COURT FILE NUMBER	2501-02733
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COOPERATIVES ACT*, SA 2001, c C-28.1 AND IN THE MATTER OF THE RECEIVERSHIP OF PICTURE BUTTE FEEDER COOPERATIVE
APPLICANT	PICTURE BUTTE FEEDER COOPERATIVE
DOCUMENT	**BOOK OF AUTHORITIES OF THE APPLICANT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Cassels Brock & Blackwell LLP** 3810, Bankers Hall West 888 3 Street SW Calgary, AB T2P 5C5 **Attention: Jeffrey Oliver / Danielle Marechal** P: 403.351.2921 / 403.351.2922 E: joliver@cassels.com / dmarechal@cassels.com File No.: 061429-00005

LIST OF AUTHORITIES

STATUTES

Tab	Authority
1.	*Alberta Rules of Court,* Alta Reg 124/2010
2.	*Bankruptcy and Insolvency Act*, R.S.C. c. B-3
3.	*Companies' Creditors Arrangement Act,* RSC 1985, c C-36
4.	*Cooperatives Act,* SA 2001, C C-28.1
5.	*Judicature Act*, RSA 2000, c J-2

ANNOTATED ACT

Tab	Authority
6.	Sarra, Janis, Geoffrey B. Morawetz and L. W. Houlden, *The 2021-2022 Annotated Bankruptcy and Insolvency Act,* Toronto: Carswell, 2021.

JURISPRUDENCE

Tab	Authority
7.	*Alberta Health Services v Networc Health Inc,* 2010 ABQB 373
8.	*Blindman Livestock Feeder Co-Op Ltd. (Receiver of) v Snyder,* 2005 ABQB 689
9.	*Law Society of Alberta v Higgerty,* 2023 ABKB 499
10.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co,* 2002 ABQB 430
11.	*Servus Credit Union Ltd v Proform Management Inc.,* 2020 ABQB 316
12.	*Sherman Estate v Donovan,* 2021 SCC 25
13.	*Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41

ORDERS

Tab	Authority
14.	In the Matter of the *Companies Creditors Arrangement Act,* RSC 1985, c C-36, as amended and in the Matter of the Compromise or Arrangement of Griffon Partners Holding Corporation, et al – Court file no. 2401-01422
15.	In the Matter of the Companies Creditors Arrangement Act, RSC 1985, c C-36, as amended and in the Matter of the Compromise or Arrangement of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air – Court file no. 2401-02664
16.	In the Matter of the Receivership of CatalX CTS Ltd. and CatalX Management – Court file no. 2401-00457

TAB 1

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

KeyCite treatment
Most Recently Cited in: Simpson v. Pawlowski, 2024 ABCA 254, 2024 CarswellAlta 1920, 72 Alta. L.R. (7th) 184, [2024] A.W.L.D. 3418, 2024 A.C.W.S. 3769 | (Alta. C.A., Jul 22, 2024)

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

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

(a) to ban publication of court proceedings,

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

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

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

(e) for use of a pseudonym.

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TAB 2

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part I — Administrative Officials (ss. 5-41)
Trustees
Appointment and Substitution of Trustees

KeyCite treatment
Most Recently Cited in: Syndic de 9126-5553 Québec inc. , 2024 QCCS 3937, 2024 CarswellQue 15914, EYB 2024-555927 | (C.S. Qué., Oct 2, 2024)

R.S.C. 1985, c. B-3, s. 14.06

s 14.06

Currency

14.06
14.06(1)No trustee is bound to act
No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

14.06(1.1)Application
In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

14.06(1.2)No personal liability in respect of matters before appointment
Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

14.06(1.3)Status of liability
A liability referred to in subsection (1.2) is not to rank as costs of administration.

14.06(1.4)Liability of other successor employers
Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

14.06(2)Liability in respect of environmental matters

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Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

14.06(3)Reports, etc., still required

Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

14.06(4)Non-liability re certain orders

Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

14.06(5)Stay may be granted

The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

14.06(6)Costs for remedying not costs of administration

If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

14.06(7)Priority of claims

Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and

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on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

14.06(8)Claim for clean-up costs
Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Note:

S.C. 1997, c. 12, s. 15(2), provides as follows:

(2) Application
Subsection (1) [S.C. 1997, c. 12, s. 15(1), which replaced s. 14.06(2) and (3) with s. 14.06(1.1) to (8)] applies to bankruptcies, proposals or receiverships in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].

Amendment History
1992, c. 27, s. 9(1); 1997, c. 12, s. 15; 2004, c. 25, s. 16; 2005, c. 47, s. 17; 2007, c. 36, s. 9(2), (3)

Currency
Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:22 (October 23, 2024)

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TAB 3

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

KeyCite treatment
Most Recently Cited in: John Doe (G.E.B. #26) v. Roman Catholic Episcopal Corporation of St. John's, 2024 NLCA 26, 2024 CarswellNfld 215, 2024 A.C.W.S. 3780, 15 C.B.R. (7th) 42 | (N.L. C.A., Jul 22, 2024)

R.S.C. 1985, c. C-36, s. 11.8

s 11.8

Currency

11.8
11.8(1)No personal liability in respect of matters before appointment
Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

11.8(2)Status of liability
A liability referred to in subsection (1) shall not rank as costs of administration.

11.8(2.1)Liability of other successor employers
Subsection (1) does not affect the liability of a successor employer other than the monitor.

11.8(3)Liability in respect of environmental matters
Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

11.8(4)Reports, etc., still required
Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

11.8(5)Non-liability re certain orders
Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

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(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

11.8(6)Stay may be granted

The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

11.8(7)Costs for remedying not costs of administration

Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

11.8(8)Priority of claims

Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

11.8(9)Claim for clean-up costs

A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

Amendment History

1997, c. 12, s. 124; 2007, c. 36, s. 67

Currency

Federal English Statutes reflect amendments current to September 25, 2024

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TAB 4

Alberta Statutes
Cooperatives Act

KeyCite treatment
Most Recently Cited in: Luellau v. Lilydale Co-operative Ltd., 2006 ABQB 454, 2006 CarswellAlta 856, 151 A.C.W.S. (3d) 224, [2006] A.W.L.D. 3040, 20 B.L.R. (4th) 89 | (Alta. Q.B., Jun 21, 2006)

S.A. 2001, c. C-28.1, s. 1

s 1. Interpretation

Currency

1.Interpretation
1(1) In this Act,

(a) **"affairs"** means the relationship between a cooperative and its affiliates and their members, shareholders, directors and officers, but does not include the business carried on by those corporations;

(b) **"affiliate"** means an affiliated corporation within the meaning of subsection (2);

(c) **"articles"** means the articles of incorporation of a cooperative and amendments to them;

(d) **"associate"**, in respect of a relationship with a person, means

(i) a corporation of which the person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 10% of the voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities;

(ii) a cooperative entity of which the person beneficially owns more than 10% of the voting rights in respect of which votes can be cast at a meeting of the cooperative entity;

(iii) an unincorporated entity of which the person beneficially owns more than 10% of the ownership interests;

(iv) a partner of the person acting on behalf of the partnership in which they are partners;

(v) a trust or an estate or succession in which the person has a substantial beneficial interest or serves as a trustee, administrator, executor or liquidator of a succession or in a similar capacity;

(vi) a spouse or adult interdependent partner or child of the person;

(vii) any of the following who has the same residence as the person:

(A) a relative of the person;

(B) the spouse or adult interdependent partner of a relative of the person;

(C) a relative of the person's spouse or adult interdependent partner;

(D) the spouse or adult interdependent partner of a relative referred to in paragraph (C);

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(e) **"auditor"** includes a firm of accountants;

(f) **"auxiliary member"** means a person who is not, or who is no longer, a full member of a cooperative but has an association with it, as determined by the articles or the bylaws;

(g) **"bearer"**, in respect of a security, means the person who is in possession of a security that is payable to bearer or endorsed in blank;

(h) **"beneficial ownership"** includes ownership through a trustee, legal representative, agent or other intermediary;

(i) **"Commission"** means the Alberta Securities Commission;

(i.1) **"contact information"** includes a person's address and, if requested by the Registrar or a cooperative, a person's telephone number and email address;

(j) **"cooperative"** means a cooperative incorporated under this Act;

(k) **"cooperative basis"** has the meaning given to it by section 2;

(l) **"cooperative entity"** means a corporation that, by the law under which it is organized and operated, must be organized and operated on, and is organized and operated on, a cooperative basis;

(m) **"corporation"** means a corporate entity, however incorporated;

(n) **"Court"** means the Court of King's Bench;

(o) **"debt obligation"** means a bond, debenture, note or other evidence of indebtedness or guarantee of an entity, whether secured or unsecured;

(p) **"delegate"** means an individual who is appointed or elected to represent a member at a meeting of members;

(q) **"director"** means a member of the board of directors of a cooperative by whatever name the director or board is called;

(r) [Repealed 2022, c. 16, s. 3(2)(b).]

(s) **"distributing cooperative"** means a cooperative any of whose issued securities, other than membership shares, investment shares issued to members or member loans, are or were part of a distribution to the public and remain outstanding and are held by more than one person;

(s.1) **"electronic means"**, in respect of attending or holding a meeting, means a method of electronic or telephonic communication that enables all persons attending the meeting to hear and communicate with each other instantaneously, including, without limitation, teleconferencing and computer network-based or internet-based communication platforms;

(t) **"entity"** means a corporation, a trust, a partnership, a fund or an unincorporated organization;

(u) **"Executive Director"** means the Executive Director of the Commission;

(v) **"extra-provincial cooperative"** means a cooperative entity that is incorporated as a cooperative otherwise than by or under an enactment of Alberta;

(w) **"federation"** means a cooperative whose membership is composed wholly or substantially of other cooperatives;

(x) **"firm of accountants"** means a professional accounting firm engaged in a professional accounting practice or public accounting practice registered under the *Chartered Professional Accountants Act*, or a corporation that is incorporated by

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or under an Act of the legislature of a province other than Alberta and is engaged in a professional accounting practice or a public accounting practice;

(y) **"holder"** means

(i) in respect of a security certificate, the person in possession of the certificate issued or endorsed to the person or to bearer or in blank;

(ii) in respect of the ownership of a membership share, the person referred to in section 102(2), and

(iii) in respect of the ownership of an investment share, the person referred to in section 108(2);

(z) **"individual"** means a natural person;

(aa) **"investment share"** means a share in the capital of a cooperative that is not a membership share;

(bb) **"investment shareholder"** means the person referred to in section 108(2);

(cc) **"issuer"**, in respect of a security, means the entity that issues the security;

(dd) **"meeting of the cooperative"** means

(i) a meeting of members or of a class of member, or

(ii) a meeting of holders of investment shares or of holders of any class or series of investment shares of a cooperative,

as the context requires;

(ee) **"member"** means a member of a cooperative other than an auxiliary member;

(ff) **"member loan"** means a loan required by the cooperative from its members as a condition of membership or to continue membership in the cooperative and, if a cooperative is incorporated without membership shares, a member loan is deemed to be a membership share issued at par value for the purpose of Parts 5, 12, 14 and 16 and section 144(2);

(gg) **"membership share"** means a share described in section 102;

(hh) **"Minister"** means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(ii) **"officer"** includes the chair of the board of directors, a vice-chair of the board of directors, the president, a vice-president, the secretary, an assistant secretary, the treasurer, an assistant treasurer and the general manager of a cooperative and any other individual designated as an officer of the cooperative by bylaw or by resolution of the directors, or any other individual who performs functions for the cooperative similar to those normally performed by an individual occupying any such office;

(jj) **"ordinary resolution"** means a resolution that is submitted to a meeting of the cooperative or a meeting of the directors and passed at the meeting by a majority of the votes cast;

(kk) **"patronage return"** means an amount that the cooperative allocates among and credits or pays to its members or to its member and non-member patrons based on the business done by them with or through the cooperative, and includes patronage dividends or bonus payments issued to members who hold investment shares issued by a cooperative referred to in Part 18, Division 4;

(ll) **"person"** means an individual or an entity and includes a legal representative;

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(mm) **"prescribed"** means prescribed by regulation;

(nn) **"proxy"** means a completed and executed form of proxy by means of which an investment shareholder appoints a proxyholder to attend and act on the investment shareholder's behalf at a meeting of the investment shareholders;

(oo) **"record date"** means the date fixed or determined as the record date by the regulations;

(pp) **"redeemable"**, with respect to a share, means

(i) that the cooperative may acquire or redeem the share on the demand of the cooperative, or

(ii) that the cooperative is required by its articles to acquire or redeem the share at a specified time or on the demand of the holder;

(pp.1) **"Registrar"** means the Registrar of Cooperatives appointed under this Act;

(rr) **"security"** includes an investment share, a debt obligation of a cooperative and a certificate evidencing such a share or debt obligation and, for the purposes of Part 16, includes a membership share;

(ss) **"security interest"** means an interest in or charge on property of a cooperative to secure payment of a debt or the performance of an obligation of the cooperative;

(tt) **"send"** includes deliver;

(uu) **"series"**, in respect of investment shares, means a division of a class of those shares;

(vv) **"share"** means a membership share or an investment share;

(ww) **"special resolution"** means a resolution that is submitted to a meeting of the cooperative or a meeting of the directors and passed at the meeting by at least 2/3 of the votes cast;

(ww.1) **"spouse"** means the spouse of a married person but does not include a spouse who is living separate and apart from the person if the person and spouse have separated pursuant to a written separation agreement or if their support obligations and family property have been dealt with by a court order;

(xx) **"unanimous agreement"** means a written agreement to which all the members and investment shareholders, if any, of a cooperative are or are deemed to be parties, whether or not any other person is also a party, that provides for any of the matters listed in Part 4, Division 10.

1(2) For the purposes of this Act,

(a) a corporation is affiliated with another corporation if one of them is a subsidiary of the other, if both are subsidiaries of the same corporation or if each of them is controlled by the same person, and

(b) if 2 corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other.

1(3) For the purposes of this Act, a corporation is the holding corporation of another corporation if that other corporation is its subsidiary.

1(4) For the purposes of this Act, a corporation is a subsidiary of another corporation if

(a) it is controlled by

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(i) that other corporation,

(ii) that other corporation and one or more corporations, each of which is controlled by that other corporation, or

(iii) 2 or more corporations, each of which is controlled by that other corporation,

or

(b) it is a subsidiary of a corporation that is that other corporation's subsidiary.

1(5) For the purposes of this Act, securities of a cooperative

(a) issued on a conversion of other securities, or

(b) issued in exchange for other securities

are deemed to be securities that are part of a distribution to the public if those other securities were part of a distribution to the public.

1(6) Subject to subsection (7), for the purposes of this Act, a security of a corporation

(a) is part of a distribution to the public if, in respect of the security, there has been a filing of a prospectus, statement of material facts, registration statement, securities exchange take-over bid circular or similar document under the laws of Canada, a province or territory of Canada or a jurisdiction outside Canada, or

(b) is deemed to be part of a distribution to the public if the security has been issued and a filing referred to in clause (a) would be required if the security were being issued currently.

1(7) On the application of a cooperative, the Commission may determine that a security of the cooperative is not or was not part of a distribution to the public if it is satisfied that its determination would not prejudice any holder of a security certificate of the cooperative.

1(8) This Act applies to a cooperative incorporated or continued under this Act.

1(9) No provisions of any Act specified in the regulations apply to a cooperative incorporated or continued under this Act.

Amendment History
2002, c. A-4.5, s. 28(2); 2014, c. 8, s. 17; 2014, c. C-10.2, s. 171; 2021, c. 3, s. 4(2); 2022, c. 16, s. 3(2); Alta. Reg. 217/2022, s. 45(2)

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Alberta Statutes
Cooperatives Act
Part 14 — Winding-Up, Liquidation and Dissolution of Cooperatives (ss. 299-330)
Division 1 — Receivers and Receiver-managers

S.A. 2001, c. C-28.1, s. 299

s 299. Appointment of a receiver or receiver-manager

Currency

299.Appointment of a receiver or receiver-manager

299(1) A person may be appointed as a receiver or as a receiver-manager of a cooperative by an instrument or by Court order.

299(2) As soon as practicable after appointment, the receiver or receiver-manager must notify the Registrar in writing of the appointment.

Amendment History

2022, c. 16, s. 3(91)

Currency

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Alberta Statutes
Cooperatives Act
Part 14 — Winding-Up, Liquidation and Dissolution of Cooperatives (ss. 299-330)
Division 1 — Receivers and Receiver-managers

S.A. 2001, c. C-28.1, s. 301

s 301. Obligations of receivers and receiver-managers

Currency

301.Obligations of receivers and receiver-managers

A receiver or receiver-manager must act in accordance with the instrument or Court order that appointed the receiver or receiver-manager and in accordance with any other directions given by the Court.

Amendment History

2022, c. 16, s. 3(57)

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Alberta Statutes
Cooperatives Act
Part 14 — Winding-Up, Liquidation and Dissolution of Cooperatives (ss. 299-330)
Division 1 — Receivers and Receiver-managers

S.A. 2001, c. C-28.1, s. 302

s 302. Court directions

Currency

302.Court directions

On application by an interested person or by the receiver or receiver-manager, the Court may make any order giving directions on any matter relating to the functions of a receiver or receiver-manager, including an order

(a) appointing, replacing or discharging a receiver or receiver-manager;

(b) approving the accounts of the receiver or receiver-manager;

(c) determining the notice to be given to any person or dispensing with notice to any person;

(d) fixing the remuneration of the receiver or receiver-manager;

(e) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager was appointed,

(i) to make good any default in connection with the receiver's or receiver-manager's custody or control of the property and business of the cooperative, or

(ii) relieving a receiver or receiver-manager, or a person by or on behalf of whom a receiver or receiver-manager was appointed, from any liability on any terms that the Court considers appropriate;

(f) confirming any act of the receiver or receiver-manager;

(g) giving directions on any other matter relating to the duties of the receiver or receiver-manager.

Currency

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Alberta Statutes
Cooperatives Act
Part 14 — Winding-Up, Liquidation and Dissolution of Cooperatives (ss. 299-330)
Division 1 — Receivers and Receiver-managers

S.A. 2001, c. C-28.1, s. 303

s 303. Duties of receivers and receiver-managers

Currency

303.Duties of receivers and receiver-managers

A receiver or receiver-manager must

(a) take the property of the cooperative into custody and control in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed;

(b) open and maintain a bank account as receiver or receiver-manager of the cooperative for the money of the cooperative coming under the receiver's or receiver-manager's control;

(c) keep detailed accounts of all transactions carried out as receiver or receiver-manager;

(d) keep accounts of the administration as receiver or receiver-manager and make them available to directors during usual business hours;

(e) at least once in every 6-month period after appointment, prepare financial statements of the administration, as far as is feasible, in the form required by section 228;

(f) on completion of duties, render a final account of the administration;

(g) if section 233 would otherwise apply, file with the Executive Director a copy of any financial statement not later than 15 days after it is prepared and any final account of the administration not later than 15 days after it is rendered.

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TAB 5

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

KeyCite treatment
Most Recently Cited in: Angus A2A GP Inc (Re) , 2025 ABKB 51, 2025 CarswellAlta 164 | (Alta. K.B., Jan 29, 2025)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.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.

13(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.

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TAB 6

a person found guilty of an indictable offence; specifically, the discretion may be exercised where the indictable offence would impair the trustee's capacity to perform the trustee's fiduciary duties. The term "convicted" was replaced with the term "found guilty".

A duty of fairness is owed in proceedings under ss. 14.01 and 14.02 of the *BIA* and the Superintendent has a high obligation of disclosure where proceedings deal with the livelihood and professional reputation of trustees, requiring production of all documents unless clearly irrelevant, in order that the trustees may understand the case against them and to ensure a fair disciplinary hearing. The fact that the Superintendent has the statutory power both to investigate and adjudicate allegations of misconduct is not sufficient to create a reasonable apprehension of bias as long as the same person does not both prosecute and participate in adjudicating the case: *Sheriff v. Canada (Attorney General)* (2006), 2006 CarswellNat 1223, 2006 CarswellNat 2432, 25 C.B.R. (5th) 204 (Fed. C.A.); *Sam Lévy & Associés Inc. c. Mayrand* (2006), 2006 CarswellNat 1512, 2006 CarswellNat 4363, 28 C.B.R. (5th) 200 (Fed. C.A.); leave to appeal to S.C.C. refused (2006), 2006 CarswellNat 3849, 2006 CarswellNat 3850 (S.C.C.). Independence and impartiality of administrative decision makers is important: *Raymond, Chabot inc. c. Canada (Procureure générale)* (2006), 2006 CarswellQue 8063, 27 C.B.R. (5th) 105 (Que. C.A.).

Section 14.03 gives the Superintendent the power to take conservatory measures for the protection of the bankrupt estate in the circumstances set out in s. 14.03(2).

Section 14.03 does not violate s. 7 of the *Charter of Rights and Freedoms*, but a search and seizure under s. 14.03 does violate s. 8 of the *Charter* unless there are reasonable grounds to believe that the measures taken will make it possible to preserve the records, data and documents of estates being administered by the trustee: *Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy)*, [1997] 2 F.C. 719, 147 D.L.R. (4th) 739 (T.D.).

If serious irregularities have been alleged against a trustee, the Superintendent is justified in taking conservatory measures under s. 14.03 for the protection of the bankrupt estates being administered by the trustee. Under s. 14.03, if the situation is urgent, the Superintendent can direct the seizure of all the estate records, the Superintendent is not required to sort through the records and determine if some of them could properly be left to be administered by the trustee: *Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy)*, *supra*.

In an application by a trustee to suspend conservatory measures ordered by the Superintendent pursuant to s. 14.03, there are three relevant tests to be applied: (1) is there a serious question to be tried? (2) has the trustee suffered irreparable harm? (3) does the balance of convenience favour one party over the other? Where trustees against whom an order had been made under s. 14.01 suspending their licences had about one thousand open estates, the court was of the view that they should be able to generate sufficient income from the open estates to maintain their operations and that they would not suffer irreparable harm. The balance of convenience, the court found, favoured the Superintendent. The court referred to the public interest in the ability of the Superintendent to investigate trustees and to assure the integrity of bankruptcy administration. Most compelling was the fact that the trustees had altered financial records and that there appeared to be a substantial shortage in their trust accounts: *Pfeiffer v. Canada (Superintendent of Bankruptcy)* (2002), 36 C.B.R. (4th) 90, 2002 CarswellNat 1911, 2002 CarswellNat 3023, 2002 FCT 806, 2002 CFPI 806 (Fed. T.D.).

C§14 — Discharge of Former Trustee Where Substitute Trustee Appointed

A trustee who has been replaced cannot be discharged until it shows that it has accounted to the satisfaction of the inspectors and of the court for all property that came into its hands, and until three months have elapsed after the date of substitution, without any undisposed claims or objections having been made by the bankrupt or any creditors: s. 41(3).

For the procedure to be followed by the former trustee when a substitute trustee has been appointed, see *post* C§123 "Procedure to be Followed by Former Trustee in Obtaining Discharge Where a Substitute Trustee has been Appointed".

C§15 — Judicial Review of Decisions of Superintendent With Respect to Trustee's Licence

The Superintendent of Bankruptcy, in granting licences under the power conferred on it by s. 5(3)(a) of the *Act*, is acting as a "federal board, commission or other tribunal" within the meaning of s. 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This means that if the Superintendent exceeds its powers in the granting or refusing of such a licence, any decision that it makes will be subject to the review of the Federal Court, either under the *Federal Courts Act* by the Federal Court of Appeal if the decision is made on a judicial or quasi-judicial basis, rather than being a decision or order of an administrative nature; or by the Trial Division of the Federal Court under s. 18 of the *Federal Courts Act*, by way of prerogative writ or declaratory relief: *Blais v. Andras*, [1973] F.C. 182 (C.A.). Section 14.02 now affirms the law as set out in *Blais v. Andras*.

