THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

**PEOPLES TRUST COMPANY,**

Applicant,

-and-

**BOKHARI DEVELOPMENT INC.,**

Respondent.

INDEX

## PART I DOCUMENTS AND AUTHORITIES RELIED UPON

**Documents To Be Relied Upon:**

1 Order (Appointing Receiver) pronounced August 29, 2023;

2 Notice of Motion dated November 16, 2023;

3 First Report of the Receiver dated November 16, 2023 (the "**First Report**");

4 Confidential Exhibit "1" to the First Report (the "**Confidential Exhibit**"); and

5 Affidavit of Service of Maryna Kozik sworn November 17, 2023 (the "**Kozik Affidavit**").

**Cases and Statutory Provisions and Authorities To Be Relied Upon:**

**TAB**

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 249
2. *The Court of King's Bench Act*, C.C.S.M. c. C280, s. 77(1);
3. *Danier Leather Inc., Re*, 2016 ONSC 1044;
4. *Target Canada Co (Re)*, 2015 ONSC 7574;
5. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400;
6. *Sherman Estate v Donovan*, 2021 SCC 25;
7. *Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al, 2022 ONSC 6354*;
8. *Rose-Isli Corp. v Frame-Tech Structures Ltd.,* 2023 ONSC 832; and
9. *Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203.

## PART II INTRODUCTION

1. On August, 29, 2023, KMPG Inc. was appointed receiver and manager (the "**Receiver**") over the assets, undertakings and property of Bokhari Development Inc. (the "**Debtor**") comprising, located at, arising from, or in any way relating to the property commonly known as 1801 – 1825 Park Drive in Portage la Prairie, Manitoba, including the development of the project (the "**Project**") located thereon and all proceeds thereof (collectively, the "**Property**") pursuant to the Order (Appointing Receiver) pronounced by the Honourable Mr. Justice Chartier (the "**Receivership Order**").

**First Report at para 1**

2. The Project involves the development of an affordable housing complex consisting of 13 mid-rise buildings (the "**Buildings**"). Construction on the Project was partially completed, but was halted prior to the Receiver's appointment.

**First Report at paras 9 and 22**

3. The Receivership Order provided that the Receiver shall not be deemed to be in possession of the real property located at 1801 – 1825 Park Drive in Portage la Prairie, Manitoba (the "**Project Premises**") until such time as the Receiver takes care and control of the Project Premises, and that the Receiver may elect not to go into possession of the Project Premises until satisfied that adequate insurance coverage is in place.

**Receivership Order at para 3**

4. Since the date of its appointment, as set out in detail in paragraph 21 of the First Report, the Receiver has worked diligently, *inter alia*:

a) Securing the Property, including engaging 24-hour onsite security personnel, installing CCTV surveillance, and erecting a fence around the Project Premises;

b) Obtaining sufficient and appropriate insurance coverage in respect of the Property;

c) Working with fire department officials from the City of Portage la Prairie to assess and reduce fire hazards at the Property;

d) Communicating with architects, engineers, and the Project's payment certifier to obtain pertinent information about the Project, including Project drawings;

e) Attempting to obtain books and records of the Debtor;

f) Engaging a local contractor to perform certain site protection and maintenance activities on the Project;

g) Engaging with the Project's structural engineer to prepare a Project status report;

h) Assessing claims made by the previous general contractor of the Project and certain subcontractors related to materials left at the Project Premises prior to the Receiver's appointment and requesting additional information from said claimants in order to determine ownership;

i) Addressing equipment return requests made by subtrades of the Project and arranging for retrieval of equipment as appropriate;

j) Issuing a Request for Proposal (the "**Package A RFP**") to potential bidders to act as a contractor for the completion of essential work on the exterior envelope of the Project and selecting the bid submitted by NDC Construction Ltd. ("**NDC**");

k) Receiving and reviewing bids in respect of the Package A RFP; and

l) Consulting with and recommending the engagement of NDC to the Applicant, Peoples Trust Company ("**Peoples**").

**First Report at para 21**

5. The Receiver seeks, *inter alia*: (i) the approval and authorization of this Honourable Court to engage NDC as contractor pursuant to the Contract (as hereinafter defined); (ii) to amend the Receivership Order to specify the legal description and status of title number of the Project Premises to facilitate the registration of a Notice of Appointment and Caveat (each as hereinafter defined) with the Manitoba Land Titles Registry; (iii) approval of the Receiver's activities and First Report; (iv) approval of the Receiver and it's counsel's fees and disbursements; and (v) the sealing of the Confidential Appendix (as hereinafter defined).

