In support of their opposition, the first mortgagees cite 3 cases. In *Marine Drive Properties Ltd. (Re)*, 2009 BCJ No. 207, Justice Butler allowed an application to set aside an *ex parte* order under the *CCAA* on the basis that the debtor's proposal was an inappropriate use of the *CCAA*. Justice Butler noted that the purpose of the *CCAA* was to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors to allow the company to stay in business (para. 31). In that case as in this case the major creditors were unlikely to approve any compromise proposed by the debtor. He found that the arrangement was doomed to fail.

[10] He also found that the debtor had sought *CCAA* protection to buy time in an attempt to raise new funding. He says at para. 38:

> To be it bluntly, the petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the petitioners stated in argument, they need time to "try to pull something of the hat." They have sought DIP financing so they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

[11] In *Cliffs over Maple Bay Investment Ltd. v. Fisgard Capital Corp.*, 2008 BCCA, the debtor was a business involved in a single land development. The Chambers judge had extended a *CCAA* stay and authorized financing. The Court of Appeal allowed an appeal from that order. Three points relevant to this case emerge from the Court's reasons. First, the fundamental purpose of the *CCAA* is to facilitate a compromise or arrangement and granting or continuing a stay is ancillary to that purpose. (paras. 26 and 27)

[12] Second, the court questions whether it should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted on by the creditors if the plan of arrangement intended to be made by the debtor will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. (para. 32)

[13] Third, if the sole business of a company is a single land development, the company may have difficulty proposing an arrangement that would be more advantageous to the secured lenders than their exercise of remedies available pursuant to their security. In such circumstances the fundamental purpose of the *CCAA* to reach a compromise or arrangement is likely to be

# TAB 16

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,*** 2008 BCCA 327

Date: 20080815
Docket: CA036261

Between:

**Cliffs Over Maple Bay Investments Ltd.**

Respondent
(Petitioner/Respondent)

And

**Fisgard Capital Corp. and Liberty Holdings Excel Corp.**

Appellants
(Respondents/Applicants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

## Oral Reasons for Judgment

| | |
|---|---|
| G.J. Tucker<br>A. Frydenlund | Counsel for the Appellants |
| H.M.B. Ferris<br>P.J. Roberts | Counsel for the Respondent |
| M. Sennott | Counsel for Century Services Inc. |
| M.B. Paine | Counsel for the Monitor, The Bowra Group |
| Place and Date of Hearing: | Vancouver, British Columbia<br>12 August 2008 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>15 August 2008 |

give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

[26] In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

[27] The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:

> "An Act to facilitate compromises and arrangements between companies and their creditors".

[28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.***( *sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."