The Federal Court has held that the standard of review of the Superintendent's decisions is one of reasonableness, resting on an assessment of the comparative expertise of the Superintendent relative to the court in the supervision of trustees, of the *BIA* in general, and of ss. 14.01 and 14.02 in particular, to ensure an appropriate exercise of fiduciary responsibilities in the administration of estates. The court will generally defer to the conclusions reached by the Superintendent, particularly in a case where the Superintendent is not bound by any legal or technical rules of evidence (s. 14.02(2)(b)). Where errors in law are alleged, the standard of review is one of correctness. The court held that ss. 7 and 11 of the *Charter of Rights and Freedoms* are not engaged by the proceedings conducted by the Superintendent under ss. 14.01 and 14.02, and that no basis was established concerning alleged violation of the *Canadian Bill of Rights* or the basic principles of fairness; the trustees knew the case in advance of the hearing, had the opportunity to provide evidence, call witnesses and make submissions before the decision was made and hence the basic standard of fairness in the process was met: *Sheriff v. Canada (Attorney General)* (2005), 2005 CarswellNat 614, 2005 CarswellNat 5011, 10 C.B.R. (5th) 70 (F.C.); affirmed (2006), 2006 CarswellNat 1223, 25 C.B.R. (5th) 204 (F.C.A.).

C§16 — Liability of Trustee or Receiver

The *BIA* offers trustees, receivers and similar insolvency professionals protection from liability for their activities in connection with a proceeding under the *Act*. The statutory framework requires the assistance of these professionals, who would likely be unwilling to serve absent protection for their good faith and duly diligent activities. Trustees are not personally liable in respect of any liability that exists before the trustee is appointed or that is calculated by reference to a period before the appointment. The specific protections from liability are discussed in the sections immediately below.

TAB 7

2010 ABQB 373
Alberta Court of Queen's Bench

Alberta Health Services v. Networc Health Inc.

2010 CarswellAlta 1017, 2010 ABQB 373, [2010] 11 W.W.R. 730, [2010] A.W.L.D. 4119, [2010] A.W.L.D. 4120, [2010] A.W.L.D. 4121, [2010] A.W.L.D. 4122, [2010] A.J. No. 627, 118 Alta. L.R. (5th) 118, 189 A.C.W.S. (3d) 939, 28 Alta. L.R. (5th) 118

Alberta Health Services (Applicant) and Networc Health Inc. (Respondent)

B.E. Romaine J.

Heard: May 3, 11, 2010
Judgment: June 1, 2010
Docket: Calgary BK01-094004

Counsel: Josef G.A, Krüger, Q.C., R.J. Daniel Gilborn, Rahim N. Punjani for Applicant, Alberta Health Services
C. Michael Smith, Smith Mack LaMarsh, Richard Dixon for Cambrian Group
David LeGeyt, David G. Loader for Respondent, Networc Health Inc.
Howard A. Gorman, Anne L. Kirker for Interim Receiver, PricewaterhouseCoopers
J. Alexander Kotkas, John Grieve for Healthcare Property Holdings Ltd.
Darren R. Bieganek for Clark Builders

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.4 Stay of application
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.6 Miscellaneous
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Status to apply — N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. and applied to continue receivership — AHS submitted that it was contingent creditor of N Inc. due to filing of Statement of Claim against N Inc. alleging it breached its agreement with AHS by committing act of insolvency and claiming unquantified damages — AHS's applications granted on other grounds — Although AHS submitted that it had status to apply for receivership order as "contingent creditor," such standing was not required under s. 46 or s. 13(2) — Whether AHS was contingent creditor was not determinative of its status — AHS was major stakeholder with respect to operations and financial health of N Inc. — AHS's interest in ensuring that citizens of province who required surgical services performed in facility provided by N Inc. were not deprived of those services gave it an interest far greater than that of mere customer of goods or services.
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Withdrawal of petition

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N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — Creditor applied for leave to withdraw bankruptcy application — AHS applied to continue interim receivership, and opposed creditor's application for leave to withdraw bankruptcy application — AHS's applications granted; receivership order granted and continued — Creditor's application dismissed — Creditor did not establish that its application to withdraw petition for receiving order should be allowed — Creditor did not prove solvency of N Inc., lack of prejudice to other creditors or that withdrawal would not undermine integrity of process.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — Miscellaneous

N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act (BIA) and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — N Inc. filed affidavit denying its indebtedness to creditor — Creditor brought application for leave to withdraw its petition — AHS applied to continue interim receivership and opposed creditor's application to withdraw — AHS's applications granted; creditor's application dismissed — Applying tri-partite test for injunctive relief, it was established that there were several serious issues to be tried — There might be irreparable harm to public interest if existing application was terminated and AHS was required to reapply under different provision of BIA — Balance of convenience favoured AHS's interest in having creditor's application remain in place and be stayed as opposed to creditor's application to have it withdrawn.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — Fact of receivership gave rise to default under N Inc.'s lease with its landlord which, but for stay created by receivership order, would entitle landlord to terminate lease — AHS brought application for appointment of interim receiver of financial records and accounts of N Inc. — Interim receiver was appointed — N Inc. filed affidavit denying indebtedness to creditor — Creditor sought to withdraw its bankruptcy application — AHS applied to continue interim receivership and opposed creditor's application for leave to withdraw its application — Landlord brought application to require interim receiver to adopt remainder of lease with N Inc. or abandon premises or allow landlord to terminate lease — AHS's applications granted and creditor's application dismissed on other grounds — Landlord's application to lift stay to allow termination of lease dismissed; application to compel receiver to affirm or disclaim lease dismissed — Landlord was not prejudiced, except to extent that its right to terminate lease for breach of covenant not to be insolvent was stayed during course of receivership — Rent would continue to be paid — Allowing landlord to terminate lease and evict N Inc. would destroy purpose of receivership: to ensure that surgical services provided by N Inc. to public in Alberta were not interrupted — Strong public policy issues were involved in present receivership.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

A. Marquette & fils Inc. v. Mercure (1975), 1975 CarswellQue 51, 10 N.R. 239, 65 D.L.R. (3d) 136, [1977] 1 S.C.R. 547, 1975 CarswellQue 51F (S.C.C.) — considered

Bayhold Financial Corp. v. Clarkson Co. (1991), 10 C.B.R. (3d) 159, 108 N.S.R. (2d) 198, 294 A.P.R. 198, *(*sub nom. *Bayhold Financial Corp. v. Community Hotel Co. (Receiver of))* 86 D.L.R. (4th) 127, 1991 CarswellNS 33 (N.S. C.A.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 1996 CarswellOnt 5053, 22 O.T.C. 247, 45 C.B.R. (3d) 169 (Ont. Gen. Div.) — referred to

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Dancole Investments Ltd. v. House of Tools Co. (Trustee of) (2010), 2001 ABQB 223, 2010 CarswellAlta 617 (Alta. Q.B.) — referred to

North America Steamships Ltd., Re (2007), 2007 BCSC 267, 2007 CarswellBC 414, 32 C.B.R. (5th) 35 (B.C. S.C.) — considered

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Pope & Talbot Ltd., Re (2008), 2008 CarswellBC 1726, 46 C.B.R. (5th) 34, 2008 BCSC 1000 (B.C. S.C. [In Chambers]) — considered

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) [1995] 3 S.C.R. 199, 1995 CarswellQue 119, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 187 N.R. 1, 1995 CarswellQue 119F (S.C.C.) — followed

Sovereign Bank v. Parsons (1912), 1912 CarswellOnt 770, [1913] A.C. 160, C.R. [1913] A.C. 259 at 293, 9 D.L.R. 476 (Ontario P.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 31(4) — referred to

s. 43 — considered

s. 43(11) — considered

s. 43(14) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — considered

s. 47 — considered

s. 47(2)(c) — considered

s. 47.1 [en. 1992, c. 27, s. 16(1)] — considered

s. 84.2(7) [en. 2007, c. 29, s. 98] — referred to

s. 84.2(8) [en. 2007, c. 29, s. 98] — referred to

s. 84.2(9) [en. 2007, c. 29, s. 98] — referred to

s. 243 — considered

s. 243(1)(c) — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 12 — considered

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

Generally — referred to

s. 13(2) — considered

APPLICATIONS by Alberta Health Services for appointment of interim receiver and continuation of receivership; COUNTER-APPLICATIONS by various interested parties.

***B.E. Romaine J.*:**

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Introduction

1 On May 3, 2010 Alberta Health Services applied for the appointment of an interim receiver of the financial records and accounts of Networc Health Inc. ("Networc"). On May 11, 2010, Alberta Health applied to continue the receivership. Various interested parties opposed these applications and brought counter-applications. I granted a receivership order on May 3, 2010 and continued it on May 11, 2010. These are my reasons.

Facts

2 Networc operates an accredited non-hospital surgical facility in Calgary under the name of the Health Resource Centre. In December, 2006, Networc and the Calgary Health Region (now Alberta Health Services) entered into an agreement whereby Networc would provide orthopaedic surgical services to the public in Alberta, the cost of which would be covered by Alberta Health. This agreement expires on March 31, 2012. Alberta Health submits that this arrangement was intended as an interim measure to assist it in dealing with capacity constraints until a new Alberta Health-owned surgical facility could be constructed. Currently, it is expected that this new facility will be operational in January, 2011. The agreement between Networc and Alberta Health limits the maximum annual number of procedures that can be performed at the Health Resource Centre, but Alberta Health has no obligation to fund any minimum number of procedures.

3 Networc also performs surgeries for the Alberta Workers' Compensation Board and out-of-province or federal insurers, but Alberta Health is its primary source of income. According to the first report of the Interim Receiver, the surgeons and anaesthetists who perform the procedures are not employees of Networc and bill Alberta Health directly for their services, but the Health Resource Centre employs about one hundred other staff members.

4 Networc planned to expand its surgical capacity and in 2008 and 2009 entered into various lease and construction agreements related to two new facilities which are not yet completely constructed.

5 On April 1, 2010, 4040 Properties Corp., Cambrian (Foothills) I Properties Corp. and Cambrian Wellness I Development Corp. (the "Cambrian Group") applied for a bankruptcy order against Networc. The Cambrian Group alleged that Networc was indebted to them in the amount of approximately $636,000.00 pursuant to two lease agreements. They alleged that Networc had admitted that it was no longer capable of meeting its obligations under the leases, relying on a letter from Networc that stated that, as Networc had received only partial commitment from Alberta Health with respect to business volumes for the budget year commencing April 1, 2010, Networc did not have the ability to pay lease costs on the two buildings that were the subject of the leases. The letter also suggested the renegotiation of one of the leases. Networc denied these allegations in a Notice of Dispute and was directed by court order to provide an affidavit setting out details of its position by Friday, April 30, 2010.

6 Alberta Health says that it followed the status of this application carefully, and on April 30, 2010, it applied for the appointment of an interim receiver of Networc and an order staying the bankruptcy proceedings commenced by the Cambrian Group by way of Notice of Motion returnable on May 3, 2010.

7 Alberta Health's application was made pursuant to section 46(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA") and section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

8 While there is nothing on the face of this legislation that requires such an application for the appointment of a receiver to be made by a creditor, Alberta Health submitted that it was in fact a contingent creditor of Networc as a result of filing a Statement of Claim against Networc alleging that it had breached its agreement with Alberta Health by committing an act of insolvency and claiming unquantified damages.

9 The application by Alberta Health originally included an application to stay the application commenced by the Cambrian Group to petition Networc into bankruptcy.

10 The whole of the application was opposed for a number of reasons by the Cambrian Group, which sought an adjournment to file a responding affidavit and to cross-examine on the affidavits. The arguments made by the parties are summarized later in

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this decision. Submissions were made during a hearing that commenced in the morning of May 3, 2010 and was adjourned for a few hours. When the hearing recommenced, Alberta Health advised the court that it would adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings to a later date and would remove any reference to a stay of the bankruptcy proceedings from its application for an interim receiver. Ultimately, I appointed an interim receiver, adjourned the application to stay the bankruptcy proceedings and directed Networc to file its affidavit in response to the Cambrian Group's application for a bankruptcy order by the end of the next day. The matter was put over to May 11, 2010 on the basis that submissions could be made on all relief sought, including the issue of whether the appointment of an interim receiver should continue.

11 Between May 3, 2010 and May 11, 2010, the complexion of the application changed dramatically. Networc filed an affidavit denying the alleged indebtedness to the Cambrian Group and raising a number of defences to the bankruptcy application. Alberta Health acquired the interest of the Canadian Imperial Bank of Commerce in Networc's current secured borrowing facilities. According to the Interim Receiver's first report to the Court, the Canadian Imperial Bank of Commerce was in the process of considering its options, including the enforcement of its security (which it appears it would be entitled to do, relying on a breach of Networc's working capital covenant associated with its operating line of credit). The Cambrian Group subsequently agreed with Networc to discontinue its application to petition Networc into bankruptcy.

12 According to the Interim Receiver's first report, on the basis of its information as of May 10, 2010 and its calculations based on that information, if the Interim Receiver were discharged, Networc would not be able to carry on its operations and repay the CIBC loans and pre-receivership payables, including construction indebtedness and the Cambrian Group's claim for rent, without a cash injection of approximately $7.2 million. I continued the interim receivership and made some ancillary orders.

Analysis

Status of Alberta Health to Apply for Receivership

13 Alberta Health based its original application for an interim receiver on section 46(1) of the BIA and section 13(2) of the *Judicature Act*. These statutory provisions are set out in Appendix A to this decision.

14 Neither of these provisions requires that an application for a receivership be made by a creditor, but it is clear from case authority that it is usually a creditor that makes such an application. Section 46 follows the sections of the BIA that deal with an application made by a creditor against a debtor for a bankruptcy order, and it requires that such an application has been filed before an application for an interim receiver can be made. There do not appear to be any reported decisions of an application under section 46 being made by a party other than a creditor, although applications under section 47.1 of the BIA, which allows the appointment of a receiver in different circumstances, have been made by trustees in bankruptcy and even by debtors themselves on occasion: for example, *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.)

15 As noted by Professor Jacob Ziegel in Part II of "The Personal Liabilities of Insolvency Practitioners under Insolvency Legislation: A Comparative Analysis of the Canadian, English and American Positions" in J. Sarra, ed., 2006 Annual Review of Insolvency Law (Toronto: Carswell 2007) at 277-338, receivers are creations of equitable origin and have served a variety of functions in many different contexts. In determining whether Alberta Health had status to apply for the appointment of an interim receiver, it was helpful to look briefly at the history of the development of receiverships under the BIA.

16 Section 46 of the BIA has long provided for the appointment of an interim receiver where an application for a bankruptcy order has been filed if the court is satisfied that such appointment is shown to be necessary for the protection of the estate of a debtor, and an undertaking with respect to damages is provided by the applicant. The appointment of an interim receiver under section 46 is for conservatory purposes and is limited specifically by section 46(2) such that the interim receiver shall not unduly interfere with the debtor except to the extent necessary for such conservatory purposes or to comply with the order of appointment. Sections 47 and 47.1 were added to the BIA in 1992 and were intended to give greater protection and flexibility to secured creditors during the period of time when they were in the process of enforcing their security. An interim receiver appointed under these sections may exercise broader powers.

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17 As noted by Professor Ziegel, these 1992 amendments radically transformed insolvency administrations, as they became very popular with secured creditors. Orders were granted that gave receivers extensive powers and remained in effect, not on an interim basis, but for lengthy periods of time. Some courts and commentators were critical of this broad use of what was described as an interim remedy under the BIA, and, in September 2009, amendments to sections 47 and 47.1 came into effect that had the result of limiting the period of time of an interim receiver appointment under these sections unless otherwise ordered by a court, and limiting the powers available to such interim receivers. However, a new provision was added to the BIA, section 243, which is available to secured creditors and allows a court to give such receiver (commonly referred to as a "national receiver") broad powers equivalent to those previously available to interim receivers under sections 47 and 47.1. It is noteworthy that these amendments did not affect section 46, either in terms of scope of powers or duration of appointment.

18 Section 13(2) of the *Judicature Act* does not require even the pre-requisite of the filing of an application for bankruptcy, as required under section 46 of the BIA, nor does it appear to limit the scope of powers of a receiver appointed under the section, requiring that it must appear to a court to be "just and convenient that the order be made." It is clear, however, that the appointment of a receiver under this provision should not be lightly granted, that alternate remedies should be explored short of a receivership, and that the rights of both an applicant and the respondent debtor must be carefully balanced before an appointment is made: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.).

19 In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc. While counsel for the Cambrian Group suggested that Alberta Health had only the status of a "customer" of Networc, and that to allow a mere customer the use of the remedy of a receivership would open the proverbial floodgates, Alberta Health's interest in ensuring that citizens of the Province who require the surgical services performed in the facility provided by Networc were not deprived of those services gives it an interest far greater than that of a mere customer of goods or services. The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the *Judicature Act*, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.

20 The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *A. Marquette & fils Inc. v. Mercure*, [1977] 1 S.C.R. 547 (S.C.C.) at 556, the Supreme Court commented:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

Initial Application

21 The focus of the case law interpreting section 46 of the BIA is on protecting the debtor against unwarranted intrusion from petitioning creditors. The courts have recognized the serious consequences that the appointment of an interim receiver has on the business of a debtor, and thus, section 46 requires that the applicant establish that:

> a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case, the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and
>
> b) there is an immediate need for the protection of the debtor's estate.

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22 Networc consented to Alberta Health's application to appoint a receiver at the initial application. The Cambrian Group, while it opposed the application, was vehement, at least on May 3, 2010, with respect to the strength of its application for an order petitioning Networc into bankruptcy.

23 Alberta Health deposed that there was an immediate need for the protection of Networc's estate. It submitted that if the bankruptcy threatened by the Cambian Group's application occurred, a trustee in bankruptcy would face huge obstacles to the continuance of Networc's operations, including exposure to liability, problems arising from the fact that the agreement between Networc and Alberta Health was not assignable without the consent of Alberta Health and the Minister of Health and the dearth of potential assignees that could properly be designated and accredited to run the facility. If Networc had to cease operations, surgeries would be disrupted, highly-skilled employees would be left jobless and physicians would be left without facilities in which to operate. Alternatively, allowing Networc to operate under the supervision of an interim receiver would alleviate this disruption and would allow Networc to generate income for the benefit of creditors.

24 The Cambrian Group applied for an adjournment of the application in order to file further materials and to cross-examine on the affidavits. Initially, given the careful consideration that a court must give to the appointment of a receiver, I considered granting a brief adjournment to May 11, 2010 without appointing an interim receiver, contingent upon the Cambrian Group agreeing not to proceed further with the bankruptcy application during this period of time. Counsel for Alberta Health submitted that in the absence of a stay, there were other parties that may take action during the week's adjournment. I asked counsel to identify this risk when the hearing recommenced in the early afternoon of May 3, 2010. At that time, Alberta Health produced an affidavit that indicated that the publicity of the proceedings had caused significant disruption to Networc's operations and uncertainty among patients, employees and suppliers, providing additional evidence of an immediate need for the protection of Networc's estate.

25 Alberta Health also indicated that it would agree to adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings and had removed any reference to that relief from its application for an interim receivership order. I was satisfied that Alberta Health had established the basis for an interim receivership order, particularly as the alleged prejudice to the Cambrian Group arising from a stay of its right to proceed with the bankruptcy proceedings was no longer a major issue. I was satisfied that the supplemental affidavit provided persuasive evidence that the bankruptcy application and the subsequent receivership application had created significant uncertainty and concern and a heightened risk of an interruption in medical services at the Networc facility. I was therefore satisfied that there were strong public interest reasons to appoint an interim receiver until the matter could be more thoroughly argued.

Applications on May 11, 2010

A. Status of Parties

26 As previously described, Alberta Health had stepped into the shoes of a secured creditor between the initial appointment and May 11, 2010, and there was no longer an issue of whether it was entitled to apply for a receivership order under bankruptcy legislation. While it would be entitled to use section 47 and/or new section 243 of the BIA, Alberta Health applied to continue the receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* for reasons that will be discussed later in this decision.

27 As a result of the affidavit filed by Networc denying its indebtedness to the Cambrian Group and denying that it had committed an act of insolvency, the next step in the bankruptcy application would have been the trial of an issue under section 43 of the BIA. After a bankruptcy judge had heard evidence in this proceeding, he or she would have the option of:

(a) granting a bankruptcy order against Networc if satisfied with the Cambrian Group's evidence;

(b) dismissing the application if satisfied with Networc's defences, or

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> (c) determining that there was a *bona fide* dispute with respect to the debt that could not be decided in bankruptcy court and should be litigated in the normal course.

28 The Cambrian Group, however, announced that it had agreed with Networc that it would withdraw its application to petition Networc into bankruptcy on the basis that neither party would be liable for costs, and applied for an order of the court allowing such withdrawal. Counsel for the Cambrian Group suggested that it was satisfied by Networc's recent affidavit that Networc could not be said to have committed an act of insolvency. It is, of course, also clear that if no application for a bankruptcy order exists, an interim receivership under section 46 of the BIA may no longer be sustainable.

29 Networc filed a Notice of Motion on May 4, 2010 applying to dismiss the bankruptcy proceeding and to terminate the interim receivership. However, on May 11, 2010, Networc did not oppose either the continuation of the receivership or the Cambrian Group's application to approve the agreement to withdraw the bankruptcy application.

30 Networc filed a supplemental affidavit on May 11, 2010 attaching a letter from its controller to its CEO projecting a more optimistic operating profit for Networc than that projected by the Interim Receiver. The controller gives his opinion that Networc's financial difficulties are due to the development of the new facilities and not Networc's normal operations.

31 Networc's current landlord, Healthcare Property Holdings Ltd., (the "Landlord") which supported Alberta Health's application on May 3, 2010, brought an application returnable on May 11, 2010 to require the Interim Receiver to either personally affirm and adopt the remainder of the lease with Networc or to abandon the premises or to allow the Landlord to terminate the lease and obtain vacant possession.

32 The Interim Receiver filed its first report and applied for the authority to make certain pre-filing payments to employees at Networc and to deposit money collected by the Interim Receiver on accounts receivable into its account established for the purpose.

B. Continuation of the Receivership

33 Alberta Health sought to continue the interim receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* rather than substituting an application for a receivership under section 47 and/or section 243 of the BIA, and opposed the Cambrian Group's application for leave to withdraw its bankruptcy application.

34 Section 43(14) of the BIA provides that a petition for an order in bankruptcy cannot be withdrawn without the leave of the Court. The Court will not lightly permit such a withdrawal. An agreement to withdraw between the petitioning creditor and the debtor is not necessarily enough. As noted in Houlden, Morawetz & Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2009) at p. 155:

> Since bankruptcy proceedings are for the benefit of all creditors and since the date on which an application is filed may be of crucial importance in attacking fraudulent transactions, the court will not allow an application to be withdrawn or dismissed unless it is satisfied that the debtor is solvent and that other creditors will not be prejudiced by the withdrawal or dismissal.

35 The Cambrian Group has provided no evidence that Networc is solvent or that no other creditors would be prejudiced by the withdrawal. In fact, Alberta Health, now a secured creditor, would be prejudiced by the withdrawal.

36 Since Networc has agreed with the Cambrian Group not to oppose the withdrawal, the Cambrian Group bears no risk of a costs application if the withdrawal is delayed for a period of time. Counsel to the Cambrian Group could not identify any specific prejudice if the application for an order in bankruptcy remains in place during the course of a receivership, other than a vague reference to how this may affect the Cambrian Group's ability to pursue other options.

37 Alberta Health's concern over the withdrawal and the necessity that this may require the receivership to continue under a different statutory provision relates to the complexity of insurance coverage now put in place for the benefit of the Interim

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Receiver in recognition of its limited role under the section 46 receivership and the concern that a termination of a section 46 receivership and the commencement of a receivership authorized under section 47 or section 243 may create practical issues with respect to the possibility of two estates, or give rise to a perceived interruption in the stay of proceedings.

38 In addition, Alberta Health submits that allowing the Cambrian Group to withdraw its petition at this point in the proceedings would be contrary to the integrity of the process, and that creditors should be discouraged from filing for and then withdrawing petitions for receiving orders for strategic reasons. Alberta Health submits that adjourning the bankruptcy application to January 15, 2011 would preserve the existing process and prevent the possibility of complications arising from converting the receivership from a section 46 receivership to a section 47 or section 243 receivership.

39 Clark Builders, identified in the Interim Receiver's report as a major creditor of Networc with respect to the development of new facilities, opposed neither the withdrawal of the bankruptcy petition nor the continuation of the interim receivership. Counsel for Clark Builders noted that the situation would be no different in outcome if this was an application for a receivership under section 47 of the BIA.

40 The Landlord supported the Cambrian Group's application to withdraw its application in bankruptcy, alleging that Alberta Health's application was a misuse of the receivership remedy. The Landlord's submissions were tied to its application to lift the stay for certain purposes, and will be discussed in greater detail later in these reasons.