## PART III FACTS

1. On August 29, 2023 the Receiver was appointed receiver over the Property pursuant to the Receivership Order.

2. Paragraph 3 of the Receivership Order provides that:

> "...the Receiver shall not be deemed to be in possession of the real property located at 1801 - 1825 Park Drive in Portage la Prairie, Manitoba (the "Project Premises") until such time as the Receiver takes care and control, in the Receiver's absolute discretion, of the Project Premises. The Receiver may elect not to go into possession of the Project Premises until such time as the Receiver is satisfied, in its absolute discretion, that adequate insurance coverage is in place with respect to the Project Premises. The Receiver shall have no obligations nor liability with respect to the Project Premises until such time as the Receiver does take care and control of the Project Premises. The Receiver shall provide written notice by email to the Service List (as defined below) upon taking possession of the Project Premises, and on the day that such notice has been provided will then be deemed to be in possession."

**Receivership Order at para 3**

3. The Receiver engaged and worked extensively with the Debtor's insurance broker regarding the Debtor's builder's risk policy, which was set to expire two days following pronouncement of the Receivership Order. On or about November 3, 2023, as a result of extensive work by the Receiver, the Receiver secured builder's liability insurance (the "**Policy**") which was extended retroactively for the period from August 31, 2023 through to February 29, 2024. The Policy is conditional on, *inter alia*, work progressing on the Project by December 3, 2023. The Receiver has also secured a wrap-up insurance policy on the Project through to February 29, 2023.

**First Report at para 21(a)-(b)**

4. On November 14, 2023, in accordance with the Receivership Order, notice by email was sent to the parties on the Service List advising that the Receiver had taken care, control and possession of the Project Premises.

**First Report at para 21(x)**

***a. Request for Proposal Process***

5. Following its appointment, the Receiver assessed the Property and Project and determined that certain time sensitive work was required to protect the Project in its unfinished state, including to protect the Buildings from fire and weather risk. The Receiver also determined that the initial scope of work to be undertaken should be completion of the exterior envelope of the Buildings in accordance with the Project design documents to fully enclose the Buildings and make them weather tight (the "**Package A Work**").

**First Report at para 23**

6. As a result, on or about October 13, 2023, the Receiver issued the Package A RFP to five potential bidders for the completion of the Package A Work.

**First Report at para 27**

6. When issuing the Package A RFP, the Receiver focused on soliciting local contractors with experience in finishing partially completed projects, who could deploy quickly and commit to a key timeline.

**First Report at para 27**

7. Five contractors attended the Project Premises. By the bid deadline on October 30, 2023, bids were submitted by four contractors, including one contractor who was not originally solicited but contacted the Receiver and requested to participate. The information submitted in the bids pertained to:

a) Previous project experience, including project size, building type and cost, as well as any experience where work in progress was continued from another contractor;

b) Proposed mobilization date and estimated completion date;

c) Hourly rates for labour and equipment along with margins for material and subcontractors under a cost-reimbursable contract, as well as anticipated high-level pricing for the Package A Work; and

d) Qualifications of key personnel, including copies of relevant CVs.

**First Report at paras 28 and 29**

8. The Receiver carefully evaluated each bid and engaged in discussions with each of the bidders. The Receiver recommends the engagement of NDC pursuant to an agreement substantially in the form of Contract – CCDC 3 - 2016 Edition and

Supplementary Conditions thereto (together, the "**Contract**") attached to the First Report as Appendix "A".

**First Report at para 30 and 32 and Appendix A**

9. The Contract is a costs plus contract and provides for an incentive to the contractor if the targeted timelines are met. The Supplementary Conditions were drafted primarily for the purposes of reflecting the particularities of the Receiver's role and circumstances of these receivership proceedings.

**First Report at paras 34 and 36 and Appendix A**

10. The Receiver intends to issue a request for proposals to potential project leads to assist the Receiver in supervising day-to-day construction operations at the Project Premises.

**First Report at para 21(p)**

***b. Land Titles Registry Matters***

11. On or about September 18, 2023, counsel for the Receiver submitted a request to the Manitoba Land Titles Registry (the "**LTO**") to register a notice of appointment of a receiver/manager ("**Notice of Appointment**") and a Caveat (the "**Caveat**") to provide notice of the Receiver's Charge and Receiver's Borrowing Charge on title to the Property (each as defined in the Receivership Order).

**First Report at para 21(w)**

12. On or about September 22, 2023, counsel was advised by the LTO that it could not register the Notice of Appointment or Caveat on title to the Property unless the Receivership Order was amended to include the legal description of the Property in addition to the civic address.

**First Report at para 39**

### *c. Equipment Return Issues*

13. Following the pronouncement of the Receivership Order, claims were made by 6332189 Manitoba Ltd. o/a Gateway Projects ("**Gateway**") and Golden Heating and Cooling Ltd. related to materials left on the Project Premises prior to the Receiver's appointment. The Receiver has received limited financial information in respect of the Project, and determined that it requires further information in order to develop a methodology to determine ownership of said materials, and has made repeated requests for said information.

**First Report at para 21(e) and (f)**

14. The Receiver also received claims by Gateway and certain subcontractors pertaining to equipment left at the Project Premises prior to the Receivership date and the Receiver arranged for the retrieval of said equipment, as appropriate.

**First Report at para 21(g)**

## PART IV ISSUES

15. The primary issues to be determined by this Honourable Court are:

A. Should the engagement of NDC pursuant to the Contract be approved and authorized?

B. Should the Receivership Order be amended (the "**Proposed Amendment**") to add:

> "and legally described as LOTS 1 AND 2 BLOCK 1 PLAN 1810 PLTO EXC ALL MINES AND MINERALS VESTED IN THE CROWN (MANITOBA) BY THE REAL PROPERTY ACT IN RL 56 and 57 PARISH OF PORTAGE LA PRAIRIE (Manitoba Land Titles Registry Status of Title No. 3015541/3)"

immediately following the words "*commonly known as 1801-1825 Park Drive in Portage la Prairie, Manitoba*"?

C. Should the actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and should the First Report, including the statements of receipts and disbursements and the activities of the Receiver described therein be approved?

D. Should the fees and disbursements of the Receiver and its counsel be approved?

E. Should **Confidential Appendix "1"** to the First Report (the "**Confidential Appendix**") be sealed?

## PART V ARGUMENT

### A. Should the engagement of NDC pursuant to the Contract be approved and authorized?

16. Pursuant to section 3 of the Receivership Order, the Receiver is empowered and authorized to:

a) Manage, operate, and carry on the business of the Debtor in relation to the Property, including the powers to enter into any agreements;

b) 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 the Receivership Order; and

c) Continue construction of the Project and obtain advice and enter into contracts and other arrangements for work, services and the supply of materials for such purposes.

**Receivership Order, para 3(c) – (e)**

17. Section 29 of the Receivership Order provides that the Receiver "*may from time to time apply to this Court for advice and directions in the discharge of its powers and duties*".

**Receivership Order, para 29**

18. Pursuant to section 249 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), the Receiver may "*...apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.*"

**BIA, s. 249 [Tab 1]**

19. Courts have considered the following factors, among others, when considering whether the engagement of professionals by a Court officer should be approved:

a) Whether the debtor and court officer overseeing the proceedings believe the quantum and nature of the remuneration are fair and reasonable;

b) Whether the professional has industry experience and/or familiarity with the business of the debtor; and

c) Whether the professional has expertise that warrants its engagement?

***Danier Leather Inc., Re*, 2016 ONSC 1044 at paras 47 & 51 [Tab 3]**

20. Through the Package A RFP, which was a fair and reasonable process, the Receiver selected NDC's bid based on its determination that, *inter alia*: (i) NDC has experience in similar scale projects; (ii) NDC's engagement is warranted as it has expertise as a contractor, which is outside of the Receiver's skills; and (iii) the anticipated cost contained in NDC's bid was more economical in comparison to the other bids received.

**First Report, para 32 & Confidential Exhibit**

21. The Receiver is of the view that the Contract is fair and reasonable, as it, *inter alia*: (i) provides a fair price and reasonable remuneration of NDC; (ii) provides the appropriate amount of control for the Receiver over the Package A Work; (iii) provides transparency on the costs of the Package A Work; and (iv) minimizes the need for excessive change orders during the course of the Package A Work.