41 The Cambrian Group did not satisfy me that its application to withdraw its petition for a receiving order should be allowed. In particular, it did not prove the solvency of Networc, the lack of prejudice to other creditors or that the withdrawal would not undermine the integrity of the process. In addition, to allow the withdrawal and then force Alberta Health into the formality of an application under section 47 or 243 of the BIA would only create additional expense in the receivership, expense which I am aware would likely be borne by the taxpayers of Alberta. At any rate, even if the bankruptcy application that triggered Alberta Health's ability to apply under section 46 were now to disappear, there is no such prerequisite to the granting of a receivership order under section 13(2) of the *Judicature Act.*

42 Farley, J in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) at 185 , in reference to the court's powers under then section 47(2)(c) (which have now been transferred to section 243(1)(c)), remarked famously that Parliament did not intend to take away from the court when fashioning an order in receivership the ability to do not only what "justice dictates" but also what "practicality demands". He noted, accurately, that:

> It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

43 While a certain amount of strategic posturing among creditors and stakeholders can be expected in the chaotic conditions that surround a situation of alleged insolvency, what is involved in this case is not just the rights of private creditors *inter se* but also the public interest in preserving the uninterrupted provision of surgical services in Alberta.

44 Counsel for the Cambrian Group submitted that the Court should not refuse it leave to withdraw its application for a receiving order since if the Court did so, it would be perceived by the public to be assisting Alberta Health in a manner not justified by law, suggesting that Alberta Health needed the bankruptcy proceedings to continue in order to justify its receivership application. As I have indicated in these reasons, that is a mischaracterization of the law and ignores the Cambrian Group's failure to satisfy the Court that its application should be withdrawn. These competing applications have raised public policy issues about the provision of health care services in Alberta by private contractors, but those issues are not issues for this Court except to the extent that the public interest in uninterrupted health care services may validly affect the exercise of any discretion granted to the Court in the appointment of a receiver.

45 It may be argued that the adjournment of the Cambrian Group's application for a receiving order for the period of time requested by Alberta Health is, in effect, a stay of these proceedings, although the Cambrian Group has now by virtue of its

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agreement with Networc made it clear that it will not be taking steps in the application in any event. While it is doubtful that the principles relating to an application for a stay apply to the circumstances as they have now evolved, I have considered whether the relief sought by Alberta Health would meet the tests for a stay.

46 Section 43(11) of the BIA provides under the description "Stay of proceedings for other reasons" that the court, for reasons other than the denial of the facts set out in an application for a bankruptcy order against the debtor, may "for other sufficient reason" make an order staying the proceedings. The general tests developed with respect to this section of the BIA do not apply to this particular circumstance. Under the common law, the tri-partite test for injunctive relief applies in determining whether a stay of a bankruptcy application should be granted: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 (S.C.C.). Applying this test to the current circumstances, I am satisfied that there would be several serious issues to be tried (including whether the Cambrian Group should be allowed to withdraw its application, and if not, whether the application should be stayed), that there may be irreparable harm to the public interest if the existing application was terminated and Alberta Health was required to reapply under a different provision of the BIA, and that the balance of convenience favours Alberta Health's interest in having the application remain in place and be stayed as opposed to the Cambrian Group's application to have it withdrawn.

C. The Landlord

47 The Interim Receiver reports that, as the Canadian Imperial Bank of Commerce froze Networc's operating line of credit when the receivership order was granted, the automatic debit for May rent did not go through. On May 5, 2010, the Interim Receiver advised the Landlord that the Interim Receiver would pay the May rent as soon as it had a bank account in place and funding was obtained. On May 7, 2010, the rent was paid, including NSF charges.

48 Thus, Networc is not in default of its covenant to pay rent. The fact of the receivership, however, gives rise to a default under the lease which, but for the stay created by the receivership order, would entitle the Landlord to terminate it.

49 As a general rule, in a receivership, a tenant's interest in a lease does not rest with the receiver but remains in the name of the debtor. In a court-appointed receivership, the receiver is not bound by the debtor's existing contracts, nor is it personally liable for the performance of those contracts: Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 341; *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.L.R. (4th) 127 (N.S. C.A.) at 143-147; *Sovereign Bank v. Parsons*, [1913] A.C. 160 (Ontario P.C.) at 167-172.

50 If the receiver occupies the premises, it may be liable for occupation rent, but that is not the situation in this case, given the Receiver's limited role. Nevertheless, Alberta Health has agreed to pay rent due and owing during the course of the receivership and has assured the Landlord that rent will be paid until at least January 31, 2011. The Landlord is not prejudiced except to the extent that its right to terminate the lease for breach of a covenant not to be insolvent is stayed during the course of the receivership.

51 The Landlord relies on *North America Steamships Ltd., Re*, 2007 BCSC 267 (B.C. S.C.) in which the court considered the necessity of a trustee in bankruptcy affirming certain forward swap agreements between a bankrupt and creditors if the trustee wished to take the benefit of the agreements. The first thing of note is that this decision deals with a trustee in bankruptcy, not a receiver. The relevance of this is set out in paragraphs 11 and 18 of the decision, discussing the position of a trustee in bankruptcy with respect to the debtor's business. The decision also deals with the special aspects of forward swap agreements: para. 15. It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination: Section 84.2 (7) (8) and (9) of the BIA. While the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract. In summary, this case does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor.

52 The present case can be distinguished even further by the fact that the receivership is a limited one, with the powers of the Receiver limited to records and financial affairs, and not a situation where a receiver-manager has been appointed.

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53 The Landlord also relies on an oral decision of Brenner, J. in *Pope & Talbot Ltd., Re* [2008 CarswellBC 1726 (B.C. S.C. [In Chambers])] dated May 20, 2008. This was a complex matter, primarily involving a filing under the CCAA, but certain properties of the debtor were also subject to a receivership order. This specific decision involved a contract for the supply of wood chips between a third-party sawmill owner, Canfor, and Pope & Talbot with respect to one of its mills under receivership. From the date of the initial order under the CCAA in November 2007 to April 25, 2008, Pope & Talbot paid monthly for the supply of wood chips. After that, it stopped paying, and on May 10, 2008 a receiver was appointed. At the time of the application, invoices for two months supply of wood chips were outstanding and Canfor submitted that it was suffering additional prejudice with respect to storage costs, space issues and contamination of stored stock. Brenner, J. considered the use of the CCAA in an insolvency that was clearly heading towards a liquidation and noted that Canfor was no longer being paid for goods supplied even though a receiver-manager was in place. He referred to *North America Steamships Ltd.*, and commenting that he was "balancing the equities as best as I can", gave the receiver until June 13, 2008 to decide whether to affirm the contract. In this case, the supplier was not being paid for the supply of materials, and the termination of the contract in question had been stayed, first by the CCAA order and then by the receivership order for seven months. Like *North America Steamships Ltd.*, this case was driven by its specific and complex facts.

54 The Landlord deposes that, at the time the application for a receivership order was being made by Alberta Health, it was negotiating a new lease with the principals of Networc. The new tenant was to be a company related to Networc, which would take up Networc's business, subject to Alberta Health agreeing to issue a contract to this new tenant. The concept was that Networc would sell its assets to this new company through a proposal under the BIA, leaving the Cambrian Group litigation to be resolved separately. Counsel for the Landlord in a letter attached to the Landlord's affidavit notes that the Cambrian Group intends to withdraw its bankruptcy application and remarks "(t)here seems to be subterfuge here, but what that subterfuge is escapes me at the moment". The letter outlines the many details that would have to be resolved as part of this proposal.

55 The Landlord also deposes to receiving expressions of interest from possible new tenants for the Networc space. It submits that the uncertainty over how long Networc may continue to be a tenant is prejudicial to its ability to re-lease the premises. What the Landlord proposes is that either Alberta Health or the Receiver assume the liabilities of Networc under the lease for the balance of its term or that it be allowed to terminate the lease.

56 Even in cases where a receiver has become liable for the supply of goods and services as a result of the use of these goods or services during the course of the receivership, this liability normally extends only during the course of the receivership, and does not place the receiver in the position of the debtor for the balance of the contract: *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)*, 2001 ABQB 223 (Alta. Q.B.) at paras. 3, 4.

57 As noted by Alberta Health, even if a trustee in bankruptcy choses to affirm a contract, it does so on behalf of the debtor company, and any subsequent breach will only result in liability to the debtor company or its estate and not personally to the trustee: *North America Steamships Ltd.* at para. 20- 23 and 25 - 26; BIA section 31(4).

58 The Landlord submits that the limited role of the receiver in this case, and the limited scope of its powers may preclude the stay from applying to the Landlord. While the limited language of the receivership order is consistent with the cautionary language of section 46, that the receivership should not unduly interfere with the debtor carrying on its business, the stay imposed by the receivership must be broad enough to ensure that the goal of conservatory measures is effective. The Landlord, somewhat disingenuously, suggests that the "simple solution" would be to direct that the stay is not effective against it, and that it "would not act precipitously."

59 Allowing the Landlord to terminate the lease and evict Networc would certainly destroy the purpose of this receivership: to ensure that surgical services provided by Networc to the public in Alberta are not interrupted. As noted by Alberta Health, the Landlord's "simple solution" is to make the Landlord's problem the problem of Alberta Health and to allow the Landlord an advantage over other creditors and stakeholders that is not justified in the circumstances. The receivership is not, as argued by the Landlord, an "artificial construct".

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60 Alberta Health has an interest as a major stakeholder, and now as a secured creditor, in applying for a receivership order. Its valid interest on behalf of the public of Alberta need not be postponed to that of the Landlord, who will continue to receive rent during the course of the receivership.

61 Given the strong public policy issues involved in this receivership, the fact that rent will continue to be paid and that the prejudice to the Landlord is limited to a delay in its ability to enforce its rights under the lease, I declined to lift the stay to allow the termination of the lease. I dismissed the Landlord's application to compel the Receiver to affirm or disclaim the lease.

62 If the parties are unable to agree on costs, they may be the subject of a later application.

Order accordingly.

Appendix A

Bankruptcy and Insolvency Act

46.(1) Appointment of interim receiver -

The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

(2) Powers of interim receiver -

The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Judicature Act

13(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.

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TAB 8

2005 ABQB 689
Alberta Court of Queen's Bench

Blindman Livestock Feeder Co-Op Ltd. (Receiver & Manager of) v. Snyder

2005 CarswellAlta 1291, 2005 ABQB 689, [2005] A.J. No. 1183, 142 A.C.W.S. (3d) 750

In the Matter of Sections 299 to 303 of the Cooperatives Act, R.S.A. 2000, C-28.1 as amended

And In the Matter of the Receivership of Blindman Livestock Feeder Co-Op Ltd.

And In the Matter of a Proposed Action Between Ian P. Mackin & Associates Inc., Receiver and Manager for Blindman Livestock Feeder Co-Op Ltd. v. Donald Allen Snyder, Hazel Snyder, 779224 Alberta Ltd., Don Snyder Cattle Sales, D & H Farms, David Snyder, Steven Snyder, Donna Garson, Cheryl Snyder and Danielle Snyder

Ian P. Mackin & Associates Inc. in its Capacity as Receiver and Manager for Blindman Livestock Feeder Co-Op Ltd. (Applicant) and Donald Allen Snyder, 279224 Alberta Ltd., Don Snyder Cattle Sales, D & H Farms, Hazel Snyder, Cheryl Snyder, Donna Garson, David Snyder, Danielle Snyder and Steven Snyder (Respondents)

Burrows J.

Heard: September 1, 2005
Judgment: September 13, 2005
Docket: Edmonton 0403-10470

Counsel: Brian Kaliel, Bryan Maruyama, Jeremy Hockin for Applicant
Melodi Ulku, Derek Elliott for Donald Allen Snyder and Hazel Snyder

Subject: Civil Practice and Procedure
Headnote
Civil practice and procedure

***Burrows J.*:**

1 In July 2004, Agrios J. ordered the Respondents to produce records and to submit to examination under oath relating to their dealings with cattle owned by the Blindman Livestock Feeder Co-Op Ltd. Ian P. Mackin & Associates had applied for the order as Receiver for Blindman Livestock Feeder Co-Op Ltd. Donald Snyder complied with the order. The Receiver now wishes to use the produced documents and the sworn testimony in an action it intends to commence against him and most of the other Respondents.

2 In this application the Receiver seeks either a declaration that the evidence provided pursuant to the July 2004 order is not subject to an implied undertaking of confidentiality or, if it is, an order releasing him from the implied undertaking.

3 Several other Respondents were also ordered to produce documents and submit to examination. The Receiver makes the same application with respect to the evidence they have provided in compliance with the order. Those Respondents did not appear on the application. I understand they do not oppose it.

Implied Undertaking

4 Generally when a party is obliged by either a rule of court or a court order to give discovery by producing documents or by submitting to oral examination, the party who obtains that discovery is obliged to maintain the documents and testimony in confidence unless relieved of that obligation by court order.

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5 An exception to this rule was recognized in *Alberta Treasury Branches v. Leahy* (2000), 270 A.R. 1 (Alta.Q.B.), affd (2002), 303 A.R. 63 (Alta.C.A.), leave denied [2002] S.C.C.A. 235 (S.C.C.). In that case after exhaustively reviewing the English and Canadian authorities, Mason J. concluded that where the evidence in question was gathered pursuant to an equitable "bill of discovery" no implied undertaking applies.

6 Mason J. observed that the remedy of an equitable bill of discovery emerged in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.). He traced its use and development through several English and Canadian cases and concluded: (para. 106)

> The foregoing review demonstrates that:
>
> a. Norwich-type relief has been granted in varied situations:
>
> (i) where the information sought is necessary to identify wrongdoers;
>
> (ii) to find and preserve evidence that may substantiate or support an action against either known or unknown wrong-doers, or even determine whether an action exists; and
>
> (iii) to trace and preserve assets.

7 Mason J. went on to thoroughly review the law in relation to the implied undertaking and its applicability to information obtained pursuant to a bill of discovery (or a "*Norwich* order"). He concluded at para. 276:

> Proceedings within the principles of *Norwich*, as I have found these to be, generally contemplate that the information obtained will be used in another action or against additional parties. The courts have accordingly recognized that the implied undertaking does not even arise in those circumstances. . . . [T]hese authorities establish that the *Norwich* principle applies where evidence has been obtained for the dual purpose of pursuing the action in which it was produced and identifying and pursuing third parties, and that there is no implied undertaking preventing the use of the evidence obtained both against the defendant in the existing action and third parties.

8 Mason J. went on to decide, in the alternative, that even if the implied undertaking did apply in the case before him, the use to which the information had been put (which the applicants alleged was a breach of the implied undertaking) was within the purpose for which the production of the information had been ordered. Therefore either there had been no breach of the undertaking or there should be relief from the undertaking.

9 The present case is within the exception discussed by Mason J.

10 These proceedings were begun in May 2004 when Topolniski J. appointed Ian P. Mackin & Associates Inc. as Receiver and Manager of Blindman Livestock Feeder Co-Op Ltd. on the joint application of Blindman and its main creditor, Alberta Treasury Branches. The receivership was inspired by the fact that Blindman was indebted to the ATB for close to $6 million and it appeared, in part because of defaults by the Respondents in relation to cattle owned by Blindman and bailed to the Respondents, that Blindman was unable to repay the debt. Topolniski J.'s order required anyone who had any materials relating to Blindman's cattle including missing cattle and missing proceeds of sale to produce them to the Receiver.

11 As mentioned, in July 2004, Agrios J. ordered several of the Respondents, including Donald Snyder, to produce documents and submit to oral examination under oath. In seeking that order, the Receiver relied on evidence that Donald Snyder, acting as a licensed livestock dealer, had received cattle owned by Blindman from other Respondents who held the cattle as bailees, had disposed of them, and had not accounted for the proceeds of disposition to Blindman.

12 Neither the order granted by Agrios J., nor the Notice of Motion in relation to the application in which it was granted, nor any of the materials in the court file relating to that application reveal clearly what source of jurisdiction Agrios J. relied upon in granting the order. The style of cause on the order makes reference to "s. 64 of the *Personal Property Security Act*, R.S.A.

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2000, c. P-7, as amended" and "s. 5 of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15". I have looked at these provisions and it is not clear to me that they provide a source of jurisdiction for the order granted.

13 But in any event, I am satisfied that Agrios J.'s order is of the type discussed by Mason J. in *Leahy.* There was material before Agrios J. to establish that Donald Snyder had information and documents relating to Blindman's cattle. Further it appears that Donald Snyder, as a licensed livestock dealer, owed Blindman a statutorily imposed fiduciary duty in relation to money he received as proceeds for the sale of Blindman's cattle. *Livestock and Livestock Products Act*, R.S.A. 2000, c. L-18, s. 7(1). As a fiduciary, Donald Snyder was properly the subject of a *Norwich* order.

14 As Agrios J.'s order is in the nature of a bill of discovery or a *Norwich* order, the implied undertaking does not apply to the information obtained pursuant to it.

15 Alternatively, if the implied undertaking does apply, the purpose of the ordered document production and oral examination was to facilitate the Receiver tracing Blindman's property or compensation for its loss. The proposed action is a further step toward that purpose. It is not a collateral to it. Use of the information in the proposed action does not violate the implied undertaking.

16 I declare that the evidence provided pursuant to the order granted in this action on July 9, 2004 by Agrios J. is not subject to an implied undertaking which would prevent it being used to make the claims set forth in the Statement of Claim in the proposed action attached to the Notice of Motion or from being used in connection with examinations for discovery, cross-examinations, interlocutory applications, or applications for summary judgment in that action.

Consolidation of Actions

17 The Receiver also seeks consolidation of 5 actions all of which, as I understand it, arise out of the same circumstances and involve only parties who are Respondents to this application. It appears that the actions involve common questions of fact and law and that it would be efficient to deal with them together. No-one opposed the application that they be consolidated. I therefore order that actions 0503 13055, 0503 13056, 0503 13057, 0503 13058, and 0503 13059 and the proposed action, the Statement of Claim for which was attached to the Notice of Motion in this application, be consolidated.

Case Management

18 The Receiver also sought an order directing that the consolidated actions be subject to case management. This aspect of the application was only touched on in the materials filed in support of the application and at the hearing of the application. The resources available for case management are always under stress. Case management should not be ordered simply because the action appears complicated or because it involves many parties or counsel. Case management is not ordered simply because it is asked for, or even because all counsel agree to it. It should be ordered because the party seeking it has been shown there is a reasonable prospect that it will promote an efficient determination of the proceedings not likely to occur without it. That has not been shown to this point in this case.

19 I will adjourn the application for case management. If counsel in fact agree that case management is warranted, they may jointly apply to the Chief Justice by letter stating how and why case management would promote the efficient determination of the proceedings. Alternatively, if they do not agree, the Receiver may renew the application.

Sealing of the Receiver's Report

20 The Receiver filed a report with the Court following his investigations in July 2004. The report includes the transcripts of the oral examinations of several of the Respondents and the documents they produced. The report was ordered sealed. The Receiver sought directions as to whether the Receiver's Report should continue to be sealed.

21 The authorities reviewed by Mason J. in *Leahy* demonstrate that no implied undertaking restricts the party who obtains a *Norwich* order to using the information obtained strictly within the action in which the order was granted. However I cannot

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see that the reasoning of those cases supports the conclusion that the compelled and otherwise private information should be considered to be in the public domain.

22 The written brief filed by counsel for the Receiver on this application was silent as to this issue. At the hearing of the application the Receiver took no position on whether the sealing order should remain in place. I do not believe counsel for Donald and Hazel Snyder spoke to the issue either.

23 I am not prepared to provide directions on that point in the absence of more complete submissions. The report should therefore remain sealed.

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TAB 9

2023 ABKB 499
Alberta Court of King's Bench

Law Society of Alberta v. Higgerty

2023 CarswellAlta 2316, 2023 ABKB 499, [2023] 11 W.W.R. 511, [2023] A.W.L.D. 4668, 2023 A.C.W.S. 4382, 62 Alta. L.R. (7th) 78, 9 C.B.R. (7th) 59

Law Society of Alberta and Richard E. Harrison (Applicants) and Patrick B. Higgerty (Respondent)

D.B. Nixon J.

Heard: June 1, 2023
Judgment: August 31, 2023
Docket: Calgary 2301-03188

Counsel: Eleanor Platt, for Applicant, Law Society of Alberta
Richard E. Harrison, for Custodian for Law Practices of Higgerty Law
Derek Pontin, for Third Party, Easy Legal Finance Inc
Scott Chimuk, for McLeod Law LLP, HMC Lawyers LLP, James & McCall Barristers, O'Fee Law, Guardian Law and Cumming & Gillespie Lawyers
Michael Loberg, for Patrick B. Higgerty
Douglas Nishimura, for Clint Docken, Clint Docken Professional Corporation, James H. Brown & Associates and Gordon Koop

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Respondent personal injury and class-action focused law firm, who had substantial number of creditors, was placed under custodianship — Applicant provincial Law Society and individual applied for order appointing receiver and manager over certain undertakings, personal property, real property and assets of law firm — Application granted — Section 13(2) of Judicature Act allowed for granting of receivership order to party that was not creditor — Test to appoint receiver and manager was whether it was just or convenient to do so in light of circumstances — Law Society was major stakeholder in law firm — Law Society as regulator of legal profession needed to ensure that parties were acting in public interest, solicitor-client privilege was preserved, and that appropriate party dealt with obligation to settle law firm's indebtedness — There were trust account improprieties in range of $419,000 and no reasonable prospect of law firm repaying loan to secured creditor — Protection of solicitor-client privilege took precedence over rights and entitlements that secured creditor asserted in its capacity as secured lender — Risk to public was greater if there were breach of solicitor-client privilege than if there were breach of secured creditor's interest in security that law firm provided in respect of its property — Risk associated with nature of property was part of business risk that secured creditor assumed when it engaged in loan arrangement — Relief that Law Society and custodian sought did not strip secured creditor of its capacity — Balance of convenience favoured applicants — It was just or convenient for court to grant receivership order — Unique circumstances of case called for receiver and manager to be appointed under s. 13(2) of Act to best ensure protection of solicitor-client privilege Judicature Act, R.S.A. 2000, c. J-2, s 13(2).

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Generally — referred to

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APPLICATION by Law Society and individual for appointment of receiver to law firm.

***D.B. Nixon J.*:**

I. Introduction

1 The Law Society of Alberta ("*LSA*") and Mr. Richard E. Harrison are the applicants on this matter (collectively, the "*Applicants*"). The Applicants seek an order appointing a receiver or a receiver and manager over certain undertakings, personal property, real property and assets of the law practices of Patrick B. Higgerty and Patrick B. Higgerty Professional Corporation (collectively, "*Higgerty Law*").

2 The receivership order sought by the Applicants is unique because of the circumstances underlying this application (the "*Application*"). The tension in this Application concerns: (i) the desire of a secured lender to enforce its rights and entitlements under the security it holds over the assets held by Higgerty Law; and (ii) the desire of the LSA to ensure the parties are acting in the public interest and to protect solicitor-client privilege that is a component of the files of Higgerty Law.

3 Easy Legal Finance Inc ("*ELFCo*") is a secured lender to Higgerty Law. It seeks the right to enforce its security. It proposes a process that it alleges will ensure confidentiality and solicitor-client privilege are maintained for stakeholders, and not strip ELFCo of substantially all of its contractual, legal and beneficial rights.

II. Issue

4 Is it just or convenient to appoint a receiver and manager of Higgerty Law?

III. Facts

5 On March 10, 2023, Higgerty Law was placed under custodianship pursuant to an Order of this Court (the "*Custodianship Order*"). Mr. Harrison was named the custodian (the "*Custodian*").

6 The Custodian Order defined "Property", and it included file material of Higgerty Law.

7 During its years of operation, Higgerty Law focused on personal injury law and class action litigation. Compensation for those files was often based on contingency fee agreements, payable when the matter concluded.

8 On the date the Custodianship Order was issued, Higgerty Law had a substantial number of creditors. ELFCo was one of those creditors.

9 On the date the Custodianship Order was issued, ELFCo asserted it held security over all present and after-acquired personal property of Higgerty Law. Based on that security, ELFCo asserts that it holds security over the proceeds of class actions.

10 ELFCo is the largest secured creditor. It is owed in excess of $1.4 million by Higgerty Law (the "*ELFCo Loan*"). Interest on the ELFCo Loan is accruing at 18%.

11 During the application for the Custodianship Order, Higgerty Law highlighted numerous improper transfers of funds from its trust account to its general account. The improper transfers aggregate to an amount in the range of $419,000. Higgerty

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Law asserted that the improper transfers were a theft which was perpetrated by an employee of the law firm (collectively, the "*Trust Account Improprieties*"). As a consequence of the alleged Trust Account Improprieties, Higgerty Law was faced with financial challenges.