**First Report at paras 35 and 38**

22. The completion of the Package A Work is a clear milestone in the progress of the Project and is necessary in order to, *inter alia*:

a) Preserve the Property;

b) Improve the value of the Project;

c) Allow the Receiver to assess the Project with a structural engineer;

d) Allow the Receiver to better evaluate its options with respect to the Property, which may include completing the Project in its entirety prior to a sale, or commencing a sale process for the Project in its current state at the time;

e) Reduce the risk presented by the Project by ensuring the Package A Work is completed in accordance with the design documents, including the development agreement registered on title to the Project Premises;

f) Limit risk of weather damage to the interior and exterior of the buildings on the Project Premises; and

g) Reduce fire risk.

**First Report at paras 23 and 25**.

23. Peoples Trust Company has advised the Receiver that it supports the engagement of NDC in accordance with the Contract.

**First Report at para 38**

24. Based on the forgoing, the Receiver respectfully submits that the engagement of NDC pursuant to the Contract should be authorized and approved by this Honourable Court.

## B. Should the Receivership Order be Amended in accordance with the Proposed Amendment?

25. It is in the best interest of the Debtor and its stakeholders and the public for the Receivership Order to be amended in accordance with the Proposed Amendment, so that notice of the stay, the Receiver's Charge, the Receiver's Borrowing Charge and Notice of Appointment will be available to the public, the Province of Manitoba and the City of Portage La Prairie on title to the Property.

26. Further, the Proposed Amendment is necessary so that the Receiver may receive any notices and/or liens that are distributed to parties registered on title to the Property.

27. The parties on the Service List have been given notice of the Proposed Amendment, and the Proposed Amendment does not change the substance of the

Receivership Order, but simply adds clarity in respect of the legal description of the Property.

**Kozik Affidavit**

**C. Should the actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and should the First Report, including the statements of receipts and disbursements and the activities of the Receiver described therein be approved?**

28. Courts have recognized that the approval of the reports of a Court officer and activities described therein is generally usual and routine.

***Target Canada Co (Re)*, 2015 ONSC 7574 at para 2 [Tab 4]**

29. In *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, the Ontario Superior Court of Justice recently confirmed that that there are good policy and practical reasons for courts to approve the conduct of a Court-appointed Receiver, and that it "*should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.*"

***Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-66 [Tab 5]**

30. The Receiver's actions and activities as described in the First Report have been carried out diligently, appropriately, and in a manner that is consistent with its mandate

and powers under the Receivership Order and in accordance with the provisions of the BIA.

31. Based on the foregoing, the Receiver respectfully submits that actions of the Receiver to date in respect of its administration of these receivership proceedings be approved, and the First Report including the statements of receipts and disbursements and the activities of the Receiver described therein be approved.

**D. Should the fees and disbursements of the Receiver and its counsel be approved?**

32. Paragraph 19 of the Receivership Order provides that "*...the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts*".

**Receivership Order, para 19**

33. Paragraph 20 of the Amended and Restated Initial Order provides that "*...the Receiver and its legal counsel shall pass their accounts from time to time.*"

**Receivership Order, para 20**

34. All parties on the Service List for these proceedings have been provided in the First Report which contains the invoices of counsel for the invoices of the Receiver and its counsel, and the Applicant supports the approval sought.

**Kozik Affidavit**
**First Report at para 46**

35. The fees and disbursements outlined on the invoices of the Receiver and its counsel as outlined in the First Report are, in each case, reasonable, incurred for services duly rendered in response to their respective required and necessary duties, and at their respective standard rates and charges.

**First Report at para 46 and Appendices B & C**

36. The services rendered and disbursements incurred between August 22, 2023 to October 31, 2023 by counsel for the Receiver, MLT Aikins LLP ("**MLT Aikins**") is in the total amount of $67,227.64. The blended hourly rate for MLT Aikins is $507.37.

**First Report, Appendix C**

37. Based on the forgoing, the Receiver respectfully submit that this Honourable Court should approve the fees and disbursements of the Receiver for the period of August 22, 2023 to October 29, 2023 and the fees and disbursements of its counsel for the period of August 22, 2023 to October 31, 2023.

**E. Should the Confidential Appendix be Sealed?**

38. Section 77(1) of *The Court of King's Bench Act* provides for the sealing of Court documents, as follows:

> The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.
>
> ***The Court of King's Bench Act*, C.C.S.M. c. C280, s. 77(1) [Tab 2]**

39. In *Sherman Estate v Donovan*, the Supreme Court of Canada confirmed that three prerequisites which must be met in order for a Court to make an order limiting openness of the courts, including a sealing order. These prerequisites are:

a) Court openness poses a serious risk to a competing interest of public importance;

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

c) The benefits of the order restricting Court openness outweighs its negative effects.

***Sherman Estate v Donovan*, 2021 SCC 25 ("Sherman Estate") at para 38 [Tab 6]**

40. The Supreme Court in Sherman Estate confirmed that a "*general commercial interest of preserving confidential information*" can constitute an important public interest.

**Sherman Estate at paras 41 and 43 [Tab 6]**

41. In insolvency proceedings, Courts have frequently found that confidential and commercially sensitive information contained in proposed bids should be sealed, as the dissemination of such information would pose a serious risk to the commercial interests

of the bidders and the insolvent company in the event that the transaction should not be completed. The sealing of key economic terms of a transaction is routine in insolvency proceedings on the basis that there is a broader public interest in maintaining confidentiality in such information.

***Just Energy Group Inc. et al. v Morgan Stanley Capital Group Inc. et al, 2022 ONSC 6354* at para 72 [Tab 7]**
***Rose-Isli Corp. v Frame-Tech Structures Ltd.*, 2023 ONSC 832 at para 98 & 137-141 [Tab 8]**
***Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 4203 at para 29 [Tab 9]**

42. In the proposed form of Order, the Receiver seeks that the Confidential Appendix be sealed until the Receiver is discharged or until further order of this Honourable Court (the "**Sealing Order**").

43. The Confidential Appendix contains commercially sensitive and confidential information in respect of bids submitted by competing contractors and a schedule summarizing and comparing the key evaluation considerations of the bids. The disclosure of this information would have a detrimental impact on each of the bidders, as it would reveal information related to pricing to their respective competitors. It would also be detrimental to the Debtor and its stakeholders in the event that the Contract not be approved or completed, or if the need for the Receiver to engage an alternate contractor for the Package A Work, or for other work on the Project arises in the future.

**First Report, para 31**

44. In the circumstances, the Sealing Order provides the least restrictive manner to preserve the confidentiality of the information contained in the Confidential Appendix and to protect the interests of the bidders, the Debtor and its stakeholders, and there is no reasonably alternative measures that will prevent the risks thereto.

45. The Sealing Order will only be in effect for a limited time period, until the Receiver is discharged, or upon further order by this Court.

46. The Receiver respectfully submits that the Sealing Order will not prejudice any of the Debtor's stakeholders. The benefits of the Sealing Order sought outweigh any negative effects.

47. In these circumstances, the Receiver submits that the prerequisites outlined in Sherman Estate are met and the granting of the Sealing Order is just and appropriate.

## PART V CONCLUSION

48. For the foregoing reasons, the Receiver respectfully submits that the relief sought by the Receiver in this motion should be granted by this Honourable Court.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER, 2023.**

**MLT AIKINS LLP**

Per: _____

J.J. Burnell / Anjali Sandhu
Counsel to the Court-appointed Receiver, KPMG Inc.

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

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

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

Current to October 31, 2023

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**(a)** directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

**(b)** restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

**Idem**

**(2)** On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

**Receiver may apply to court for directions**

**249** A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

1992, c. 27, s. 89.

**Right to apply to court**

**250 (1)** An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

**Where inconsistency**

**(2)** Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

**(a)** the security agreement or court order under which the receiver acts or was appointed, or

**(b)** any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

1992, c. 27, s. 89.

**Protection of receivers**

**251** No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a

247, le tribunal peut, aux conditions qu'il estime indiquées :

**a)** ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

**b)** interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

**Idem**

**(2)** Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

**Instructions du tribunal**

**249** Le tribunal donne au séquestre qui lui en fait la demande les instructions écrites qu'il estime indiquées sur toute disposition de la présente partie.

1992, ch. 27, art. 89.

**Ordonnance d'un autre tribunal**

**250 (1)** Une demande peut être présentée aux termes des articles 248 ou 249 indépendamment de toute ordonnance qu'aurait pu rendre un tribunal au sens du paragraphe 243(1).