12 On April 24, 2023, ELFCo issued a demand for payment on the ELFCo Loan (the "*ELFCo April 2023 Demand*"). ELFCo also issued a notice of intention to enforce security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*").

13 The ELFCo April 2023 Demand referenced the right of ELFCo to the following collateral:

> Please note, the files of the Borrower, and particularly the Borrower's receivables, rights under fee arrangements and other prevailing interests, along with all present and after-acquired personal property of the Borrower (without limitation including all tangible and intangible property), comprise the Lender's collateral.
>
> Moreover, the foregoing, and all file material and related solicitor work product, information and documentation, comprise the property of the Borrower that is subject to the Borrower's solicitor's lien. The Lender asserts an interest in the Borrower's solicitor's lien, and relies upon the same. To the extent you as Custodian are liquidating, transferring or otherwise disposing of such collateral, you are doing so subject to the Lender's rights. We assert a continuing interest in all Borrower's property and business, and proceeds thereof, and request notice be given to the Lender in advance of all dispositions, particularly (and without limitation) of matters whereunder the Borrower has significant and valuable fee interests in extant contingency litigation.
>
> [Emphasis added.]

14 Larry Herscu is the President of ELFCo. In an affidavit dated May 25, 2023 (the "*Herscu Affidavit*"), he stated that he believed there was no reasonable prospect of Higgerty Law repaying the ELFCo Loan.

IV. Analysis

A. Overview

15 Initially, several issues were to be addressed in the Application, including: (i) whether a receiver and manager should be appointed; (ii) whether the interest payable on the ELFCo Loan should be stayed; and (iii) the scope of the ELFCo Loan security. The parties agreed to restrict this hearing to the issue of whether a receiver and manager should be appointed. The other issues were deferred to a subsequent hearing.

16 ELFCo challenges the proposal to appoint a receiver and manager. It asserts there is no business of Higgerty Law to manage and no material estate to administer.

17 ELFCo asserts that a receiver and manager in these circumstances would be limited to the negotiation of the transfer of a limited number of legal files to new lawyers. It submits that this is not an appropriate mandate for a receiver and manager and that it would not be commercially reasonable in view of the needless cost and redundancy a receivership would create.

18 As an alternative, ELFCo makes an application for approval of a basic process to enforce its security. It asserts that this alternative process would ensure that confidentiality and solicitor client privilege are maintained for stakeholders. Further, ELFCo asserts that this alternative process would not strip it of substantially all its rights and entitlements under its security, which would occur under the Custodian's proposal.

B. Balancing of Interests

19 The unique circumstances of this case present a challenge for the Court because there are various stakeholders with different rights that must be balanced, including: (i) the rights of the Higgerty Law clients to have their solicitor-client privileged communications protected; (ii) the entitlement of a secured creditor to enforce its legal and beneficial rights; (iii) the rights of

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Higgerty Law clients whose funds appear to have been misappropriated; (iv) the rights of Higgerty Law clients to access their file material; and (v) the rights of unsecured creditors, including clients of Higgerty Law.

V. Law

A. Receiver vs Receiver and Manager — The Distinction

20 The Application seeks the appointment of either a receiver or a receiver and manager. A receiver is "...a person who receives rents or other income paying ascertained outgoings, but who does not ... manage the property in the sense of buying or selling or anything of that kind". If there is a need to continue the trade at all, it is necessary to appoint a receiver and manager: see Frank Bennett, *Bennett on Receiverships* 4th ed (Thomson Reuters 2021) at 268 [*Bennett on Receiverships*].

21 An aspect of the trade in the Higgerty Law context would be the proposed dealing with the "Property" as that term is defined in the Custodian Order. It includes the file material of Higgerty Law.

22 The draft "receiver order" provided by the Applicants (the "*Draft Receiver Order*") includes in clause 4 a number of powers that are granted to the proposed receiver, including the power to: (i) take possession of the Property; (ii) negotiate payment for the Property; and (iii) settle, extend or compromise any indebtedness owing to or by Higgerty Law.

23 Based on my review of the scope of the powers in the Draft Receiver Order, I find they include elements of trade, albeit much will involve the transfer of Property in the form of legal files. I further note that the powers include a number of initiatives that are beyond the passive scope asserted by ELFCo. Based on the foregoing, if I conclude that any such appointment is appropriate in the circumstances of this case, I find it prudent to appoint a receiver and manager, rather than just a receiver.

B. The Test — Just or Convenient

24 The test to appoint a receiver and manager is whether it is just or convenient to do so in light of the circumstances: *Judicature Act*, RSA 2000, c J-2, s. 13(2); *Servus Credit Union v Proform Management Inc* 2020 ABQB 316 at para 65.

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

26 A wide array of factors should be taken into consideration when considering the appointment of a receiver and manager. A non-exhaustive list of the factors I may consider prior to any such appointment are set out in *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co* 2002 ABQB 430 at para 27 as follows:

> 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;

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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.

VI. Application of Law to Facts

27 The LSA is one of the Applicants in this case. It regulates the legal profession in the public interest by promoting and enforcing a high standard of professional and ethical conduct by Alberta lawyers. As part of my analysis of whether it is just or convenient to appoint a receiver and manager of Higgerty Law, I infer that the LSA is making this application on an objective basis given its status as a regulator.

A. Does the Law Society of Alberta have status necessary to apply for a receivership order?

28 The Applicants assert their authority to apply for the Draft Receiver Order is legislated under section 13(2) of the *Judicature Act*. Unlike certain provisions in the *BIA*, a receivership order may be granted under the *Judicature Act* following an application by a party that is not a creditor. Further, it may be granted in circumstances outside the normal course of bankruptcy.

29 In this case, neither Applicant relies upon its status as a creditor in applying for the Draft Receiver Order. The Applicants assert that receivership orders have been granted before in similar unique circumstances: see *Alberta Health Services v Networc Health Inc*, 2010 ABQB 373.

30 *Networc* provides instructive judicial guidance in granting a receivership order under section 13(2) of the *Judicature Act* at paragraphs 18 - 19 of the decision:

> [18] Section 13(2) of the *Judicature Act* does not require even the pre-requisite of the filing of an application for bankruptcy, as required under section 46 of the BIA, nor does it appear to limit the scope of powers of a receiver appointed under the section, requiring that it must appear to a court to be "just and convenient that the order be made." It is clear, however, that the appointment of a receiver under this provision should not be lightly granted, that alternate remedies should be explored short of a receivership, and that the rights of both an applicant and the respondent debtor must be carefully balanced before an appointment is made: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469.

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> [19] In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the *BIA* or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc. While counsel for the Cambrian Group suggested that Alberta Health had only the status of a "customer" of Networc, and that to allow a mere customer the use of the remedy of a receivership would open the proverbial floodgates, Alberta Health's interest in ensuring that citizens of the Province who require the surgical services performed in the facility provided by Networc were not deprived of those services gives it an interest far greater than that of a mere customer of goods or services. The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the *Judicature Act*, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.
>
> [Emphasis added]

31 ELFCo has asserted that Higgerty Law is not insolvent. I infer that ELFCo advances this assertion on a balance sheet basis because when viewed from the cash flow perspective, there is a strong indication that Higgerty Law is insolvent. While I am not making a finding at this time concerning the solvency of Higgerty Law, this inference is supported by the fact that Mr. Herscu stated in the Herscu Affidavit that he believed there was no reasonable prospect of Higgerty Law repaying the ELFCo Loan.

32 Based on the evidence, the circumstances in this case are analogous to those of Alberta Health Services in *Networc*. The LSA is a major stakeholder in the wind up of Higgerty Law. The LSA in its capacity as the regulator of the legal profession in Alberta needs to make sure that: (i) the parties are acting in the public interest; (ii) solicitor-client privilege is preserved over the file information; and (iii) an appropriate party deals with the obligation to settle, extend or compromise any indebtedness owing to or by Higgerty Law: see clause 4(f) of the Draft Receiver Order. Given the foregoing, I find that the LSA has the status necessary to apply for a receivership order.

B. Is protecting solicitor-client privilege an essential element of this custodianship?

33 Custodianship orders are granted pursuant to sections 95 and 96 of the *Legal Profession Act*, RSA 2000, c L-8, which grant the LSA the authority to apply for an Order appointing a custodian in certain circumstances.

34 Custodians are appointed to protect the interests of clients. In doing so, custodians protect the larger public interest.

35 Section 95(1)(g) of the *Legal Profession Act* provides that a custodian may be appointed "when there is reason to believe that the trust money held by a member is not sufficient to meet the member's trust liabilities".

36 The evidence in this case is that: (i) there are Trust Account Improprieties in the range of $419,000; and (ii) there is no reasonable prospect of the Applicants repaying the ELFCo Loan. Insofar as the President of ELFCo stated in the Herscu Affidavit that he believed there was no reasonable prospect of Higgerty Law repaying the ELFCo Loan, I infer that the deficiencies in the Higgerty Law trust accounts (because of the Trust Account Improprieties) are in jeopardy.

37 By virtue of being members of the LSA, custodians can maintain solicitor-client privilege over files and information within their custody. Both the LSA and the Custodian are stakeholders in ensuring the maintenance of solicitor-client privileged information.

38 The British Columbia Court of Appeal in *de Stefanis (Re)* 2005 BCCA 156 at paragraphs 18 and 21 draws an important distinction between secured creditors, who are interested in protecting themselves and usually do so through a receiver that they appoint, and a custodian who is typically interested in protecting the clients of the financially troubled law firm and their respective rights and entitlements, including their respective rights to solicitor client-privilege:

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> [18] From the perspective of the secured creditors the results which flow from the appointment of a custodian are no happier. A custodian is obliged by the ***Act*** to protect the interests of clients of the firm, including confidentiality, and is consequently unable to collect accounts receivable either efficiently or economically.
>
> . . .
>
> [21] RBC further submits that the task of the custodian is significantly dissimilar from that of the receiver in that the primary objective of the custodian is the protection of clients' interests. Receivers, by contrast, act in accordance with the interests of creditors. Any benefit enjoyed by creditors which results from the appointment of the custodian is merely incidental to the primary function of the custodian, which is the protection of the clients:
>
> See also ***Kennedy (Re)***, 1997 CanLII 14921 at para 47.

39 Solicitor-client privilege is a fundamental underpinning of the legal profession in this country. It is near absolute and merits protection. Successive courts have held that solicitor-client privilege carries with it the status of a constitutional norm: *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7 at paras 43 and 44; see also *Lavallee, Rackel & Heintz v Canada (Attorney General)*; *White, Ottenheimer & Baker v Canada (Attorney General)*; *R v Fink* 2002 SCC 61 (CanLII), [2002] 3 SCR 209 at para 21 and 39; see also Mahmud Jamal and Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) 20 SCLR (2d) 213, online (pdf) *http://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/9*.

40 Solicitor-client privilege cannot be breached by the interests and entitlement of a secured creditor. Any risks in that regard must be carefully considered. To illustrate this point, the Supreme Court of Canada has held that Anton Piller orders must ensure protection of the solicitor-client communications of the party being searched. There is no right to disclosure of such communications in discovery because they are protected by privilege. If a moving party fails to ensure that privileged communication is protected from improper disclosure, a court has the ability to remove the law firm representing the moving party: see *Celanese Canada Inc v Murray Demolition Corp* 2006 SCC 36 at paras 56 - 59.

41 In my view, the higher duty in the circumstances of this case is to protect the public interest, which includes the protection of privilege associated with the files of Higgerty Law. Given the inherent concerns associated with the issues touching on the "Property" as that term is defined in the Draft Receiver Order, it is inevitable that matters concerning the solicitor-client privilege over the Higgerty Law files will be engaged. As a regulator, the LSA has an obligation to ensure the parties are acting in the public interest and to protect privilege over the Higgerty Law files.

42 In my view, protecting solicitor-client privilege is an essential element of this custodianship.

C. Should a receivership order be granted?

1. The Paragon Capital Factors

43 ELFCo asserts that *Paragon Capital* is the leading case on the issue of when a receiver and manager ought to be appointed. *Paragon Capital* provides a non-exhaustive list of factors for the Court to consider in exercising its discretion, as is set out above in this decision.

44 ELFCo focused on five of the *Paragon Capital* factors, which I have reframed into question format as part of my analysis.

a. Will irreparable harm result if a receiver and manager is not appointed?

45 The LSA and Custodian require assistance to deal with their obligations associated with Higgerty Law. This is undisputed.

46 Of particular concern is solicitor-client privilege. The particulars of this case indicate there is a risk that solicitor-client privilege could be breached if matters are not monitored by the LSA and the Custodian.

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47 In my view, solicitor-client privilege is best protected by the LSA and the Custodian through the use of a receiver and manager. With respect, I do not accept the assertions of ELFCo that its solution is safe, more efficient and ultimately more viable than receivership. I make this determination because the solicitor-client privilege element is too important a factor with which to gamble in the proposed circumstances. Quite simply, it is better to be safe than sorry.

48 Based on my review of the evidence and analysis of the law, I find irreparable harm is likely to result if a receiver and manager is not appointed. If communications protected by solicitor-client privilege are disclosed, the resulting harm cannot be corrected. Counsel for ELFCo proposed to protect the solicitor-client privileged information by establishing an information wall or barrier within the law firm. While I appreciate the proposed structure, I remain concerned with the ELFCo proposal. Notwithstanding the good intentions, I am concerned that there could be a leakage of privileged information within the same firm. This could occur if, for example, administrative staff are shuffled from one area to another within the same firm in a fashion where they shift from one side of the information barrier to the other side. Any such harm would be irreparable. Given the absolute nature of solicitor-client privilege, and the possibility there could be a leakage of information, in addition to the inability to correct the resulting harm should this occur, it is prudent to take protective steps by appointing a receiver and manager.

b. In its capacity as a secured lender, is there risk to the ELFCo?

49 ELFCo is a secured lender. It asserts that it needs to protect and safeguard its interest in the security that Higgerty Law has provided. In particular, ELFCo is concerned that the Application puts it at risk because it will not have the control it wishes over the "Property" of Higgerty Law.

50 I acknowledge that if I grant the Application and install a receiver and manager as sought by the Applicants, ELFCo will not achieve the control it is striving to attain. However, that is the point.

51 Given the circumstances of this unique case, it would not be appropriate to grant ELFCo the control it seeks over the Property. I make that determination because of my concern for, and the paramount importance of, the solicitor-client privilege that currently exists between Higgerty Law and its clients and embedded in the Property.

52 While I acknowledge there is a risk to ELFCo if a receiver and manager is appointed, the germane question is whether solicitor-client privilege takes precedence over the rights and entitlements asserted by ELFCo in its capacity as a secured lender.

53 Based on my review of the evidence and analysis of the law, I find the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a breach of ELFCo's interest in the security that Higgerty Law has provided in respect of its Property. Solicitor-client privilege is near absolute, such that it supersedes the importance of the ELFCo security. As a result, the balance on this factor militates in favour of the Applicants.

c. Is the nature of the property subject to possible waste or loss?

54 ELFCo asserts that greater loss will result if a receiver and manager is appointed because of a redundancy of that position, and two layers of professional costs. I disagree. The LSA is a regulator, and I understood it to say that it is not in the business of back charging its costs.

55 While I conceded that the receiver and manager may need to consult counsel to evaluate and deal with the legal files, that is a cost of doing business. Given the submissions of the LSA and the Custodian, I accept that the cost burden will not be excessive. Further, I am of the view that ELFCo was cognizant of some of these risks when it lent the secured funds, as demonstrated by the fact that it is charging an interest rate of 18% on the ELFCo Loan. In short, with reward comes risk. The fact that ELFCo is charging an 18% interest rate on the ELFCo Loan is evidence indicative of ELFCo knowing there were substantive risks to this financing.

56 Based on my review of the evidence and analysis of the law, although I find there is risk associated with the nature of the property, that risk and the possible wasting aspect is part of the business risk that ELFCo assumed when it engaged in the

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ELFCo Loan arrangement with Higgerty Law. As a result, I do not view this factor as leaning in favour of ELFCo. It is best characterized as neutral in this case.

d. Does the relief sought by the LSA and the Custodian strip the secured creditor of all its rights?

57 ELFCo asserts that this question highlights the problem inherent in this case. In particular, in its capacity as the largest secured creditor, ELFCo is strongly opposed to the relief sought by the Applicants. ELFCo is opposed because it asserts that the relief sought by the Applicants would strip it of essentially all its rights. I disagree.

58 ELFCo has rights, but the extent of those rights is yet to be determined. Any displacement of its rights comes as a result of it being in competition with the paramount importance of the solicitor-client privilege that currently exists between Higgerty Law and its clients.

59 Based on my review of the evidence and analysis of the law, I find the relief sought by the LSA and the Custodian does not strip ELFCo, in its capacity as a secured creditor, of all its rights. Necessarily ELFCo's rights will be impacted if a receiver and manager is appointed. However, I am required to balance the rights of the secured creditor against the rights of clients of Higgerty Law in respect of their solicitor-client privilege. The LSA and the Custodian are advocating for those latter rights in this Application. In these circumstances, I have found that the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a displacement of security rights held by ELFCo in the "Property" of Higgerty Law. As a result, the balance on this factor militates in favour of the Applicants.

e. Does the balance of convenience favour the Applicants?

60 ELFCo argues that the balance of convenience amongst the parties weighs heavily against the appointment of a receiver and manager in this case because its prejudice is substantial. I disagree.

61 In this case there are competing interests. On the one hand, ELFCo holds a security interest in the Property. On the other hand, the LSA and the Custodian want to ensure that solicitor-client privilege is protected.

62 Both are important rights. The question is which way the balance must tip given these competing interests.

63 Solicitor-client privilege is a fundamentally important right. Once it is lost, it is gone forever. Further, any such loss of solicitor-client privilege would be an erosion of a fundamental principle of the legal system. While I agree that the appointment of a receiver and manager is extraordinary relief which should be granted cautiously and sparingly, there are times when it is warranted.

64 Based on my review of the evidence and analysis of the law, I find balance of convenience favours the Applicants because the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a displacement of the ELFCo security rights in the "Property" of Higgerty Law. As a result, the balance on this factor militates in favour of the Applicants.

2. Exercising Discretion — Appointment of a Receiver and Manager

65 The Applicant ask me to exercise my discretion to appoint a receiver and manager over any contractual agreements to which Higgerty Law may be entitled. For the following eight reasons, I find that the appointment of a receiver and manager in this case has merit.

66 First, ELFCo asserts the documents associated with the ELFCo Loan provide it with additional protections. In particular, it asserts that those loan documents grant it a settlement of a trust in respect of any and all litigation proceeds that may be recovered by Higgerty Law for its own account. ELFCo further asserts that its security is perfected, and the trust interest is irrevocable in its favour. It states that the irrevocable trust in its favour is created as soon as proceeds are received by Higgerty Law, up to the amount of the aggregate of the outstanding borrowings under the agreement. While the assertions advanced by ELFCo must be considered carefully, I need to balance the rights and responsibilities of the Applicants against the rights and entitlements of the other stakeholders (including ELFCo as a secured creditor and the other creditors). I acknowledge the

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importance of the rights of ELFCo. However, the solicitor-client privilege must be protected from the outset. As I noted above, the appellate law expresses the view that the secured creditors are interested in protecting themselves whereas in this case, a receiver and manager working with the Custodian is interested in protecting the clients of the financially troubled law firm, including their respective rights to privilege. In my view, the higher duty here is to the protection of the public interest, which includes the protection of the solicitor-client privilege associated with the files of Higgerty Law. As a result, the importance of protecting solicitor-client privilege tips the balance in favour of the appointment of the receiver and manager at this time.

67 Second, ELFCo asserts that a receiver and manager would be neither equipped to negotiate the transfer agreements nor able to provide an orderly payout of funds received. I disagree with both assertions for the following three reasons.

a. A common function of a receiver and manager is the negotiation of agreements to effect the sale of assets. As stated in *Bennett on Receiverships* at 451 and 452:

> In most court-appointed receiverships, the receiver is given the power to sell assets in the debtor's ordinary course of business without further court approval. If the receiver wants to sell all the assets, the business, or major items, the court order usually requires that the receiver come back to the court first for an order marketing the assets on notice to all interested parties and then for a sale approval.

If I determine that it is appropriate to appoint a receiver and manager over the contracts attributable to Higgerty Law, I will direct that the receiver and manager come back to the Court for an order whenever a Higgerty Law file is proposed to be transferred to a third party. This procedural step would ensure all interests are appropriately protected and would be consistent with the primary duty of the court which is to see that the best possible price is obtained for the property: *Westcoast Savings Credit Union v Wachal*, 1988 CanLII 3222 (BCCA) at para 10; see also *Bennett on Receiverships* at 393.

b. A standard function of a receiver and manager is to effect an orderly payout of funds when it has the responsibility to do so. In my experience, that is part of the ordinary course of business of a receiver and manager. As a result, I have no hesitation in finding that the proposed receiver and manager would be well equipped to address the orderly payout of any funds received.

c. As a final point, the expertise of a receiver and manager is necessary in this case to negotiate the transfer agreements. That role is outside the purview of the Custodianship Order which did not contemplate the complicated circumstances of this case, notwithstanding that the March 2023 Custodianship Order vested the Applicants with the authority to deal with the "Property" of Higgerty Law. In my view, the LSA and Custodian are simply being proactive in their efforts to deal with the challenges associated with Higgerty Law.

68 Third, in my experience, an organized sale of the assets by a receiver and manager is: (i) a cost-effective means to realize on the assets; and (ii) typically maximizes recovery for creditors. Indeed, maximizing recovery is a primary duty of a receiver and manager: *Westcoast Savings* at para 10.

69 Fourth, in this case, the LSA and the Custodian seek a limited scope receiver and manager in their efforts to maintain solicitor client privilege. The limited scope is because the purpose of the Draft Receiver Order is to focus on the administration of one aspect of the "Property" of Higgerty Law, as that term is defined in the Custodianship Order. Acting under the authority of a Custodian, the receiver and manager would be able to negotiate a transfer agreement in a fashion that maintains the solicitor-client relationship between Higgerty Law and the former clients of Higgerty Law, a vital aspect of this Application.

70 Fifth, the proposed receiver in this case is Barry Nykyforuk. Mr. Nykyforuk has consented to act as the receiver, and is a Licensed Insolvency Trustee. Based on my review of the circumstances in this case and Mr. Nykyforuk's qualifications, I am satisfied that he will operate in a cost-effective manner compared to the alternatives.

71 Sixth, the limited scope of the Draft Receiver Order should constrain the cost that will be associated with the appointment of a receiver and manager. As I indicated above, the purpose of the Draft Receiver Order is to administer one aspect of the "Property" of Higgerty Law, as that term is defined in the Custodian Order.

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72 Seventh, the Draft Receiver Order would place all creditors and stakeholders of Higgerty Law on a level and transparent playing field under the administration of this Court. In my view, this would ensure the consistent and lawful treatment of all stakeholders.

73 Eighth, a receiver and manager acting under the authority of the Custodian would safeguard solicitor-client privilege. As noted above, maintaining solicitor-client privilege is a cornerstone of our legal system. It is in the public interest to ensure appropriate steps are taken to protect that privilege.

74 Based on my review of the evidence and analysis of the law, I find it is just or convenient for the Court to grant a receivership order. This determination is subject to the proviso that there are no other viable alternatives, which is addressed below.

3. Are there other viable alternatives?

75 The jurisprudence directs the Applicants, who are seeking the Draft Receiver Order, to demonstrate that alternate remedies have been explored, short of a receivership: *Networc* at para 18. The Applicants did explore alternative remedies and determined that no other available remedy met all the objectives sought by the Applicants.

76 By way of review, the alternatives explored did not respond to the limitations, which included: (i) the length of time of the Custodianship Order; (ii) the need to protect solicitor-client privileged information; and (iii) the need address the dissipation of assets of unsecured creditors, including, potentially, former clients of Higgerty Law whose trust funds were misappropriated (i.e., the Trust Account Improprieties). The issue of Trust Account Improprieties will need to be addressed as this file moves forward.

77 With respect, the alternative proposed by ELFCo is also not viable. In my view there is too great of a risk that solicitor-client privilege may be breached under the ELFCo proposal. The proposed information wall or barrier does not provide me with a satisfactory level of comfort.