**Incompatibilité**

**(2)** Les dispositions d'une ordonnance rendue aux termes de l'article 248 ou d'une instruction donnée aux termes de l'article 249 l'emportent sur les dispositions incompatibles du contrat de garantie ou de l'ordonnance du tribunal portant nomination du séquestre, de même que sur les dispositions incompatibles de toute autre ordonnance rendue par le même tribunal.

1992, ch. 27, art. 89.

**Protection du séquestre**

**251** Le séquestre est à l'abri de toute poursuite pour le préjudice ou les pertes résultant de l'envoi ou de la

# MANITOBA

## THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

## LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

As of 17 Nov. 2023, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 17 nov. 2023. Son contenu était à jour pendant la période indiquée en bas de page.

## PART XIII

## PUBLIC ACCESS

**Hearings open to public**
**76(1)** Subject to subsection (2) or unless otherwise provided by statute or the rules, a hearing held by the court or a judge is open to the public.

**Exception**
**76(2)** The court may by order exclude the public from a hearing where the possibility of serious harm or injustice to a person justifies a departure from the general principle that hearings of the court are open to the public.

**Disclosure of what transpires**
**76(3)** Where the public is excluded from a hearing, disclosure of information relating to the hearing, including disclosure of what transpires in the hearing, is not contempt of court unless the court expressly prohibits such disclosure.

**Sealing confidential documents**
**77(1)** The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

**Documents public**
**77(2)** Upon payment of the prescribed fee, if any, a person may see

(a) a list of the proceedings in the court, or

(b) a document that is filed in a proceeding,

unless otherwise provided by statute, by the rules or by an order.

## PARTIE XIII

## DROIT D'ACCÈS DU PUBLIC

**Audiences publiques**
**76(1)** Sauf disposition contraire d'une loi ou des règles ou sous réserve du paragraphe (2), une audience que tient le tribunal ou un juge est publique.

**Exception**
**76(2)** Le tribunal peut, par ordonnance, tenir une audience à huis clos si la possibilité d'un préjudice ou d'une injustice grave à l'endroit d'une personne justifie une dérogation au principe général d'accès du public aux audiences de la Cour.

**Divulgation de renseignements**
**76(3)** Si une audience est tenue à huis clos, la divulgation de renseignements relatifs à l'audience, y compris la divulgation de faits qui se produisent durant l'audience, ne constitue pas un outrage au tribunal sauf si le tribunal interdit expressément une telle divulgation.

**Documents confidentiels**
**77(1)** Le tribunal peut ordonner qu'un document déposé dans le cadre d'une instance civile soit confidentiel, soit fermé et ne fasse pas partie du dossier public de l'instance.

**Droit d'accès à certains documents**
**77(2)** Sauf disposition contraire d'une loi, des règles ou d'une ordonnance et sur paiement, le cas échéant, du droit prescrit, une personne peut avoir accès :

a) soit à une liste des instances dont le tribunal est saisi;

b) soit à un document déposé dans le cadre d'une instance.

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

# In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

**The Motion**

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

**Background**

 

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

**The Stalking Horse Agreement**

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

 

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

**The SISP**

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

 

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

*Brainhunter Inc., Re*, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

  

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

 

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

**The Break Fee**

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

 

45 I find the break fee to be reasonable and appropriate in the circumstances.

**Financial Advisor Success Fee and Charge**

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

*Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

**Administration Charge**

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

 

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

**D&O Charge**

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

 

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

**Key Employee Retention Plan and Charge**

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re* ***supra.***

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

> (a) whether the court appointed officer supports the retention plan;
>
> (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
>
> (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;
>
> (d) whether the quantum of the proposed retention payments is reasonable; and
>
> (e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Grant Forest Products Inc., Re*, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

  

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

**Sealing Order**

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

 

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

*Order accordingly.*

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

# In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

Subject: Insolvency

APPLICATION by monitor for approval of reports and activities set out in reports.

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future

 

be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
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> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
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> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
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> (f) protects creditors from the delay in distribution that would be caused by:
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> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

 

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
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> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
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> . . . . .
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> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
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> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
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> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
> >
> > . . . . .
> >
> > 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

  

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

  

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

*Application granted in part.*

2023 ONSC 3400
Ontario Superior Court of Justice [Commercial List]

Triple-I Capital Partners Limited v. 12411300 Canada Inc.

2023 CarswellOnt 8707, 2023 ONSC 3400

# APPLICATION UNDER Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Triple-I Capital Partners Limited (Applicant) and 12411300 Canada Inc. (Respondent / Debtor)

Peter J. Osborne J.

Heard: June 6, 2023
Judgment: June 6, 2023
Docket: CV-22-00684372-00CL

Counsel: Kevin Sherkin, Monica Faheim, Hans Rizarri, for Receiver, Crow Soberman Inc.
Avi Freedland, for Respondent / Debtor

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

***Peter J. Osborne J.*:**

1 Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.

2 The Respondent, 12411300 Canada Inc. (the "Debtor"), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the "Applicant"), nor the Second Mortgagees (defined below) appeared.

**Chronology of This Matter**

3 The Applicant advanced to the Debtor $6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.

4 The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the "Receivership Order"). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.$^2$.

5 As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of $6,865,154 plus additional interest and accrued expenses.

6 Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed $2 million, although on October 10 the Debtor made a payment to them in the amount of $410,000, with the result that the principal amount owing to them was in the amount of $1,590,000. There were no other significant creditors.

7 After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.

8 The Receiver then brought a motion for approval of a sales process.

9 Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.

10 On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.

11 That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.

12 On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.

13 On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.

14 That same day, funds in the amount of $6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.

15 The payment was made in two tranches given the dispute that underlies this motion. The first tranche of $6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of $396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

**Should the Fees of the Receiver and its Counsel be Approved?**

***Material Filed and Positions of the Parties***

16 The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.

17 The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

18 Today, the Receiver seeks approval of fees of $106,722.25 plus disbursements of $32,851.56 and HST in the amount of $17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of $91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to $247,953.15.

19 The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.

20 The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.

21 The Respondent submits that this Court ought to approve 50 percent of total fees ($53,361.13 instead of $106,722.25) and 80 percent of disbursements ($26,281.25 instead of $32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent ($45,507.47

 

instead of $91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to $125,149.85.

22 The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

***The Test***

23 The factors to be considered have been sent out by the Court of Appeal for Ontario: Bank of Nova Scotia v. Diemer, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:

a. the nature, extent and value of the assets;

b. the complications and difficulties encountered;

c. the degree of assistance provided by the debtor;

d. the time spent;

e. the receiver's knowledge, experience and skill;

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

h. the results of the receiver's efforts; and

i. the cost of comparable services when performed in a prudent and economical manner.

24 The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer* , at para. 33, citing with approval Confectionately Yours Inc., Re(2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.

25 The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.

26 While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer* , at para. 45).

***Application of the Test to This Case***

27 In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.

28 The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.

29 The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the

  

first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.

30 The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31 The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.

32 The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.

33 The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.

34 Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.

35 At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.

36 The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.

37 The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38 As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.

39 The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional

 

(lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed $5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.

40 The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.

41 The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.

42 Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.

43 In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.

44 The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45 The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46 The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or "workdays" when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).

47 Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver's work over that period of time [late July and early August, see para. 18 of the Debtor's factum] "brought no value to the Corporation or its creditors, including the Second Mortgagees". I cannot give any weight to this submission based on that evidence.

48 The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.

49 The Debtor made vigourous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.

50 The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

> Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.
>
> The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51 The source for this submission is the lawyer's own affidavit at paragraphs 29 - 32 (CaseLines B-1-17).

52 The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of .... the work .....".

53 In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54 Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.

55 Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately $248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately $6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately $125,000.

56 Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.

57 Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigourously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.

58 I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59 The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued

  

and repeated pleas, effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60 In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.

61 As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.

62 The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.

63 As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.

64 The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of $247,953.15.

**Approval of the Third Report and Activities**

65 While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in Target Canada Co. (Re), 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66 The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67 The Third Report and the activities described in it are approved.

**Costs**

68 Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of $18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of $10,719.18 on the same basis.

69 Section 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70 Having considered the factors set out in r. 57.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is $12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.

71 Order to go in accordance with these reasons.

End of Document

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [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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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

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

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

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

 

## I. Overview

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

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

  

## II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

## III. Proceedings Below

### *A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore

  

concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

### *B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1* (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

### *C. Subsequent Proceedings*

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

## IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

  