78 A review of the options indicates that the most viable alternative remedy would be the filing of a notice of intention under section 50.4 of the *BIA*. I considered the notice of intention alternative. In my view, this option has several limitations, including the following:

> a. If a notice of intention under section 50.4 of the *BIA* was granted, a stay of proceedings would only be effective for 30 days. While 45-day renewal periods may be granted, those renewals cannot exceed in the aggregate five months after the expiry of the first 30-day period: *BIA*, section 50.4(9). Given the length of time this custodianship is likely to last, a notice of intention is not appropriate.
>
> b. A notice of intention ultimately requires the debtor to file a proposal under section 62. Given the unique circumstances of this case, it is very doubtful that the Applicants would have sufficient information to support a proposal for Higgerty Law's creditors under section 62. The nature of the contingency file settlements are years into the future: *BIA*, s. 50.4(8) and 62.
>
> c. A notice of intention in respect of a proposal does not have the same capacity to protect solicitor-client privileged information as a receivership order would.
>
> d. A receivership order is more flexible than a notice of intention or a proposal.

79 Based on my review of the evidence and analysis of the law, the filing of a notice of intention under section 50.4 of the *BIA* is not viable. Further, the other alternatives explored were not viable because they were either impractical or put solicitor-client privilege associated with the Higgerty Law files at too much risk of disclosure. While I appreciate the protective steps that ELFCo proposes in its cross application, the risk of a breach of solicitor-client privilege is too important of a matter with which to gamble.

4. The Effect of Granting a Receiver Order

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80 ELFCo asserts that the judicial guidance provided in *Axelrod, Re, [1994] OJ No 2277 (ONCA)* is informative and essentially determinative. ELFCo states that its proposed solution of transferring the files of Higgerty Law to Dentons Canada LLP will protect the rights of the clients of Higgerty Law, while preserving the secured creditor's realization and enforcement rights under its security. ELFCo submits that this is the very path approved by the Ontario Court of Appeal in *Axelrod*, and that it should be followed in respect of Higgerty Law. I disagree.

81 While the steps taken in *Axelrod* are instructive, they are distinguishable from the Higgerty Law circumstances. *Axelrod* was dealing with the files and records of a medical practitioner which were subject to common law and statutory rights of the patient in respect of confidentiality and access. Conversely, the files of Higgerty Law that ELFCo is seeking to have transferred to Dentons Canada LLP are subject to solicitor-client privilege.

82 While I am cognizant of the steps that ELFCo is proposing its counsel take to protect the existing solicitor-client privilege associated with the Higgerty Law files, I am of the view that there is a critical distinction between the protection that should be awarded to the confidentiality of files held by medical practitioners and the protection that should be awarded to solicitor-client privilege of files held by lawyers. Both are important, but because solicitor-client privilege is near absolute, it warrants greater protection.

83 I recognize that if I grant the Draft Receiver Order proposed by the Applicants it impacts the rights and entitlements of a secured creditor such as ELFCo. As a general rule, a secured creditor ought not to be deprived of its realization and enforcement rights granted pursuant to a security agreement: *Axelrod* at para 16.

84 This is an unusual case because there are two important but competing principles. This debate between the Applicants and ELFCo requires balancing. While the rights and entitlements of ELFCo are important, they are displaced in these unique circumstances because the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a displacement of the rights of ELFCo in the "Property" of Higgerty Law. As mentioned above, the balance on this issue militates in favour of the Applicants.

D. The RJR MacDonald Case

85 ELFCo also asserted that the Applicants seek to prevent it from acting on all its contractual rights and security interests. ELFCo's position is that this can only be viewed as injunctive relief.

86 The test for an injunction is threefold: (1) is there a serious question to be tried?; (2) will the applicant suffer irreparable harm if the relief is not granted?; and (3) does the balance of convenience weigh in favour of this extraordinary relief? See *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC).

87 In addressing the tripartite test as outlined by *RJR-MacDonald*, ELFCo asserted that none of the tests were met. Its assertions and my analysis are as follows:

a. Concerning the first branch of the test, ELFCo submits there is no serious issue. I disagree. As I stated above, there are competing interests. Both are important. On the one hand, ELFCo holds a security interest in the Property. On the other hand, LSA wants to ensure that solicitor-client privilege is protected. The tension between these competing issues is the foundation of a serious issue to be tried.

b. Concerning the second branch of the test, ELFCo submits there is no demonstrable harm, let alone irreparable harm. I disagree. Solicitor-client privilege is a fundamentally important right. If solicitor-client privilege is lost, it is gone forever. This would constitute an irreparable harm. Indeed, any such loss of solicitor-client privilege would be an erosion of a fundamental tenet of the legal system.

c. Concerning the third branch of the test, ELFCo submits the balance of convenience weighs heavily against the imposition of a receiver and manager. ELFCo asserts a number of reasons in support of its position, including that receivership eliminates substantially all rights of ELFCo, and that the process proposed by the Custodian only protects client stakeholder

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interests at the expense of others. After a careful review of the reasons advanced by ELFCo, I disagree with its arguments. As I stated above, I find the balance of convenience falls in favour of the Applicant because the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a displacement of the ELFCo security rights in the "Property" of Higgerty Law, militating in favour of the Applicants.

VII. Conclusions

88 Based on my review of the evidence and analysis of the law, I find that it is just or convenient to appoint a receiver and manager of Higgerty Law. The unique circumstance in this case calls for a receiver and manager to be appointed under section 13(2) of the *Judicature Act* in order to best ensure the protection of the solicitor-client privilege associated with the files of Higgerty Law.

89 I direct that the Draft Receiver Order obligate the receiver and manager to come back to the Court for an order whenever a Higgerty Law file is proposed to be transferred to a third party. The Draft Receiver Order must stipulate the notice that is to be given to the stakeholders whenever there is a proposed file transfer.

Application granted.

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TAB 10

2002 ABQB 430
Alberta Court of Queen's Bench

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

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

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

Romaine J.

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

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

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.
Annotation

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

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

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

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

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

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

Marc Lavigne [*]

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

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

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

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

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

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

Statutes considered:

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

s. 244 — referred to

Rules considered:

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

Generally — referred to

R. 387 — considered

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

***Romaine J.*:**

INTRODUCTION

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

SUMMARY

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

FACTS

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

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

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

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

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

d) an assignment of mortgage-backed debentures;

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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Should the ex parte receivership order have been granted?

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

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

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

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

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

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

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

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

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

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

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

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

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

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

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

Should the ex parte order now be set aside?

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

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

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

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

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

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

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

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

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

Should the order be stayed?

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

> a) that there is a serious issue to be tried on appeal;
>
> b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
>
> c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

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

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

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

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

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

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

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

Application dismissed.

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Footnotes

1 Alta. Reg. 390/68.

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

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

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

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

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

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

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

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

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

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

12 Para. 20.

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

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TAB 11

2020 ABQB 316
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Proform Management Inc.

2020 CarswellAlta 903, 2020 ABQB 316, [2020] A.W.L.D. 1940, 12 P.P.S.A.C. (4th) 120, 18 Alta. L.R. (7th) 277, 318 A.C.W.S. (3d) 404

Servus Credit Union Ltd. (Plaintiff/Applicant) and Proform Management Inc., Proform Concrete Services Inc., and Proform Construction Products Inc., formerly known as Proform Precast Products Inc. (Defendants / Respondents)

M.J. Lema J.

Heard: May 5, 2020
Judgment: May 11, 2020
Docket: Edmonton 2003-06374

Counsel: Rick T.G. Reeson, Q.C., Patrick Harnett, for Plaintiff / Applicant
Jeffrey Oliver, D. Maréchal, for Defendants / Respondents
Adam Maerov, for Respondent / Guarantor, 285319 Alberta Ltd.
Sean E. Fleming, for Interim Monitor
J. Phillips, M. Phillips, for themselves

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — General principles
Debtors, group of related companies, were indebted to creditor for approximately $12.6 million — There had been two forbearance periods and additional period of interim monitoring — Creditor held consent receivership order granted at onset of forbearance — Debtors believed they could arrange refinancing to pay out entire debt if they had further 30 days of monitoring — Creditor applied for appointment of receiver; debtors applied to extend interim monitoring period — Creditor's application granted; debtors' application dismissed — Debtors were in state of default, creditor's enforcement rights were engaged, and gateway for entering consent receivership order had been opened — COVID-19 pandemic did not impact debtors in material way — Debtors' defaulted on second forbearance agreement as early as March 3, 2020, but massive impact of COVID-19 only began to emerge as of March 8, 2020 — Evidence was insufficient to show that pandemic had any material impact on debtors' businesses, refinancing efforts or asset sale efforts through March 12, 2020, when second forbearance period ended, and debtors received further 19 days of no enforcement when interim monitoring order was granted and further five week stay of proceedings — By signing consent receivership order debtors acknowledged their indebtedness to creditor, their default status, triggering of creditor's enforcement options which included applying for receiver, and that appointment of receiver was warranted once period of forbearance had expired without clearance of creditor's debt — At this stage, in light of agreement, it was not open to debtors to argue why receivership order was not just or convenient — Creditor lived up to its end of deal by forbearing from taking action, and by end of forbearance periods debtors had not accomplished clearing creditor's debt in full — Creditor had not agreed to any further forbearance period, consequence that it could seek receivership order in circumstances was exactly what debtors agreed to, and debtors had blocked themselves from resisting granting of order — Court had jurisdiction to grant receivership

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order, debtors consented to receivership order, and consent was not tainted — Debtors conceded that, if and when forbearance period ended, consent order could be entered if they remained in default and without any substantive argument objection by them — In circumstances, and emphasizing debtors' consent to proposed receivership order, it was just and convenient that it be entered — Interim monitoring period should not be extended and receiver should be appointed.

Table of Authorities

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

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

Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc. (2019), 2019 ABQB 732, 2019 CarswellAlta 2187, 50 C.P.C. (8th) 391 (Alta. Q.B.) — referred to

Fisher v. Fisher (2008), 2008 ABQB 170, 2008 CarswellAlta 340, 52 R.F.L. (6th) 435, 442 A.R. 304 (Alta. Q.B.) — considered

G. (C.T.) v. G. (R.R.) (2016), 2016 SKQB 387, 2016 CarswellSask 778, 86 R.F.L. (7th) 312 (Sask. Q.B.) — considered

K. (T.E.H.) v. S. (C.L.) (2011), 2011 ABCA 252, 2011 CarswellAlta 1538 (Alta. C.A.) — referred to

Mraiche v. Sander (2010), 2010 ABQB 341, 2010 CarswellAlta 968 (Alta. Q.B.) — considered

Octa Hage Enterprises Ltd. v. Bank of Credit & Commerce Canada (1988), 59 Alta. L.R. (2d) 31, 1988 CarswellAlta 64, 1988 ABCA 109 (Alta. C.A.) — considered

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

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

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

Skagen v. Canadian Imperial Bank of Commerce (2004), 2004 BCSC 602, 2004 CarswellBC 1035 (B.C. S.C.) — considered

Smith v. Pricewaterhousecoopers Inc. (2013), 2013 ABCA 288, 2013 CarswellAlta 1520, *(*sub nom. *Smith v. PricewaterhouseCoopers Inc.)* 245 A.R. 245, 584 W.A.C. 245, 3 Alta. L.R. (6th) 341 (Alta. C.A.) — considered

Western Surety Co. v. Hancon Holdings Ltd. (2007), 2007 BCSC 180, 2007 CarswellBC 274, 59 C.L.R. (3d) 255, [2007] 6 W.W.R. 630, 68 B.C.L.R. (4th) 382 (B.C. S.C.) — considered

741431 Alberta Ltd. v. Devon (Town) (2002), 2002 ABQB 870, 2002 CarswellAlta 1162, 32 M.P.L.R. (3d) 67, 4 R.P.R. (4th) 84, 324 A.R. 201 (Alta. Q.B.) — considered

Statutes considered:

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

s. 243 — referred to

s. 243(2) "receiver" — considered

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

s. 13(2) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 65(7) — referred to

Authorities considered:

DiSarro, Anthony, *"Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation"* (2010) 60:2 Am U L Rev 275

at 317-320.

APPLICATION by creditor for appointment of receiver; APPLICATION by debtors to extend interim monitoring period.

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

A. Introduction

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1 Servus Credit Union Ltd. (Servus) seeks the appointment of a receiver of a group of related companies collectively indebted to it for approximately $12 million. This follows two forbearance periods of approximately six months and three more months, respectively, and an additional month of interim monitoring. It holds a consent receivership order granted at the onset of forbearance and submits that the debtors' ongoing defaults allow Servus to submit it for entry.

2 The debtor companies, supported by a guarantor, seek a further 30 days of monitoring, during which they believe they can make material headway on paying down their debt to Servus and in arranging refinancing to pay it out entirely. They acknowledge having provided the consent receivership order but submit (in part) that the emergence of the Covid-19 pandemic deprived it of the full benefit of the second forbearance period and that, accordingly, the order should not be entered now.

3 I find that the debtors are in state of default, that Servus's enforcement rights are engaged, that the gateway for entering the consent receivership order has been opened, that the Covid-19 pandemic did not cast a material shadow here, that the debtors' available arguments do not extend beyond those issues, that the interim-monitoring period should not be extended, and that it is just and convenient that a receiver be appointed.

B. Issues

4 The issues are:

1. the preconditions to Servus submitting the consent receivership order (CRO) for filing;

2. the impact (if any) on Servus's enforcement position of the emergence of the Covid-19 pandemic — in particular, its impact on the debtors' businesses and refinancing and asset-sale efforts, and whether it deprived the debtors of the full benefit of the combined forbearance and stay period;

3. whether the debtors are entitled, in the face of the CRO, to raise any arguments bearing on whether granting a receivership order is "just or convenient" or otherwise appropriate i.e. aside from arguments bearing on the enforceability and state of the forbearance arrangements, including the satisfaction of the triggering conditions for the entry of the CRO;

4. the Court's duty when presented with a consent order generally and in these circumstances; and

5. whether the CRO should be granted.

C. Analysis

Preconditions to Servus seeking entry of the consent receivership order

5 Servus and the debtors entered into a forbearance agreement, following default by the debtors under certain credit arrangements, which included a guarantee from a third party, anchored by real property mortgages against properties owned by that party.

6 In that agreement, the debtors and the guarantor acknowledged owing approximately $12.4 million to Servus and that various events of default had occurred.

7 Here is the heart of the forbearance agreement:

2.1 **Forbearance period.** Subject to compliance by Borrowers and Guarantor with the terms and conditions of this Agreement, the Lender hereby agrees to forbear from exercising its right and remedies against the Borrowers and guarantor under the Loan Documents and otherwise with respect to the Existing Defaults during the period (the "**Forbearance Period**") commencing on the Effective Date [defined elsewhere] and ending on the earlier of (i) 2:00 p.m. (Edmonton Time) Friday, November 9, 2019 and (ii) the date that any Forbearance Default [defined elsewhere] occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to*

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> *me under the Loan Documents, the Consent Documents (as hereinafter defined [and discussed further below]) or otherwise available to the Lender at Law.*
>
> 2.2 **Scope of Forbearance.** During the Forbearance Period, the Lender will not initiate or continue proceedings to collect or enforce the Obligations, including by repossessing, foreclosing upon, or disposing of any of the Collateral, through judicial proceedings or otherwise. [emphasis added]

8 Article 3 outlined various conditions precedent to the Forbearance Agreement taking effect, including the provision of "a duty executed consent receivership order with respect to the Borrowers and the Guarantor [limited, for the latter, in certain respects], in the form attached hereto as Schedule '*B*.'" The debtors and the guarantor signed the draft order in the required form, reflecting their consent to it.

9 In a parenthetical note tucked between subparagraphs (i) and (j), s. 3.1 defines "*Consent Documents*" as meaning various documents including the consent receivership order.

10 The application proceeded on the basis that the various condition precedents were satisfied, including the provision of the CRO, and that the initial forbearance period took effect thereafter.

11 The debtors did not clear their collective debt to Servus by the November deadline. On November 22, 2019, counsel for Servus wrote counsel for the debtors:

> Pursuant to the Forbearance Agreement . . . we confirm that the Borrowers have not repaid the Lender in full . . . its outstanding indebtedness prior to the [November 2019] expiration of the Forbearance Period as required by . . . the Forbearance Agreement. This constitutes an Event of Default under . . . the Forbearance Agreement.
>
> As you know, the Lender is currently reviewing the Borrowers' request for a further extension of the Forbearance Agreement.
>
> Notwithstanding this Notice of Default and, without in any way waiving the Event of Default or waiving any other rights of the Lender in relation to the Event of Default, the Lender acknowledges receipt of the Borrowers' request for a further extension and will advise of its decision in respect of that request in due course.

12 As it turned out, Servus decided to extend the forbearance period, via a Forbearance Amendment / Extension Agreement made with the debtors and the guarantor on December 30, 2019. One preamble of that agreement states: "The Borrowers have advised the Lender that they anticipate being able to *repay the Loans in full by March 12, 2020*, if an extension is granted" (emphasis added).

13 The extension agreement also included the debtors and guarantor acknowledging indebtedness to Servus, as of December 10, 2019, of approximately $13.6 million and the existence of various ongoing defaults under the credit arrangements.

14 The purpose of the agreement was described (in s. 1.4) as "to provide [the] Borrowers with a further period of time to restructure and refinance to *pay out the Obligations in full* . . . " (emphasis added).

15 The heart of the extension agreement is here:

> 2.1 **Forbearance Period.** The Forbearance Period, as defined in s. 2.1 of the Forbearance Agreement, is amended to end on the earlier of (i) 2:00 p.m. (Edmonton Time), Thursday, March 12, 2020 and (ii) the date that any Forbearance Default (as defined in the Forbearance Agreement) occurs (the "**Termination Date**"). *On and from the Termination Date, the Lender may, in its sole discretion, exercise any and all remedies available to it under the Loan Documents, the Consent Documents (as hereinafter defined) or otherwise available to the Lender at law.* [emphasis added]

16 Article 3 outlined various conditions precedent to the extension agreement taking effect. At the application, the parties proceeded on the basis that the agreement indeed took effect.

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17 The extension agreement did not provide a particular definition for Consent Documents. However, s. 1.1 (Definitions) stated that:

> Capitalized terms [e.g. "Consent Documents" in s. 2.1] not otherwise defined herein shall have the meaning ascribed thereto in the Forbearance Agreement. . . . [As noted above, s. 3.1 of the first agreement defined "Consent Documents" as including the consent receivership order.]

18 The extension agreement also included "entire agreement" and "full force and effect" terms:

> The Forbearance Agreement, this Amendment Agreement and the Loan Documents constitute the sole and entire agreement of the parties to this Amendment Agreement with respect to the subject matter contained herein and therein and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such matter.
>
> The Forbearance Agreement and the Loan Documents shall remain unchanged, in full force and effect, and continue to govern and control the relationship between the parties hereto, except to the extent they are inconsistent with, superseded or explicitly modified herein. To the extent of any inconsistency, amendment or superseding provision, this Amendment Agreement shall govern and control

19 On March 3, 2020, counsel for Servus wrote the debtors to advise (or confirm) that certain financial reporting by the debtors was overdue per the credit arrangements and the Forbearance Agreement, and that it regarded this as an event of default under the Forbearance Agreement. It gave three days' notice to rectify, failing which it reserved its right to enforce its security and use the Consent Documents.

20 On March 10, 2020, counsel for Servus wrote counsel for the debtors reviewing certain information provided by the debtors and providing its assessment that the borrowers and the guarantor were in breach of certain margining requirements and that they continued "to be in default under the terms of the Forbearance Agreement." Servus also advised:

> [We are] not willing to discuss a further extension of the forbearance period beyond the current March 12, 2020 expiry date without having unconditional commitment letters from reputable lenders in place, and which are accepted by the Borrowers and the Guarantor, in an amount sufficient to promptly pay Servus in full. Further Servus also requires the margining deficiency to be resolved to Servus' satisfaction, before it is willing to discuss any extension to the forbearance period.
>
> Nothing in this matter constitutes a commitment from Servus with respect to any extension to the Forbearance Agreement. Servus continues to reserve al of its rights and remedies, including those under the Forbearance Agreement.

21 On March 13, 2020, counsel for Servus wrote the debtors again (stating in part):

> Further to our March 3, 2020 correspondence, this letter confirms that the Forbearance Period as set out in the Forbearance Agreement has now terminated, in accordance with its terms.
>
> Pursuant to the terms of the Forbearance Agreement, the Lender is entitled to exercise all of its rights and remedies available to it under the Loan Documents, the Consent Documents, and otherwise available to the Lender at law.
>
> We are also advised by the Lender that the Borrowers and Guarantor remain in breach of their margining requirements, and that the Borrowers and Guarantor are aware of this breach.
>
> Please take this as notice of the Lender's intention to enforce its "Servus Security" as set out in the August 8, 2019 Priority Agreement made between [various parties.]"

22 On March 31, 2020, ACJ Nielsen granted an interim monitoring order on the consent of Servus and the debtors, installing PWC Inc as the monitor. Section 4 of the order stated:

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> The Interim Monitoring [Order] shall terminate on the earliest of:
>
> > (a) The taking of possession by a receiver, within the meaning of subsection 243(2) [*BIA*], of the Debtor's property over which the Interim Monitor was appointed; and
> >
> > (b) May 5, 2020, unless renewed by further Order of this Court prior to the expiry date.

23 The Interim Monitoring Order had the same general effect as the forbearance agreements, freezing Servus's enforcement rights, albeit temporarily:

> 15. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Interim Monitor or with leave of this Court[,] and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court . . . .
>
> 16. All rights and remedies of any Person . . . against or in respect of the Debtor . . . or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court . . .

24 I also note the "material adverse change" provision:

> 10. Upon:
>
> > (a) the Interim Monitor filing with the Court a Material Adverse Change Report;
> >
> > (b) the Debtor failing to pay when due any Employee-related Obligations; or
> >
> > (c) the Debtor otherwise being in default of any of its obligations in this Order;
>
> then Servus is at liberty to immediately apply to Court, on 3 days' notice, for a Receivership Order to appointed [PWC] as receiver in respect of the Debtor and Property.

25 On April 27, 2020, Sean Fleming of PWC Inc prepared a report of PWC's interim-monitoring activities and a snapshot of the debtors' financial picture as of that date. It also included an update on the debtors' refinancing efforts. In a nutshell, it noted that, of nine lenders they had connected with, "only one lender has provided a commitment letter to [them]", namely, a certain lender providing a commitment letter for the lending of $6.5 million against a particular property owned by the guarantor, which (in light of other borrowing against it) would yield about $5 million for application against the debtors' debts.

26 As of April 21, 2020, the debtors' debts to Servus stood at approximately $12.6 million, "plus further amounts owed in respect of costs and expenses incurred by Servus, plus further accruing interest."

27 The debtors remained in default under their credit arrangements with Servus as of that date and as of the application heard on May 6, 2020.

28 The debtors did not dispute the state of default. Neither did they assert that the forbearance period was still in effect, that the Interim Monitoring Order was still in effect, or that Servus was not otherwise in a position to enforce its security, including seeking the entry of the consent receivership order.

29 Their position, instead, was that, in light of significant progress in their refinancing efforts and also in separate efforts to liquidate certain properties, and considering the impact of the current pandemic and the partially related turmoil in the Alberta economy, they should be given another month, through to June 4, 2020, to continue those efforts, which would very likely produce substantial paydowns — as much as $9 or $10 million — against their debts to Servus and very possibly a refinancing package to clear those debts completely.

30 In other words, as of May 6, 2020:

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- Servus was still owed over $12.5 million;
- the debtors continued to be in default under their credit arrangements;
- the forbearance period (per the first and second agreements) had expired;
- no additional forbearance agreement had been put in place;
- the Interim Monitoring Order stay and suspension had expired;
- Servus had reserved its rights to enforce its security and to use the Consent Documents, including the consent receivership order;
- the debtors did not assert that any new forbearance period was in place or otherwise that Servus was not entitled to take enforcement steps, including seeking the entry of the consent receivership order;
- the debtors did not disavow that order in any fashion; and
- the debtors instead asked the Court to find it was not "just or convenient" that the consent receivership order be entered now.

31 I find, on the first issue, that the express "trigger conditions" — i.e. for Servus to seek the entry of the consent receivership order — were satisfied here: the forbearance period was over, and the debtors continued to be in default.

Impact of Covid-19 pandemic

32 The debtors argued that they did not get the benefit of the full second forbearance period, invoking the onset of the Covid-19 pandemic.

33 I do not accept this argument:

1. the debtors went into default in June 2019;
2. Servus issued notices of default to the debtors on June 4, 2019;
3. the debtors had the benefit of the first forbearance period (mid-July 2019 to mid-November 2019);
4. they received the benefit of a *de facto* forbearance period from mid-November 2019 to the end of December 2019), while the parties negotiated the second forbearance period;
5. the second forbearance period ran from December 30, 2019 to March 12, 2020;
6. the debtors defaulted on the second forbearance agreement as early as March 3, 2020;
7. Covid-19's now-massive impact was only beginning to emerge in the week of March 9-13. I take judicial notice that no provincially ordered "restrictions on gatherings" were in place by that week. (I was sitting in Grande Prairie that week; it was "business as usual" at the Court through March 13, at minimum.) The Alberta Government's Covid-19 case statistics [1] only start as of March 8, 2020. The bar-graphs are not calibrated to allow perfect counts, but, from a baseline of zero confirmed cases as of March 8, 2020, the collective number of probable and confirmed cases in those early days (March 8-12) appears to be approximately 25 people. That compares to 6,017 cases as of May 7, 2020. Another chart shows total hospitalized cases, in those same days, at under 10 people, with one or two in intensive care; that compares to 255 "hospitalized ever" and 52 "ICU ever" cases as of May 7, 2020; and

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8. in any case, the debtors' Covid-19-related evidence is silent or vague about the pandemic having any impact on their businesses before March 13. In one of his March 30, 2020 affidavits, Shaun Peesker stated (in part):

> 6. . . . the Companies are seeking an adjournment of the Receivership Application for the following reasons, among others:
>
> a. The Companies have been making substantial progress in their refinancing efforts, but the COVID-19 pandemic has temporarily prevented such efforts from being advanced to a conclusion . . .
>
> . . .
>
> 22. The majority of the Companies' customers have either temporarily shut down operations or have delayed their projects pending the resolution of the COVID-19 pandemic. [no information about when that started]
>
> 23. *As a result of the foregoing, the business operations and employee numbers of the Companies are different than they would normally be at this time of year*. A summary of the current operations and employee numbers for [one debtor company] and [another one] are summarized below:
>
> a. [neutral employment information for one debtor company]
>
> b. Prior to last week [i.e. the week of March 23-27, 2020] [another debtor company] had approximately 110 employees that had been retained throughout the winter season. However, *last Thursday [i.e. March 26, 2020], the decision was made to cease all operations all [two certain plants], other than those operations that are required to fill ongoing orders from current customers. As such, as of last Thursday, the workforce of [that company] has been further reduced to approximately 30 employees.* [major changes but no detailed indication of any Covid-19 impact before late March]

34 In his other affidavit of the same date, Mr. Peesker describes the status of various refinancing possibilities. Of the total number described, two include a Covid-19 dimension: one indicated a delay "as a result of the COVID-19 pandemic." However, that lender had only been approached around March 23. Another prospect is described as retreating from a possible commitment on account of Covid-19 concerns; however, no evidence is given of when that prospect emerged and when the retreat occurred.

35 In Mr. Peesker's follow-up affidavits sworn May 1, 2020, while updates are provided on various fronts, no mention is made of Covid-19, let alone any impact on the debtors' efforts to attract refinancing and sell assets.

36 This evidence is insufficient to show the pandemic having any material impact on the debtors' businesses, refinancing efforts, or asset-sale efforts through March 12, 2020, when the second forbearance period ended.

37 In any case, the debtors received the benefit of a further 19 days of no enforcement (between March 12 and March 31, when the Interim Monitoring Order was granted) and a further five-week stay of proceedings (March 31 to May 5) under that order i.e. almost two more months combined.

38 For all its devastating impact to date, the pandemic did not impair the debtors in any material way through March 12.

39 As for the stay period from March 31 to May 5 (i.e. the lifespan of the Interim Monitoring Order), the debtors and Servus negotiated that arrangement (and obtained the Court's blessing of it, via the March 31 consent order) with their collective eyes opened wider to the Covid-19 phenomenon. And (as noted above re their May 1 affidavits), the debtors produced no evidence about Covid-19 having any particular effect on their activities or efforts from March 31 through May 1, or thereafter.

Whether the debtors are generally blocked from contesting the receivership order

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40 The debtors made various other arguments, not akin to the unexpected circumstance of Covid-19, about why no receivership order should be granted. They focused on the "just or convenient" requirement in ss. 13(2) of the *Judicature Act* [2], addressing progress made to date in reducing their indebtedness to Servus, the state of various financing "irons in the fire", the sale of certain properties, and the overall prospect of making major headway against the debt if more time is given to them. They also point to evidence that Servus is over-secured and will or should recover its entire claim eventually i.e. even if more time (up to June 4, 2020, at minimum) is given to them.

41 This raises a question: was it open to the debtors to make such (substantive) arguments in the face of the consent receivership order? I examine this question next.

Consent orders provided as part of forbearance or standstill agreements

42 In *Octa Hage Enterprises Ltd. v. Bank of Credit & Commerce Canada* [3], the Alberta Court of Appeal examined a consent-order-in-exchange-for-more-time scenario:

> [2] In this mortgage foreclosure action the defendants filed a statement of defence by a law firm. In response to the plaintiff's motion for an order nisi, *the defendants' solicitors negotiated a settlement agreement under which more time was purchased in return for a form of final order of foreclosure with the endorsed consent of the defendants' solicitors of record. The plaintiff held this form and in due course when the agreed time had elapsed, presented it to a Master in chambers, with notice to the defendants*. The Master granted a final order of foreclosure in the same terms but with a stay of execution for an additional six months. The defendants appealed that order to a Queen's Bench justice and now to us.
>
> . . .
>
> [4] The defendants also argue that section 41(2) of the Law of Property Act impliedly forbids going directly to final order without passing the previous step and collecting an order nisi. Two decisions to that effect were cited, the latter being Canada Trustco Mortgage Co. v. Coleman (M 1985) 1985 CanLII 1132 (AB QB), 59 A.R. 367. But neither involved a consent order, and in our view nothing in section 41 prevents such a consent. Subsection (5) on waivers or releases is referring only to the situation before suit or even before default. It is not necessary here to determine whether the consent operated under subsection (3) of section 41, or under subsection (4), or under the general law on consents to judgment. ***The most that could be said of any requirement for an order nisi (if there is one) is that it would a matter of substantive law, not jurisdiction. And consent judgments are expressly designed to bypass substantive defences***.
>
> [5] That in turn is an answer to a number of substantive defences which the defendants now suggest, including want of formal demand for payment and certain interpretations of the mortgages and the interaction of their amounts. That applies even more strongly to some suggested flaws in the wording of the statement of claim. ***A consent to judgment would be worthless if the plaintiff still had to prove his case in full and negative every defence. It might be (as the defendants argue) that the Master or judge is not always required to grant the order consented to and reserves some power to refuse or vary it. But we need not decide that, for the Master and chambers judge both decided to grant it***, except for the stay of which the defendants do not complain.
>
> [6] ***The defendants also sought to argue that later facts made the final order unjust. For example, they try to argue that their equity in the lands has risen substantially. Given the 16 months which have now elapsed since the consent was given, any injustice is hard to see. But in any event when more time is purchased by a consent judgment the defendant takes the risk of whether the future will be kinder to him or to the plaintiff.*** [emphasis added]

43 The apparent matter-of-fact entry of a consent receivership order, after forbearance, is reflected in *Smith v. Pricewaterhousecoopers Inc.* [4], where Rowbotham JA (in chambers) commented:

> [31] The draft statement of claim also alleged that Servus acted negligently or unreasonably and in bad faith in putting Caliber into receivership at the time that it did. The applicant failed to identify any evidence that could support his

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allegations. He acknowledged that Caliber was in "a cash flow crisis." *It was never seriously disputed that Caliber had been in a constant state of default for the nine-month period leading up to the receivership.* ***The terms of the final forebearance agreement executed between Caliber and Servus, which the applicant personally signed on behalf of Caliber, made it explicit in clauses 3.4 and 3.5 that Servus was at liberty to make immediate use of the Consent Receivership Order that had previously been signed by Caliber's legal counsel on the company's behalf.*** The applicant's counsel conceded that it would have been easy to undo the receivership order if any of Caliber's other creditors or another third party would have come forward to rescue the company. It was demonstrably false that the trustee and Servus refused to meet with the restructuring group as alleged in the proposed statement of claim. Accordingly, it was reasonable for the chambers judge to have concluded, as she did, that the negligence claim was spurious. [emphasis added]

44 In *741431 Alberta Ltd. v. Devon (Town)* [5] , Watson J. (as he then was) kept a defaulting party to a consent-judgment-to-be-held arrangement:

[40] Ultimately there was a settlement of the action reached which, in sum, provided that (a) the *Applicant would endorse a Consent Judgment to the Respondent's motion for Summary Judgment granting all relief sought*, and (b) the Applicant would provide Counsel for the Respondent with a suitable Transfer and (c) the Applicant would pay the legal costs of the Applicant to a maximum of $4,600.00.

[41] *As part of this settlement*, ***the Respondent did agree that it would make no use of the Consent Judgment and Transfer unless the Applicant failed to reach the roof stage deadline by July 1, 2001 at which point the Respondent could proceed to use the Transfer and Consent Judgment.*** The Respondent also agreed, however, to discontinue its action if the Applicant reached the roof stage by that date. The Applicant would have to pay all fees related to the project promptly upon submission of its plans.

[42] The Respondent's Counsel prepared the Consent Judgment and Transfer and forwarded it to Abbey for execution. Ultimately, *Abbey signed the Consent Judgment and returned it along with the Transfer to Counsel for the Respondent by letter dated December 29, 2000.* ***That letter imposed trust conditions as to the Respondent's holding off on use "unless 741431 Alberta Ltd. fails to meet the roof stage level of construction by July 1, 2001".***

. . .

[117] In the case at bar, the Applicant's Notice of Motion effectively sought an indefinite period of time within which to enable it to decide when to get on with this project. Its argument, in my view, came down to the proposal of a series of estoppels by acquiescence by the Respondent allowing the Applicant to evade the consequences of a series of separate promises, defaults, re-promises and re-defaults. This history does not persuade me of an entitlement of the Applicant on the equities of this case.

. . .

[119] . . . the Applicant has failed to prove the existence of an alleged settlement contract overriding the Consent Judgment and Transfer agreement, such as to require this Court to enforce the latter.

. . .

[136] ***In my view, the Respondent is not acting punitively to enforce the old agreement as in the concept of the liquidated damages cases. The Respondent is seeking merely to enforce the terms of their agreement as to the Consent Judgment and Transfer.*** [emphasis added]

45 As did Macklin J. in *Mraiche v. Sander* [6] :

[27] In my view, this is simply a contractual matter and the Court needs only to review the facts and the agreements between the parties. All of the agreements were voluntarily entered into between sophisticated parties. The Defendant

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Shirley Sander describes herself as a businesswoman. She owns a number of properties in B.C. When Ms. Sander entered into the Purchase Contract, she utilized the services of a realtor. When she entered into the Affirming Agreement, she did so in the presence of her lawyer. The transfer back was signed by her in the presence of her lawyer. In Clause 10 of the Affirming Agreement, Ms. Sander acknowledged that "she has had the time to review, and has reviewed, this Agreement and that she has received independent legal advice prior to the execution and delivery of this Agreement".

[28] *The agreements expressly contemplate remedies which were agreed to between the parties in the event either failed to complete the contract according to its terms. In the event that Ms. Sander, as the buyer, failed to complete, the agreements contemplated, among other things, a transfer back of the Edmonton property to the Plaintiff, and the filing of the Consent Order granting the Plaintiff immediate possession of the Edmonton property.*

[29] There is no suggestion, nor on these facts could there be, of *non est factum*. Ms. Sander understood the terms of each agreement, she had the advice of a realtor, and, importantly, she had the advice of legal counsel.

[30] ***It is not the function of this Court to rewrite Agreements negotiated and executed by sophisticated business people. It is also not the function of this Court to examine such Agreements to see whether the consideration flowing from one side to the other is appropriate. The parties made those decisions.***

[31] *Ms. Sander has clearly defaulted on payment under the agreements. She has still not paid, or even tendered, the amounts due on the extended date of March 26*. Ms. Sanders' allegations concerning alleged interference by the Plaintiff in her efforts to obtain financing do not have the air of reality or accuracy. The lender advised Ms. Sander's representative that he was declining the loan and would not be providing financing three days before counsel for the Plaintiff spoke to the lender.

[32] *Ms. Sander's lawyer executed a Consent Order in November of 2009 knowing of all of the terms and conditions set out in the various agreements. The Consent Order was entered after Ms. Sander had received an extension of one week by Justice Verville of this Court and after she had failed to make payment as required by that Order. The Consent Order was entered after Ms. Sander's representative had clearly been advised that the lender would not be providing financing.*

. . .

[35] At the commencement of the Appeal, counsel for Ms. Sander provided the Court with a new affidavit sworn by Ms. Sander and filed the same day (May 12, 2010). She now claims to have received a commitment for bridge financing from a company called Kennedy Financing, Inc. located in New Jersey. ***This new evidence does not impact on the fact that Ms. Sander is still in default and does not justify granting any further relief to her***. I would point out, however, that the supposed commitment appears to be conditional only, both as to the granting of a loan and as to amount. [emphasis added]

46 And Morawetz J. (as he then was) in *Royal Bank v. Walker Hall Winery Ltd.* [7] :

[18] Counsel to the Receiver also points out that the receivership application was commenced in November 2009 and Walker Hall retained Mr. Duncan. Mr. Duncan and counsel to RBC reached agreement on a timetable to have the application heard on December 16, 2009, but the day before such hearing Mr. Duncan contacted counsel to RBC to request an adjournment. ***Counsel agreed that, in exchange for Walker Hall's consent to the Receivership Order, the hearing would be adjourned to December 23, 2009, to provide time for Walker Hall to obtain refinancing***. Mr. Lukezic signed the consent on behalf of Walker Hall. ***Walker Hall did not obtain refinancing and, acting on Mr. Lukezic's consent, counsel to RBC obtained the Receivership Order on December 23, 2009.***

. . .

[36] ***The central issue is whether circumstances exist that would make it appropriate to nullify or remove the Receivership Order***. A secondary issue is whether the damage claim against RBC is more properly pursued in CV-10-399090.

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[37] The Receivership Order was made on consent.

[38] Mr. Macfarlane submits that a party who seeks to have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed. In this case, Mr. Macfarlane submits that there is no evidence of fraud. Further, the application was resolved when the respondents consented to the Receivership Order which they did not appeal.

[39] Counsel also submits that, in the absence of fraud or collusion, a consent order cannot be set aside. See ***Houston v. Bousquet***, (1965) CarswellMan 20 (M.C.Q.B.) and Sjogren v. Lamson, (1922) CarswellMan 12.

. . .

[41] Mr. Lukezic has stated that his consent was premised on the $150,000 promised advance***. In my view, it follows that in order to succeed on this motion, the Court has to be satisfied that the consent was not a true consent***. The Court has to be satisfied that there was an agreement under which the Receiver or RBC would advance $150,000 to Walker Hall.

. . .

[46] *In my view, even overlooking evidentiary deficiencies, Mr. Lukezic has failed to persuade me that it is appropriate to set aside or vary the Receivership Order.*

[47] ***Mr. Lukezic consented to the Receivership Order on December 23, 2009.***

[48] ***In my view, there is no evidence of fraud or that there was an arrangement under which $150,000 would be advanced by the Receiver or RBC to Walker Hall***. [various evidence reviewed]

. . .

[63] ***Mr. Lukezic has failed to provide any basis to have the Receivership Order set aside or varied. He has alleged that the Receiver or BDO promised to advance $150,000 to Walker Hall at the time of the Receivership Order and that, in response to this promise, he consented to the Receivership Order. The allegations set out in his factum are, simply put, not supported by the evidence***. No credible alternative to the receivership has been put forth by Mr. Lukezic. [emphasis added]

47 In contrast, see *Western Surety Co. v. Hancon Holdings Ltd.* [8], where a creditor had received a consent judgment as part of a work-out arrangement, but the trigger clause was found to be ambiguous. The clause was as follows:

4. As security for the performance and fulfillment of their respective obligations under the General Indemnity Agreement, Moh Creek and the Indemnitors will execute an Appearance and *Consent to Judgment* in an action under the General Indemnity Agreement in an amount which includes the anticipated Advances, Expenses and Interest *to be held by counsel for WSC on the basis that it will not be entered unless Moh Creek does not make payment of the Advances, Expenses and Interest in accordance with a payment schedule to be agreed upon by Moh Creek and WSC prior to September 30, 2000 and in any event payment in full shall be made by December 31, 2001 or make such other agreement to extend that period*. [emphasis added]

48 The parties were unable to agree on a payment schedule; eventually, the creditor filed the consent to judgment and registered it against title to various properties. Per Gerow J.:

[20] On March 13, 2002, the defendants brought an application to have the Consent Judgment removed from the titles. In opposing the application, *Western Surety argued that it was entitled to file and register the Consent Judgment because the defendants were in default under the Agreement for failing to provide a payment schedule as required by paragraph 4 of the Agreement. However, Morrison J. set aside the Consent Judgment on the basis that it was premature. In her reasons,*

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> *Morrison J. stated that paragraph 4 of the Agreement was uncertain and ambiguous.* [consent judgments were removed from the titles] [emphasis added] [9]

49 Similarly, in contrast, see *Skagen v. Canadian Imperial Bank of Commerce* [10], where Williams J. found that the trigger condition (default) did not exist:

> [6] The plaintiffs say the Bank has breached its agreement and that the Consent Judgment which was entered against both Skagen and the numbered company should be set aside.
>
> . . .
>
> [48] *With respect to the consent judgment that was provided to the Bank, it constitutes valuable consideration provided by the plaintiffs on the understanding that it would be entered in the event that the plaintiffs defaulted on their contractual obligations.* When the October payment was not received, the Bank entered the judgment. In my view, *that must be set aside, as the pre-condition for its entry, default by the plaintiffs of their obligations under the Agreement, did not occur*. When the consent judgment was entered, the repudiation had been accepted and there was no further obligation owing by the plaintiffs, hence there could be no default. The decision of Koenigsberg J. in ***Harbelah Enterprises Ltd. v. O'Neil*** (1994), 1994 CanLII 16671 (BC SC), 94 B.C.L.R. (2d), 26 C.P.C. (3d) 315, [1994] 9 W.W.R. 162 (paras. 22-25) establishes that a consent order can be set aside in circumstances such as these. [emphasis added]

Applying those principles here

50 By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and *that the appointment of a receiver was warranted* i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.

51 The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."

52 I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.

53 It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

54 Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.

55 Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.

56 Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

Court's duty when presented with a consent order

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57 What, then, is the Court's duty when presented with a consent order, as here? Many cases confirm it is not simply to act as a rubber stamp: see, for instance, *G. (C.T.) v. G. (R.R.)* [11], where Popescul CJQB held:

> [11] Where parties have had their agreement sanctioned by the court by incorporation of the child support terms into a judgment or order, a judicial determination has been made. The courts have a duty to scrutinize agreements and consent orders or consent judgments that are submitted by the parties in order to ensure that they comply with the law and are in accordance with the best interests of the child or children who are subject to the order or judgment. ***The process is more than just a "rubber stamp".*** See ***Hayes v Hayes*** (1987), 6 RFL (3d) 138 (Sask QB).

58 In *Fisher v. Fisher* [12], McDonald J. (as he then was) held:

> [65] On June 23, 1993 Ostapowich [defendant in ***BMO v Ostapowich (Trustee of)*** (1996) 144 Sask R 207 (CA)] made an assignment into bankruptcy. Shortly thereafter the Bank brought an application by way of Notice of Motion seeking to set aside the vesting order and other portions of the consent judgment claiming it represented a settlement or fraudulent conveyance. Ostapowich opposed the application, claiming that it was in substance a collateral attack on a valid judgment of the Court. The Court agreed, holding at paras. 11-13:
>
> > *The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment*. See: The Hardy Lumber Co. v. The Pickerel River Improvement Co. (1899) 1898 CanLII 16 (SCC), 29 S.C.R. 211; City of Toronto v. Toronto R.W. Co. (1917) 39 O.L.R. 310 at p. 313. ***Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it.*** See Peterson v. Bishop et al., 1923 CanLII 356 (SK CA), [1923] 3 W.W.R. 25; Hope Hardware et al. V. Fields Stores Ltd. et al. (1978), 1978 CanLII 254 (BC SC), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement ***the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement.*** *The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.*
>
> > . . .
>
> [66] While Georgette Fisher is proceeding pursuant to the provisions of Section 10 of the *Matrimonial Property Act* in advancing her claim to a larger interest in the Haysboro property than stipulated in the Hawco Order, the reasoning in *Ostapowich* is applicable. ***The Hawco Order is more than just a mere agreement between Suzanne Fisher and Morris Fisher; it represents a final determination of their respective interests in the Haysboro property as sanctioned by this Court.*** [emphasis added]

59 For a supportive American perspective, see "Six Degrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation" [13], where Anthony DiSarro wrote:

> V. A CONSENT DECREE IS THE COURT'S DOCUMENT
>
> . . . a consent decree "contemplates judicial interests apart from those of the litigants." ***Courts have an interest in the contents of their orders***. Absent a statutory obligation to approve the terms of settlement, courts have no interest in the contents of private settlement agreements.
>
> *A. Consent Decree as Both Contract and Order: Entry of the Decree*

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A consent decree embodies an agreement of the parties that "serves as the source of the court's authority" to enter the decree. A court should not unilaterally alter a proposed consent decree that has been submitted to it for entry." Nor should it refuse to enter a consent decree merely because it would afford greater relief than that which could have been awarded after trial.

However, a court does have the prerogative to at least make the "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree". A consent decree should bear some relationship to the case and pleadings that have invoked the federal court's jurisdiction in the first place'" and "further the objectives of the law upon which the complaint was based." The decree should not undermine judicial integrity.

The court should inform the parties of any concerns regarding a proposed consent decree and give them an opportunity to address them. If the court's concerns are not adequately addressed, it may refuse to endorse the proposed decree because when court orders are involved, courts have a say in their contents.

The court's role here is discretionary, not mandatory. A court can opt not to scrutinize a consent decree when it is submitted for endorsement. It might not want to interfere with the terms of a proposed consent decree when doing so could undermine a settlement that removes a case from the court's docket. A court might prefer instead to summarily approve the consent decree and defer any potential concerns about its terms for a later date.

Those concerns may, after all, become academic. The parties may never return to court to present a dispute regarding the decree. If the parties do return to enforce or modify the decree, the court can address its concerns at that time, if they still exist. The consent decree will be publicly available and, thus, if third parties believe that they are adversely affected by the decree, they can move to intervene and to modify the decree. Deferring concerns about a consent decree for a later date enables the court to determine, based on the parties' actual experience under the consent decree, whether those concerns are real or merely hypothetical.

Nevertheless, while there are weighty reasons why a court might not apply exacting scrutiny to a proposed consent decree at the time of entry, the fact remains that the court has the discretion to do so, or to insist that the parties change portions of the proposed decree as a condition to entry. As one court aptly put it, a federal court is "more than a 'recorder of contracts' from whom parties can purchase injunctions." Parties need to understand that by choosing the consent decree route, they are inviting the court to have a say on the terms of settlement. [footnotes omitted] [emphasis added]

Distillation of principles

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

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

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

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

63 A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside. [14]

Whether it is "just or convenient" to appoint a receiver in these circumstances

64 The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

65 The question becomes whether it is indeed "just or convenient" to appoint a receiver here.

66 Here is where (as confirmed by the "consent-order-and-forbearance" cases) the debtors' consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

67 The debtors' core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs — continuing default — in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

68 In other words, even acknowledging significant progress to date, and even acknowledging the likelihood of more such progress over the next month, the debtors have *already agreed* that, if and when Servus decided against further grace (i.e. after the expiry of the latest hold period), it could move for the order *with no "merits" objection by them*.

69 Accordingly, on the "merits" review i.e. whether it is "just or convenient" to appoint a receiver here, I focus on the circumstances outlined by Servus.

70 Here it cites Romaine J.'s decision in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [15], in particular her helpful catalogue of appointment factors. I reproduce the *Paragon*-factors review from Servus's application brief:

> (a) Servus is a secured creditor of the Debtors and holds a security interest in of all the present and after-acquired property of the Debtors, subject to certain provisions of priority agreements entered into by Servus. Servus holds a first- ranking security interest in the Alberta Lands and NWT Lands;
>
> (b) The Debtors have demonstrated losses for the past 3 years;
>
> (c) the nature of the Debtors' property includes mobile equipment potentially located across Alberta, the Northwest Territories, British Columbia, Saskatchewan. There is also a risk of these mobile assets being subject to unauthorized sale and removal. The Debtors' also own two parcels of land located in Alberta and one parcel of land located in the Northwest Territories subject to Servus' security;

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(d) given that the Debtors' property includes multiple parcels of land, and that the Debtors' property is located across multiple jurisdictions, a receiver is a cost effective mechanism to organize the sale of the property;

(e) an organized sale by a Receiver is likely to maximize recovery for secured and unsecured creditors rather than secured creditors individually seeking to enforce their securities;

(f) the balance of convenience is in favour of Servus. The most recent consolidated financial statements of the Debtors indicates a net loss of $1,137,511 for the month of January 2020. This is indicative of the serious financial distress facing the Debtors;

(g) the conduct of the Debtors is supportive of the granting of the Order requested, as:

(i) Servus first demanded payment from the Debtors in June 2019, and Servus has since entered into a lengthy forbearance period between July 2019 and March 2020 to assist the Debtors in making alternative arrangements to pay Servus in full. To date, the Debtors have failed to pay their obligations to Servus in full, which includes the Indebtedness; and

(ii) the large net loss reported in the January 31, 2020 consolidated financial statements of the Debtors, the Debtors cannot sustain their current operations on an ongoing basis without a material injection of capital or refinancing. Such refinancing has not materialized, despite this additional time to obtain it; and

(iii) the Debtors have consented to the Consent Receivership Order;

(h) the Securities granted by the Debtors and Forbearance Agreement authorize Servus to appoint a Receiver over the Debtors upon default, which is further supported by the Consent Receivership Order provided for in the Forbearance Agreement;

(i) a court appointment is necessary to enable the Receiver to carry out its duties more effectively and efficiently given the nature of the Debtors' property and assets;

(j) a Receivership Order would place all creditors and stakeholders of the Debtors on a level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of all stakeholders;

(k) while there is a cost of appointing a Receiver, all indications to date indicate that the appointment of a Receiver will be the most cost effective means of dealing with the estates of the Debtors;

(l) it is likely that the value of the property of the Debtors will be maximized by establishing a level and transparent process administered by this Honourable Court; and

(m) Servus is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver, particularly in giving the Debtors since July 2019 to make arrangements to pay Servus in full.

71 I also note the following comments by the interim monitor (from his April 27 report):

6. STATUS OF PROFORM'S REFINANCING EFFORTS

6.1 At paragraph 35 of the Peesker Affidavit and at paragraph 10 of the Confidential Peesker Affidavit, Mr. Peesker provides a summary of nine lenders the Company was pursuing for financing.

6.2 The Interim Monitor understands that only one lender has provided a commitment letter to Proform:

6.2.1 Lender : Lender 2 has provided a commitment letter in the total amount of $6.5 million to be financed against the Old Brew Property owned by 285. This property has an existing mortgage registered by Servus to secure

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approximately $1.43 million due to Servus from 285. Therefore, the net amount that would be available to be applied against Proform's indebtedness to Servus is approximately $5.07 million.

6.3 With respect to the balance of the potential lenders identified in the Peesker Affidavit, the Company advised the Interim Monitor that many were not prepared to provide commitment letters due to the current economic environment, while one significant potential lender apparently advised Proform that it did not meet the lender's mandate to lend to businesses in rural communities.

6.4 In summary, as at April 27, 2020 the Company has secured only one financing commitment. This is not sufficient to repay Servus in hill as illustrated below.

	$
Estimated Proform indebtedness to Servus	(12,750,000)
Lender 2 - net ATB financing available to Servus on Old Brew	5,070,000
Remaining outstanding Proform indebtedness	(7,680,000)

6.5 On April 27, 2020, the Company provided the Interim Monitor with an executed real estate purchase contract with respect to the sale of the NWT Property ('NWT Sale Contract'). The NWT Sale Contract is included in the confidential appendix noted below. Management advise that the full amount of the sales proceeds would be applied against the Servus debt, of which approximately $790,000 relates to a Servus mortgage registered against the NWT Property. Regardless, there remains a significant shortfall to Servus.

6.6 The Company advised that it anticipates the receipt of a number of commitment letters in the next several days that will address this shortfall. While the Interim Monitor is hopeful, it should be noted that the Company has stated this on various occasions over the last several weeks and months. For various reasons, including those noted above, commitment letters have not been obtained.

EVALUATION OF THE ASSETS

7.1 As set out in paragraph 9 of the Interim Monitor Order, the Interim Monitor is to conduct a review and evaluation of the Property (as defined in the Interim Monitor Order) and file a report to the Court in respect of the same.

7.2 To assist in its evaluation of the Company's major assets and to assess Mr. Peeskers claim that 'the value of collateral held by Servus is several multiples in excess of the $12 million outstanding", the Interim Monitor immediately engaged the previous real estate appraisers utilized by the Company and 285 seeking the previous real estate appraisers utilized by the Company and 285 seeking updated appraisals for the Burnt Lake Property, the NW' Property, the Gasoline Alley Property and the Old Brew Property. In addition, the Interim Monitor sought a high — level valuation of the Company's major pieces of equipment, rolling stock and concrete plant assets from Century.

7.3 With respect to the real estate, on April i6, 2020, SWM delivered its NWT Property appraisal to the Interim Monitor. Subsequently, on April 21, 2020, Soderquist delivered to the Interim Monitor appraisals of the Burnt Lake Property, the 01(1 Brew Property and the Gasoline Alley Property.

7.4 With respect to the Company's equipment, rolling stock, and concrete plant assets, on April 23, 2020 Century provided the Interim Monitor with its estimated valuation on these assets.

7.5 It is the Interim Monitor's view that Proform's assets subject to the security of Servus are insufficient to repay Servus in full. The Interim Monitor estimates the shortfall to be in range of $1.94 million to $6.81 million. Accordingly, it will he necessary for Servus to look to the additional collateral pledged to Servus by 285 to address shortfall.

D. Conclusion

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72 In these circumstances, and emphasizing the debtor's consent to the proposed receivership order, it is "just *and* convenient" that it be entered and, accordingly, that the debtors' application to extend the interim-monitoring period to June 4, 2020 be dismissed.

Creditor's application granted; debtors' application dismissed.

Footnotes

1 https://covid19stats.alberta.ca. I am using these statistics as a proxy for the general state of the Covid-19 pandemic in Alberta in the first part of March.

2 Servus also invoked s. 243 *BIA*, ss. 65(7) *PPSA*, and "Part A of the [*ABCA*]."

3 1988 ABCA 109 (Alta. C.A.)

4 2013 ABCA 288 (Alta. C.A.)

5 2002 ABQB 870 (Alta. Q.B.)

6 2010 ABQB 341 (Alta. Q.B.)

7 2010 ONSC 4236 (Ont. S.C.J. [Commercial List]) affd 2011 ONCA 314 (Ont. C.A.) leave denied 2011 CanLII 65628 [*Chegancas v. Lukezic*, 2011 CarswellOnt 10873 (S.C.C.)]

8 2007 BCSC 180 (B.C. S.C.)

9 See also the judgment of Mahoney J. in *Custom Metal Installations Ltd. v. Winspia Windows (Canada) Inc.*, 2019 ABQB 732 (Alta. Q.B.)

10 2004 BCSC 602 (B.C. S.C.)

11 2016 SKQB 387 (Sask. Q.B.)

12 2008 ABQB 170 (Alta. Q.B.)

13 (2010) 60 Am U L Rev 275 at 317-320

14 See, for example, *K. (T.E.H.) v. S. (C.L.)*, 2011 ABCA 252 (Alta. C.A.). See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 ("Judgments, Orders, and Settlements), R. ("Consent Orders or Judgments"), 7. ("Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 ("Consent Orders as Evidence of a Contract Between Parties" and "Binding Effect of Consent Orders") at p 303.

15 2002 ABQB 430 (Alta. Q.B.)

End of Document

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TAB 12

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court

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XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing

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interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk

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to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

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Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

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Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario (2021), 2021 ONSC 1100, 2021 CarswellOnt 1831 (Ont. Div. Ct.) — referred to

X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

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

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I. Overview

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

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

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

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

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

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

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

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

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II. Background

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

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

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

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

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

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore

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concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

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

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

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

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

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

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

C. Subsequent Proceedings

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

IV. Submissions

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

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

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

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

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

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

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

V. Analysis

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

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

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

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

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

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

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

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

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

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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.

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

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

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

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

B. The Public Importance of Privacy

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

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various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

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

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

50 In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289

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C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.* 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev*. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

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

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson*(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid

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important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*2017 FC 629, at para. 9 (CanLII),) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

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

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

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

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland* 2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

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render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

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

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

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

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

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

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

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

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

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

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

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

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

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

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

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

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

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

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threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

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

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

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

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

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information

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is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

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

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

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

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

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

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

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

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

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

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

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

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

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

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

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

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

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

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

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*2016 ONCA 576, 352 O.A.C. 121, at para. 45).

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

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

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

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

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

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

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

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

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

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

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

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by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

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

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

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

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TAB 13

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 823, 2002 CarswellNat 822, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

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Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

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XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

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The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

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Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Generally — considered

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s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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s. 486(1) — referred to

Rules considered:

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R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

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2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

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III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

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that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

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26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

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34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

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40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

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50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

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(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

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

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63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

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70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents

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relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

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confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

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be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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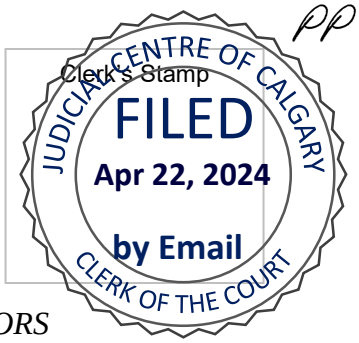
TAB 14



COURT FILE NUMBER	2401-01422
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Julie Treleaven Telephone: (403) 260-7000 / 7048 Email: RVandemosselaer@osler.com / JTreleaven@osler.com File Number: 1246361

DATE ON WHICH ORDER WAS PRONOUNCED: April 17, 2024

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice Sidnell

UPON the application of Griffon Partners Holding Corporation, Griffon Partners Capital Management Ltd., Stellion Limited, 2437801 Alberta Ltd., 2437799 Alberta Ltd., and 2437815 Alberta Ltd. (collectively, the "**Applicants**"); **AND UPON** reading the Affidavit of Daryl Stepanic, sworn April 8, 2024; **AND UPON** reading the Third Report of Alvarez & Marsal Canada Inc. (the "**Monitor**"); **AND UPON** noting the Affidavit of Service of Elena Pratt, to be filed; **AND UPON** hearing from counsel for the Applicants, counsel for the Monitor, and any other interested party; **AND UPON** being satisfied that the Applicants have acted and continue to act in good faith and with due diligence and that circumstances exist that make this Order appropriate;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of this application is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other person other than those persons served is entitled to service of this application.

EXTENSION OF THE STAY PERIOD

2. The Stay Period, as defined in paragraph 14 of the Amended and Restated Initial Order granted in these proceedings by the Honourable Justice B. Johnston on February 7, 2024 (the "**ARIO**") is hereby extended up to and including May 17, 2024.

ENHANCED MONITOR POWERS

3. Notwithstanding any other provision of the ARIO, in addition to other rights and obligations of the Monitor under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, the Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of the property and business of the Applicants and, without in any way limiting the generality of the foregoing, the Monitor is hereby expressly empowered and authorized to do any of the following where the Monitor considers it necessary or desirable (collectively, the "**Monitor's Enhanced Powers**"):

   (a) to take possession of and exercise control over all of Applicants' present and after-acquired assets, property and undertakings (the "**Applicants' Property**"), and any and all proceeds, receipts and disbursements arising out of or from the property, which shall include the Monitor's ability to abandon, dispose of, or otherwise release any interest in any of Applicants' real or personal property, or any right in any immoveable;

   (b) to receive, preserve and protect the Applicants' Property, or any part or parts thereof;

   (c) to manage, operate and carry on the business of Applicants, including the powers to enter into any agreements, incur any obligations in the ordinary course of

business, cease to carry on all or any part of the business, or cease to perform any contracts of Applicants;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, financial advisors, investment dealers, and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's Enhanced Powers conferred by the ARIO;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Applicants or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to The Applicants and to exercise all remedies of the Applicants in collecting such monies, including, without limitation, to enforce any security held by the Applicants;

(g) to settle, extend or compromise any indebtedness owing to or by the Applicants;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Applicants' Property or business, whether in the Monitor's name or in the name and on behalf of the Applicants, for any purpose pursuant to the ARIO;

(i) to undertake environmental or workers' health and safety assessments of the property and operations of the Applicants;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Applicants, the property or the Monitor (in relation to the exercise by the Monitor of the Monitor's Enhanced Powers), and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in the ARIO shall authorize the Monitor to defend or settle the action in which the ARIO was made unless otherwise directed by this Court;

(k) to market any or all of the Applicants' Property, including advertising and soliciting offers in respect of the property or any part or parts thereof and negotiating such terms and conditions of sale as the Monitor in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign or otherwise enter into transactions respecting the Applicants' Property or any part or parts thereof out of the ordinary course of business, either:

(i) with the written prior approval of the Applicants, Trafigura Canada Limited, Signal Alpha C4 Limited, and Tamarack Valley Energy Ltd.; or

(ii) in accordance with the terms of any sale process which may be granted by this Court on subsequent application by the Monitor; or

(iii) with the approval of this Court on application by the Monitor,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c P-7 or any other similar legislation in any other province or territory shall not be required;

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Applicants' Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such property;

(n) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate all matters relating to the Applicants' Property, business, and these proceedings, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(o) to register a copy of the ARIO and any other orders in respect of the Applicants' Property against title to any of the Applicants' Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Monitor, in the name of the Applicants;

(q) to assign any of the Applicants into bankruptcy, to become the trustee in bankruptcy of any of the Applicants and to take all steps reasonable required to carry out its role as licensed insolvency trustee in bankruptcy of any of the Applicants should the Monitor deem that it is appropriate in the circumstances to do so;

(r) to enter into agreements with any trustee in bankruptcy appointed in respect of the Applicants, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Applicants;

(s) to exercise any shareholder, partnership, joint venture or other rights which the Applicants may have; and

(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Applicants, and without interference from any other person.

MONITOR PROTECTIONS

4. The enhancement of the Monitor's powers as set for in this Order, the exercise by the Monitor of any of its powers, the performance by the Monitor of any of its duties, or the employment by the Monitor of any person in connection with its appointment and the performance of its powers and duties shall not constitute the Monitor as an employer, successor employer, or related employer of the employees of the Applicants or any employee caused to be hired by the Applicants by the Monitor within the meaning of any provincial, federal or municipal legislation, other relevant legislation, regulation, common law, or rule of law or equity governing employment, pensions, or labour standards for any purpose whatsoever or expose the Monitor to any liability to any individual arising from or relating to their employment or previous employment Applicants; Without limiting the provisions of the ARIO, all employees and consultants of the Applicants shall remain employees or consultants of the Applicants until such time as the Monitor, on the Applicant's behalf, may terminate the employment of such employees or other contractual

or consulting agreements. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitations, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

5. The Monitor is not and shall not be or be deemed to be a principal, director, officer, or employee of the Applicants;

6. The Monitor shall continue to have the benefits of all of the indemnities, charges, protections and priorities as set out in the ARIO and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor and the fulfillment of its duties or the carrying out of the provisions of this Order.

7. The Applicants shall cooperate fully with the Monitor and any directions it may provide pursuant to this Order and shall provide such assistance as the Monitor may reasonably request from time to time to enable the Monitor to carry out its duties and powers as set out in the ARIO, this Order, or any other Order of this court under the CCAA or applicable law, generally.

8. Nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant legislation, regulation, common law, or rule of law or equity. For greater clarity, any distribution to creditors of any of the Applicants administered by the Monitor on behalf of any of the Applicants will be deemed to have been made by any of the Applicants, themselves.

9. Notwithstanding the enhancement of the Monitor's powers and duties as set forth herein, the exercise by the Monitor of any of its powers, or the performance by the Monitor of any of its duties, the Monitor is not, and shall not be deemed, to be the owner of the Property for any purpose and nothing contained herein shall require the Monitor to occupy or take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might be cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or

relating to the disposal of waste or other contamination including, without limitation, the Canadian Environmental Protection Act or any other provincial or federal regulations in Canada or internationally ("**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in Possession.

10. In addition to the rights and protections afforded to the Monitor under the CCAA, the Amended and Restated Initial Order, this Order, or any other Order granted by this Honourable Court or as an officer of this Court, the Monitor shall incur no liability or obligation, in its personal or corporate capacity, as a result of its appointment or the carrying out of the Provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any appliable legislations.

11. The power and authority granted to the Monitor by virtue of this Order shall, if exercised in any case, be paramount to the power and authority of the Applicants with respect to such matters and in the even of a conflict, the terms of this Order and those of the Amended and Restated Initial Order or any other Order of this Court, the provisions of this Order shall govern.

MISCELLANEOUS

12. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice E. Sidnell

Justice of the Court of King's Bench of Alberta

TAB 15

COURT FILE NUMBER	2401-02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR
DOCUMENT	**ORDER (STAY EXTENSION AND ENHANCED MONITOR POWERS)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Julie Treleaven Telephone: (403) 260-7000 / 7048 Email: RVandemosselaer@osler.com / JTreleaven@osler.com File Number: 1246361

DATE ON WHICH ORDER WAS PRONOUNCED:	June 28, 2024
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary, Alberta
JUSTICE WHO MADE THIS ORDER:	The Honourable B. E. C. Romaine

UPON the application of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx (collectively, the "**Applicants**"); **AND UPON** reading the Affidavit of Micheal Woodward sworn June 19, 2024; **AND UPON** reading the Fifth Report of FTI Consulting Canada Inc. (the "**Monitor**"); **AND UPON** hearing from counsel for the Applicants, counsel for Indigo Northern Ventures LP (the "**Interim Lender**" or "**Indigo**"), counsel for the Monitor, and any other interested party; **AND UPON** being satisfied that the Applicants have acted and continue to act in good faith and with due diligence and that circumstances exist that make this Order appropriate;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of this application is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other person other than those persons served is entitled to service of this application.

EXTENSION OF THE STAY PERIOD

2. The Stay Period, as defined in paragraph 15 of the Amended and Restated Initial Order granted in these proceedings by the Honourable Justice Whitling on March 1, 2024 ("**ARIO**") is hereby extended up to and including September 30, 2024.

ENHANCED MONITOR POWERS

3. Notwithstanding any other provision of the ARIO, in addition to other rights and obligations of the Monitor under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, the Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of the property and business of the Applicants and, without in any way limiting the generality of the foregoing, the Monitor is hereby expressly empowered and authorized to do any of the following where the Monitor considers it necessary or desirable (collectively, the "**Monitor's Enhanced Powers**"):

   (a) take possession of and exercise control over the Applicants' present and after-acquired assets, property and undertakings (the "**Property**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include the Monitor's ability:

      (i) to abandon, dispose of, or otherwise release any interest in any of the Applicants' real or personal property, or any right in any immoveable; and

      (ii) upon further order of the Court, to abandon, dispose of, or otherwise release any license or authorization issued by any government authority;

(b) receive, preserve and protect the Applicants' Property, or any part or parts thereof;

(c) manage, operate and carry on the business of the Applicants, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, cease to perform any contracts of the Applicants, hire or terminate employees as the Monitor may consider necessary, and wind down any employee benefit plans as the Monitor may consider appropriate;

(d) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, financial advisors, investment dealers, the Transaction Agent (as such term is defined below) and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's Enhanced Powers conferred by the Stay Extension and Enhanced Monitor Powers Order;

(e) purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Applicants or any part or parts thereof;

(f) receive and collect all monies and accounts now owed or hereafter owing to the Applicants and to exercise all remedies of the Applicants in collecting such monies, including, without limitation, to enforce any security held by the Applicants;

(g) settle, extend or compromise any indebtedness owing to or by the Applicants;

(h) execute, assign, issue and endorse documents of whatever nature in respect of any of the Applicants' Property or business, whether in the Monitor's name or in the name and on behalf of the Applicants, for any purpose pursuant to the Stay Extension and Enhanced Monitor Powers Order;

(i) undertake environmental or workers' health and safety assessments of the Property and operations of the Applicants;

(j) initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the

Applicants, the Property or the Monitor (in relation to the exercise by the Monitor of the Enhanced Powers), and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in the Stay Extension and Enhanced Monitor Powers Order shall authorize the Monitor to defend or settle the action in which the ARIO was made unless otherwise directed by this Court, provided that the foregoing shall not prevent counsel to the Applicants from continuing their engagement in respect of the AIF Trust Claims (as defined in the Fourth Report of the Monitor dated May 15, 2024), with the consent of the Monitor, or to deal with any other issue as the Monitor may request;

(k) market any or all of the Applicants' Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Monitor in its discretion may deem appropriate;

(l) sell, convey, transfer, lease or assign or otherwise enter into transactions respecting the Applicants' Property or any part or parts thereof out of the ordinary course of business with the approval of this Court and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required.

(m) apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Applicants' Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) report to, meet with and discuss with such affected persons as the Monitor deems appropriate all matters relating to the Applicants' Property, business, and these proceedings, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(o) register a copy of the ARIO and any other orders in respect of the Applicants' Property against title to any of the Applicants' Property;

(p) apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Monitor, in the name of the Applicants;

(q) enter into agreements with any trustee in bankruptcy appointed in respect of the Applicants, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Applicants;

(r) exercise any shareholder, partnership, joint venture or other rights which the Applicants may have; and take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Applicants, and without interference from any other person.

MONITOR PROTECTIONS

4. The enhancement of the Monitor's powers as set for in this Order, the exercise by the Monitor of any of its powers, the performance by the Monitor of any of its duties, or the employment by the Monitor of any person in connection with its appointment and the performance of its powers and duties shall not constitute the Monitor as an employer, successor employer, or related employer of the employees of the Applicants or any employee caused to be hired by the Applicants by the Monitor within the meaning of any provincial, federal or municipal legislation, other relevant legislation, regulation, common law, or rule of law or equity governing employment, pensions, or labour standards for any purpose whatsoever or expose the Monitor to any liability to any individual arising from or relating to their employment or previous employment Applicants; Without limiting the provisions of the ARIO, all employees and consultants of the Applicants shall remain employees or consultants of the Applicants until such time as the Monitor, on the

Applicant's behalf, may terminate the employment of such employees or other contractual or consulting agreements. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitations, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

5. The Monitor is not and shall not be or be deemed to be a principal, director, officer, or employee of the Applicants;

6. The Monitor shall continue to have the benefits of all of the indemnities, charges, protections and priorities as set out in the ARIO and any other Order of this Court and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor and the fulfillment of its duties or the carrying out of the provisions of this Order.

7. The Applicants shall cooperate fully with the Monitor and any directions it may provide pursuant to this Order and shall provide such assistance as the Monitor may reasonably request from time to time to enable the Monitor to carry out its duties and powers as set out in the ARIO, this Order, or any other Order of this court under the CCAA or applicable law, generally.

8. Nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant legislation, regulation, common law, or rule of law or equity. For greater clarity, any distribution to creditors of any of the Applicants administered by the Monitor on behalf of any of the Applicants will be deemed to have been made by any of the Applicants, themselves.

9. Notwithstanding the enhancement of the Monitor's powers and duties as set forth herein, the exercise by the Monitor of any of its powers, or the performance by the Monitor of any of its duties, the Monitor is not, and shall not be deemed, to be the owner of the Property for any purpose and nothing contained herein shall require the Monitor to occupy or take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might be cause or contribute to a spill, discharge, release

or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the Canadian Environmental Protection Act or any other provincial or federal regulations in Canada or internationally ("**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in Possession.

10. In addition to the rights and protections afforded to the Monitor under the CCAA, the ARIO, this Order, or any other Order granted by this Honourable Court or as an officer of this Court, the Monitor shall incur no liability or obligation, in its personal or corporate capacity, as a result of its appointment or the carrying out of the Provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any appliable legislations.

11. The power and authority granted to the Monitor by virtue of this Order shall, if exercised in any case, be paramount to the power and authority of the Applicants with respect to such matters and in the event of a conflict, the terms of this Order and those of the ARIO or any other Order of this Court, the provisions of this Order shall govern.

MISCELLANEOUS

12. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta

TAB 16

Clerk' Stamp:

COURT FILE NUMBER	2401 -
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF CATALX CTS LTD. and CATALX MANAGEMENT LTD.
APPLICANTS	CATALX CTS LTD. and HYUK JAE PARK
RESPONDENTS	CATALX CTS LTD. and CATALX MANAGEMENT LTD.
DOCUMENT	**ORIGINATING APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 525 – 9th Avenue SW, 43rd Floor Calgary, AB T2P 1G1 Attention: James W. Reid / John-David D'Souza Phone: 403-298-2418 / 403-298-2431 E-mail: jwreid@millerthomson.com / jdsouza@millerthomson.com File No.: 0281594.0001

NOTICE TO RESPONDENT(S):

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the justice.

To do so, you must be in Court when the application is heard as shown below:

Date	January 19, 2024
Time	3:30 PM
Where	Calgary Law Courts (via WebEx)
Before Whom	The Honourable Justice R.A. Neufeld

Go to the end of this document to see what else you can do and when you must do it.

Remedy sought:

1. The Applicants, CatalX CTS Ltd. ("**CatalX**") and Hyuk Jae Park ("**Mr. Park**") seek an order substantially in the form attached hereto as **Schedule "A"**:

   (a) abridging, if necessary, the time for service of notice of this Originating Application and materials in support thereof, and declaring service of the same to be good and sufficient;

   (b) appointing Deloitte Restructuring Inc. as receiver-manager of CatalX pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c. J-2, and section 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 (the "**ABCA**");

   (c) appointing Deloitte Restructuring Inc. as receiver-manager of Catalx Management Ltd. ("**Catalx Management**", and together with CatalX, the "**Companies**") pursuant to section 39 of the *Law and Equity Act,* RSBC 1996, c. 253; and

   (d) such further and other relief as this Court deems just and appropriate.

Basis for this claim:

Background on the Companies

2. Until recently, CatalX operated an internet-based platform for the trading of crypto assets, which enables customers to buy, sell, hold, deposit, and withdraw crypto assets such as Bitcoin, Ether, and anything commonly considered to be a crypto asset, digital or virtual currency, or digital or virtual token (collectively, "**Crypto**").

3. CatalX was formed in British Columbia in February 2018 under the name CatalX Exchange Inc., and was continued in Alberta under the ABCA on September 10, 2019. CatalX changed its name to CatalX CTS Ltd. on January 4, 2021. CatalX's registered office is located in Calgary, Alberta.

4. Catalx Management was incorporated pursuant to the laws of British Columbia pursuant to the *Business Corporations Act,* SBC 2002, c 57 on August 28, 2018, and has its registered office located in Vancouver, British Columbia. It is extra-provincially registered in Alberta.

5. Until recently, Catalx Management employed the employees that provided services to Catalx. Catalx Management also held the bank accounts that CatalX used for its operations.

6. Mr. Park is the Chief Executive Officer of CatalX. He is now also the only remaining officer and sole director of CatalX.

7. Until December 22, 2023, upon CatalX accepting his resignation, Jae Ho Lee ("**Mr. Lee**") was a director and the Chief Financial Officer of CatalX. As former CFO, Mr. Lee was understood to be the only known person that has access to the digital wallets and accounts at Bittrex Global Gmbh ("**Bittrex Global**") that hold CatalX's Crypto and the Crypto held on behalf of CatalX's customers (the "**CatalX Wallets**").

8. Mr. Park and Mr. Lee are the only two directors of Catalx Management.

9. At all relevant times the operations of the Companies were interconnected.

CatalX's Decision to Cease Operations

10. CatalX operated its platform for the trading of Crypto through its platform-support supplier, Bittrex Global, which served as custodian for the Crypto of CatalX's clients.

11. Bittrex Global and its related entity Bittrex Global (Bermuda) Ltd. are major shareholders of CatalX. Bittrex Global, through various technology and licensing agreements, provided CatalX with substantially all of the technology and liquidity required for CatalX to operate its Crypto trading platform.

12. On November 20, 2023, without notice to the Companies, Bittrex Global publicly announced its decision to wind-down its operations and cease the provision of all trading services effective as of December 4, 2023.

13. CatalX determined it was not feasible for it to continue to operate its platform without the required technological and liquidity support from Bittrex Global and in light of certain financial difficulties (as discussed below).

14. On December 4, 2023, CatalX notified the Alberta Securities Commission ("**ASC**") that it was withdrawing its application to become a licensed securities exchange.

15. During a meeting between Mr. Park and Mr. Lee on November 24, 2023, certain without prejudice information was disclosed about CatalX's financials, which information needed

to be verified. This information caused concern and Mr. Park began making internal enquires.

16. Mr. Park became aware that CatalX had ceased allowing withdrawals of customer deposits. Further, Mr. Park became aware that Catalx Management had ceased paying its employees.

17. Mr. Park understood the responsibilities of managing trades within and withdrawals from the CatalX Wallets, and paying employees, had been overseen and completed by CatalX's CFO, Mr. Lee.

18. By mid-December, Mr. Park became aware Mr. Lee was not performing these duties as CFO and requested via email the login information for access to the CatalX Wallets and the bank accounts of the Companies.

19. After not receiving a response to Mr. Park's email, counsel to CatalX wrote to counsel for Mr. Lee demanding access to the CatalX Wallets and the bank accounts.

20. No response was received from the above letter and CatalX followed up with a further letter to counsel to Mr. Lee on December 19, 2023. In addition to demanding access to the CatalX Wallets and the bank accounts, in this letter counsel to CatalX also advised that based on a review of the records that could be viewed by certain Catalx Management staff, the balances of customer funds in the CatalX Wallets had been withdrawn or transferred out of the accounts.

The ASC Investigation

21. On December 21, 2023, CatalX advised the ASC of the situation, including that the balances of customer funds in the CatalX Wallets had been withdrawn or transferred out of the accounts, and that CatalX was in the process of engaging Deloitte LLP to conduct an investigation into the transactions that have taken place in the CatalX Wallets and the Companies' bank accounts (the "**Letter**").

22. Following receipt of the Letter, on December 21, 2023, the ASC granted an interim cease trade order, among other things, advising that the ASC has commenced an investigation respecting, among others, CatalX, and ordering, among other things, that CatalX must cease trading in or purchasing any securities or derivatives (the "**Interim Cease Trade Order**").

23. On January 5, 2024, the ASC issued an interim order extending the Interim Cease Trade Order to January 5, 2025.

CatalX's Engagement of Deloitte

24. Mr. Park caused CatalX to engage Deloitte LLP to provide independent and impartial forensic and investigative services in connection to the tracing of Crypto transfer and location(s) of the Crypto that was to be held by CatalX for its customers in its Bittrex Global accounts.

25. Additionally, Mr. Park caused CatalX to retain Deloitte Restructuring Inc. to assist it and Catalx Management in the orderly wind-down of the Companies.

26. Since its engagement, Deloitte LLP and Deloitte Restructuring Inc. have been working closely with the Companies' management and former employees to gather and secure records and documents, including with respect to the CatalX Wallets.

Efforts by the Applicants to Prevent Harm

27. To fund the ongoing engagement of counsel for CatalX as well as its retention of Deloitte LLP and Deloitte Restructuring Inc., Mr. Park loaned CatalX $800,000 in cash.

28. Further, CatalX is working with Deloitte LLP to investigate the alleged Crypto misappropriation to the best of its abilities.

The Appointment of a Receiver is Necessary and Appropriate

29. This Honourable Court has jurisdiction to appoint a receiver-manager over CatalX pursuant to section 99 of the ABCA:

> … on an application by any interested person, the Court may make any order it thinks fit including…
>
> a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts.

30. This Court has jurisdiction to appoint a receiver-manager over CatalX Management pursuant to section 39 of the *Law and Equity Act,* RSBC 1996, c. 253:

> 39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager 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.
>
> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

31. This Court may also order the appointment of a receiver under section 13(2) of the *Judicature Act*, RSA 2000, c J-2 if it is satisfied that it is just and equitable that a receiver be appointed.

32. It is just, equitable, and convenient that a receiver be appointed for the following reasons:

(a) There may be claims from CatalX customers against the Companies, as customers are no longer able to withdraw Crypto from the CatalX platform. A Court-appointed receiver-manager would permit customers to submit claims in an open and transparent manner.

(b) Given the ongoing ASC investigation and the Interim Cease Trade Order, a Court-appointed receiver-manager would ensure that the Companies are operated and managed by an independent third-party approved by the Court.

(c) Given Deloitte LLP and Deloitte Restructuring Inc.'s background and involvement with the Companies from its investigation, Deloitte Restructuring Inc. is in the best position to gather the necessary information and attempt to trace and locate the Crypto for the benefit of the Companies' customers and stakeholders.

(d) Third parties, including Bittrex, Mr. Lee, and other former employees and service providers are more likely to assist and provide timely information to a Court-appointed officer and at the direction of the Court than they would otherwise.

(e) Mr. Park, the only secured creditor of CatalX, supports the appointment.

(f) The Companies have no ongoing operations and an orderly wind-down of their business by a receiver-manager is not prejudicial to any party.

(g) Deloitte Restructuring Inc. has consented to act as receiver-manager over the Companies.

33. In the circumstances, the balance of convenience weighs in favour of the appointment of Deloitte Restructuring Inc. being appointed as receiver-manager, and it is just, equitable and convenient to appoint Deloitte Restructuring Inc. as receiver-manager over the Companies.

Material or evidence to be relied on:

34. Affidavit of Hyuk Jae Park, sworn January 10, 2024, to be filed.

35. Consent to Act of Deloitte Restructuring Inc., to be filed.

36. Pre-filing report of Deloitte Restructuring Inc., to be filed.

37. Bench Brief of the Applicants.

38. Such further and other materials as counsel may advise and this Honourable court may permit.

Applicable Acts, Rules and Regulations:

39. *Business Corporations Act,* RSA 2000, c B-9, section 99.

40. *Judicature Act*, RSA 2000, c J-2, section 13(2).

41. *Law and Equity Act*, RSBC 1996, c 253.

42. *Alberta Rules of Court,* Alta Reg 124/2010, Part 3 Division 2 and Part 6.

Any irregularity complained of or objection relied on:

43. None.

How the application is proposed to be heard or considered:

44. On the Commercial List, via WEBEX before the Honourable Justice R.A. Neufeld.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

SCHEDULE “A”

Proposed form of Receivership Order

COURT FILE NUMBER	2401-
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF CATALX CTS LTD. and CATALX MANAGEMENT LTD.
APPLICANTS	CATALX CTS LTD. and HYUK JAE PARK
RESPONDENTS	CATALX CTS LTD. and CATALX MANAGEMENT LTD.
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 525 – 9th Avenue SW, 43rd Floor Calgary, AB, T2P 1G1 Attention: James W. Reid / John-David D'Souza Phone: 403-298-2418 / 403-298-2431 E-mail: jwreid@millerthomson.com / jdsouza@millerthomson.com File No.: 0281594.0001

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED:	**January 19, 2024**
LOCATION OF HEARING:	**Calgary, Alberta**
NAME OF JUSTICE WHO GRANTED THIS ORDER:	**The Honourable Justice R.A. Neufeld**

UPON the application of CatalX CTS Ltd. ("**CatalX**") and Hyuk Jae Park in respect of appointing a receiver-manager over CatalX and Catalx Management Inc. ("**Catalx Management**", and together with CatalX the "**Companies**");

AND UPON having read the Originating Application, the Affidavit of Hyuk Jae Park sworn January 10, 2024, and the Affidavit of Service of Marica Ceko sworn January [●], 2024, filed;

AND UPON reading the consent of Deloitte Restructuring Inc. to act as receiver-manager (the "**Receiver**" or "**Deloitte**") of the Companies, filed;

AND UPON hearing counsel for CatalX, counsel for Hyuk Jae Park, counsel for Jae Ho Lee, counsel for the proposed Receiver, and any other counsel or other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service

1. The time for service of the Originating Application for this order (the "**Order**") is hereby abridged and deemed good and sufficient, if applicable, and this application is properly returnable today.

Appointment

2. Pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c. J-2, section 99(a) of the *Business Corporations Act*, RSA 2000, c.B-9, and section 39 of the *Law and Equity Act,* RSBC 1996, c. 253 (as applicable), Deloitte Restructuring Inc. is hereby appointed Receiver, without security, of all of Companies' current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**").

Receiver's Powers

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

   (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Companies, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Companies;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to take possession of and exercise control over the Property;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Companies and to exercise all remedies of the Companies in collecting such monies, including, without limitation, to enforce any security held by the Companies;

(g) to settle, extend or compromise any indebtedness owing to or by the Companies;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor for any purpose pursuant to this Order;

(i) to undertake an investigation into the Companies' dealings, business, operations, and assets (including without limitation (i) the crypto currency assets of the Companies and (ii) the crypto currency assets or entitlements of the Companies' customers, whether now or previously in the possession of the Companies);

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Companies, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize

the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000;

(ii) with the approval of the Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceeding clause:

and in each such case notice under subsection 60(8) of the Personal *Property Security* Act, RSA 2000, c. P 7 or any other similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with, and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality required by the *Securities Act* (Alberta) or as the Receiver deems advisable;

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Companies may have;

(q) to undertake a claims process to determine claims or entitlements of any creditors or customers against the Companies or their assets now or previously in the possession of the Companies (including without limitation cryptocurrency assets or fiat currencies);

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and

(s) assign the Companies into bankruptcy;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Companies, and without interference from any other Person (as defined below).

Duty to Provide Access and Co-operation to the Receiver

4. (i) The Companies, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Companies, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto,

provided however that nothing in this paragraph or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

No Proceedings Against the Receiver

7. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Companies or the Property

8. No Proceeding against or in respect of the Companies or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Companies or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by

statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the Companies or an action, suit or proceeding that is taken in respect of the Companies by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a Province and for clarity it includes the Alberta Securities Commission and British Columbia Securities Commission.

No Exercise of Rights of Remedies

9. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

   (a) empower the Companies to carry on any business that the Companies are not lawfully entitled to carry on;

   (b) prevent the filing of any registration to preserve or perfect a security interest;

   (c) prevent the registration of a claim for lien; or

   (d) exempt the Companies from compliance with statutory or regulatory provisions relating to health, safety or the environment.

10. Nothing in this Order shall prevent any party from taking an action against the Companies where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party, except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Receiver at the first available opportunity.

No Interference with the Receiver

11. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement,

licence or permit in favour of or held by the Companies, except with the written consent of the Companies and the Receiver, or leave of this Court.

Continuation of Services

12. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Companies, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Companies,

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Companies or exercising any other remedy provided under such agreements or arrangements. The Companies shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Companies in accordance with the payment practices of the Companies, or such other practices as may be agreed upon by the supplier or service provider and each of the Companies and the Receiver, or as may be ordered by this Court.

Receiver to Hold Funds

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation its investigation or the sale of all or any of the Property in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

Employees

14. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Companies until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c B-3 ("**BIA**"), other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

Limitation on Environmental Liabilities

15. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order:

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of

the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

(A) complies with the order; or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by:

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order;

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

Limitation on the Receiver's Liability

16. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

Receiver's Accounts

17. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver

and counsel to the Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Receiver's Charge**") on the Property as security for their professional fees and disbursements incurred at the normal rates and charges of the Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

18. The Receiver and its legal counsel shall pass their accounts from time to time.

19. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Funding of the Receivership

20. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

21. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "**A**" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

23. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

24. The Receiver shall be authorized to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds collected from the investigation or the sale of any assets without further approval of this Court.

Allocation

25. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

General

26. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. Notwithstanding Rule 6.11 of *the Alberta Rules of Court,* unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

28. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

29. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

30. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Filing

32. This Order is issued and shall be filed in Court of King's Bench Action No. 2401-[●]

33. The Receiver shall establish and maintain a website in respect of these proceedings at ☯] (the "**Receiver's Website**") and shall post there as soon as practicable:

    (a) all materials prescribed by statue or regulation to be made publicly available; and

    (b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

34. Service of this Order shall be deemed good and sufficient by:

    (a) serving the same on:

(i) persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Receiver's Website

and service on any other person is hereby dispensed with.

35. Service of this Order and any other materials filed in these proceedings may be effected by facsimile, electronic mail, ordinary mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

_____

Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $ _____

1. THIS IS TO CERTIFY that Deloitte Restructuring Inc., the receiver and receiver manager (the "**Receiver**") of all of the assets, undertakings and properties of the CatalX CTS Ltd. and Catalx Management Ltd. (the "**Companies**") appointed over by Order of the Court of King's Bench of Alberta (the "**Court**") dated the 19th day of January, 2024 (the "**Order**") made in action number 2401 - **[●]**, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of **[$]**, being part of the total principal sum of **[$]** that the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded **[daily] [monthly not in advance on the ● day of each month]** after the date hereof at a notional rate per annum equal to the rate of **[●]** per cent above the prime commercial lending rate of Bank of **[●]** from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at **[●]**.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

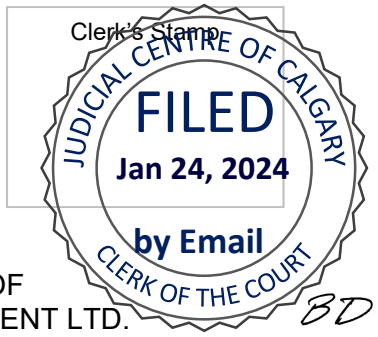
7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2024.

Deloitte Restructuring Inc. solely in its capacity as Receiver of CatalX CTS Ltd. and Catalx Management Ltd., and not in its personal or corporate capacity

Per: _____
Name:
Title:

Clerk's Stamp



COURT FILE NUMBER	2401-00457
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF CATALX CTS LTD. and CATALX MANAGEMENT LTD.
APPLICANTS	CATALX CTS LTD. and HYUK JAE PARK
RESPONDENTS	CATALX CTS LTD. and CATALX MANAGEMENT LTD.
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 525 – 9th Avenue SW, 43rd Floor Calgary, AB, T2P 1G1 Attention: James W. Reid / John-David D'Souza Phone: 403-298-2418 / 403-298-2431 E-mail: jwreid@millerthomson.com / jdsouza@millerthomson.com File No.: 0281594.0001

DATE ON WHICH ORDER WAS PRONOUNCED:	**January 19, 2024**
LOCATION OF HEARING:	**Calgary, Alberta**
NAME OF JUSTICE WHO GRANTED THIS ORDER:	**The Honourable Justice R.A. Neufeld**

UPON the application of CatalX CTS Ltd. ("**CatalX**") and Hyuk Jae Park in respect of appointing a receiver-manager over CatalX and Catalx Management Inc. ("**Catalx Management**", and together with CatalX the "**Companies**");

AND UPON having read the Originating Application, the Affidavit of Hyuk Jae Park sworn January 10, 2024, and the Affidavit of Service of Marica Ceko sworn January 15, 2024, filed;

AND UPON reading the consent of Deloitte Restructuring Inc. to act as receiver-manager (the "**Receiver**" or "**Deloitte**") of the Companies, filed;

AND UPON hearing counsel for CatalX, counsel for Hyuk Jae Park, counsel for Jae Ho Lee, counsel for the proposed Receiver, and any other counsel or other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service

1. The time for service of the Originating Application for this order (the "**Order**") is hereby abridged and deemed good and sufficient, if applicable, and this application is properly returnable today.

Appointment

2. Pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c. J-2, section 99(a) of the *Business Corporations Act*, RSA 2000, c.B-9, and section 39 of the *Law and Equity Act,* RSBC 1996, c. 253 (as applicable), Deloitte Restructuring Inc. is hereby appointed Receiver, without security, of all of Companies' current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**").

Receiver's Powers

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

   (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Companies, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Companies;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to take possession of and exercise control over the Property;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Companies and to exercise all remedies of the Companies in collecting such monies, including, without limitation, to enforce any security held by the Companies;

(g) to settle, extend or compromise any indebtedness owing to or by the Companies;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor for any purpose pursuant to this Order;

(i) to undertake an investigation into the Companies' dealings, business, operations, and assets (including without limitation (i) the crypto currency assets of the Companies and (ii) the crypto currency assets or entitlements of the Companies' customers, whether now or previously in the possession of the Companies);

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Companies, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize

the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000;

(ii) with the approval of the Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceeding clause:

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c. P 7 or any other similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable and in accordance with the confidentiality requirements pursuant to the *Securities Act* (Alberta);

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Companies may have;

(q) to undertake a claims process to determine claims or entitlements of any creditors or customers against the Companies or their assets now or previously in the possession of the Companies (including without limitation cryptocurrency assets or fiat currencies);

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and

(s) assign the Companies into bankruptcy;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Companies, and without interference from any other Person (as defined below).

Duty to Provide Access and Co-operation to the Receiver

4. (i) The Companies, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Companies, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver

to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

No Proceedings Against the Receiver

7. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Companies or the Property

8. No Proceeding against or in respect of the Companies or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Companies or the Property are hereby stayed and suspended pending further Order of

this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the Companies or an action, suit or proceeding that is taken in respect of the Companies by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a Province and for clarity it includes the Alberta Securities Commission and British Columbia Securities Commission.

No Exercise of Rights of Remedies

9. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that nothing in this Order shall:

   (a) empower the Companies to carry on any business that the Companies are not lawfully entitled to carry on;

   (b) prevent the filing of any registration to preserve or perfect a security interest;

   (c) prevent the registration of a claim for lien; or

   (d) exempt the Companies from compliance with statutory or regulatory provisions relating to health, safety or the environment.

10. Nothing in this Order shall prevent any party from taking an action against the Companies where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party, except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Receiver at the first available opportunity.

No Interference with the Receiver

11. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Companies, except with the written consent of the Companies and the Receiver, or leave of this Court.

Continuation of Services

12. All persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Companies, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Companies,

    are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Companies or exercising any other remedy provided under such agreements or arrangements. The Companies shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Companies in accordance with the payment practices of the Companies, or such other practices as may be agreed upon by the supplier or service provider and each of the Companies and the Receiver, or as may be ordered by this Court.

Receiver to Hold Funds

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation its investigation or the sale of all or any of the Property in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by

the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

Employees

14. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Companies until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c B-3 ("**BIA**"), other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

Limitation on Environmental Liabilities

15. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply

with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order:

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

(A) complies with the order; or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by:

(A) the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order;

(B) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

Limitation on the Receiver's Liability

16. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

Receiver's Accounts

17. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Receiver's Charge**") on the Property as security for their professional fees and disbursements incurred at the normal rates and charges of the Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

18. The Receiver and its legal counsel shall pass their accounts from time to time.

19. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Funding of the Receivership

20. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but

subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

21. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "**A**" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

23. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

24. The Receiver shall be authorized to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds collected from the investigation or the sale of any assets without further approval of this Court.

Allocation

25. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

General

26. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. Notwithstanding Rule 6.11 of *the Alberta Rules of Court,* unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

28. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

29. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

30. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Filing

32. This Order is issued and shall be filed in Court of King's Bench Action No. 2401 – 00457.

33. The Receiver shall establish and maintain a website in respect of these proceedings at https://insolvencies.deloitte.ca/en-ca/Pages/CataIx.aspx (the "**Receiver's Website**") and shall post there as soon as practicable:

    (a) all materials prescribed by statue or regulation to be made publicly available; and

    (b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

34. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

(i) persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Receiver's Website

and service on any other person is hereby dispensed with.

35. Service of this Order and any other materials filed in these proceedings may be effected by facsimile, electronic mail, ordinary mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $ _____

1. THIS IS TO CERTIFY that Deloitte Restructuring Inc., the receiver and receiver manager (the "**Receiver**") of all of the assets, undertakings and properties of the CatalX CTS Ltd. and Catalx Management Ltd. (the "**Companies**") appointed over by Order of the Court of King's Bench of Alberta (the "**Court**") dated the 19th day of January, 2024 (the "**Order**") made in action number 2401 - **[●]**, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of **[$]**, being part of the total principal sum of **[$]** that the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded **[daily] [monthly not in advance on the ● day of each month]** after the date hereof at a notional rate per annum equal to the rate of **[●]** per cent above the prime commercial lending rate of Bank of **[●]** from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at **[●]**.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2024.

Deloitte Restructuring Inc. solely in its capacity as Receiver of CatalX CTS Ltd. and Catalx Management Ltd., and not in its personal or corporate capacity

Per: _____
Name:
Title: