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| COURT FILE NUMBER | **25-3009380** B301-009380 |
| COURT | COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3 AS AMENDED |
| | AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD. |
| APPLICANTS | ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD. |
| DOCUMENT | **BENCH BRIEF OF THE APPLICANTS: APPROVAL OF SETTLEMENT AGREEMENT & BACKUP BID** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **Fasken Martineau DuMoulin LLP**<br>Attn: Robyn Gurofsky / Jessica Cameron<br>3400 First Canadian Centre<br>350-7 Avenue SW<br>Calgary, AB T2P 3N9<br>Telephone: (403) 261-9469/261-9468<br>Facsimile: (403) 261-5351<br>Email: rgurofsky@fasken.com / jcameron@fasken.com<br><br>File No. 318938.00024 |

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## I. INTRODUCTION:

1. This Bench Brief is submitted by the Applicants in support of their Application for an order which, among other things: i) approves the settlement agreement between the Applicants and JMAC Energy Services LLC ("**JMAC**") dated March 28, 2024 (the "**Settlement Agreement**"), and ii) approves the JMAC Backup Bid (as defined below).

2. The Settlement Agreement represents a fair and reasonable compromise as between the Companies and JMAC, which fully and finally resolves the dispute regarding JMAC's assertion of a right of first refusal ("**ROFR**") and the applicability of such ROFR to the Companies' proposed $29.2 million Transaction with Badger Mining Corporation ("**Badger**"). The Settlement Agreement also resolves any dispute regarding JMAC's willingness to honour its Backup Bid at a value of $29.1 million, versus JMAC's prior assertions that it should be allowed to exercise its ROFR at a purchase price of $13.1 million.

3. The Settlement Agreement is critical to the success of the Companies' Proposal Proceedings, as it will allow the Companies to proceed to closing either the Badger Transaction or the JMAC Backup Bid. Under either scenario, even after the Settlement Amount is paid, the Companies expect that the proceeds from closing will allow all creditors to be paid in full and provide distributions to AMI shareholders. As such, the Settlement Agreement will maximize realizations for all of the Companies' creditors, shareholders, and other stakeholders. It is therefore necessary and appropriate to approve the Settlement Agreement in the circumstances.

4. As part and parcel of the Settlement Agreement, the Companies also seek approval of the "**JMAC Backup Bid**" which is comprised of: i) a transaction for the sale of all shares of AMI to JMAC Resources Ltd. ("**JMAC Resources**" and the "**JMAC Share Transaction**") pursuant to the Subscription Agreement between the Companies and JMAC Resources dated March 28, 2024 (the "**JMAC Subscription Agreement**"), and ii) a transaction for the sale of the Membership Units held by AMI in AMIS LLC (the "**AMIS Unit Sale**") pursuant to the Membership Interest Purchase Agreement between AMI and JMAC dated March 28, 2024 (the "**Purchase Agreement**").

5. As with the Badger Transaction, the JMAC Subscription Agreement is to be consummated by way of a reverse vesting order ("**RVO**"), for which the Companies also seek approval on this Application. In order for the JMAC Backup Bid to proceed, the conditions to closing the JMAC Subscription Agreement must be satisfied, namely the Badger Transaction does not close on or before April 30, 2024.

6. The Companies are seeking approval of the JMAC Backup Bid concurrent with the Badger Transaction in order to avoid the costs and delays associated with bringing a further Application seeking approval of same, which delays could prove fatal to the Companies and their stakeholders considering that the Companies stay of proceedings can only be extended to May 13, 2024 (following which they will automatically be deemed to be bankrupt).

7. The Applicants are supported on this Application by the Proposal Trustee and JMAC (including JMAC Resources).[1]

## II. Facts

8. The facts in support of this Application are set out primarily in three affidavits sworn by Mr. Churchill, AMI's CFO, the most recent of which is Affidavit No. 5 of John David Churchill, sworn April 8, 2024 (the "**Fifth Churchill Affidavit**"). All capitalized terms used but not otherwise defined herein have the meanings given to them in the Fifth Churchill Affidavit.

9. On November 13, 2023, each of the Companies filed a notice of intention to make a proposal to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**")[2] with the Office of the Superintendent of Bankruptcy (collectively, the "**Proposal Proceedings**"). KSV Restructuring Inc. was appointed as the Proposal Trustee.[3]

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[1] Affidavit No. of John David Churchill, sworn April 8, 2024 (the "**Fifth Churchill Affidavit**") at para 6.

[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [BIA] [**TAB 1**].

[3] Fifth Churchill Affidavit at para 7.

10. Subsequently, on December 12, 2023, the Companies obtained an order from this Court, which amongst other things, approved a stalking horse sales and investment solicitation process ("**SISP**") with JMAC acting as the stalking horse bidder.[4]

11. The procedural history regarding the conduct of the SISP, including the holding and conducting of the Auction by the Proposal Trustee is set out at paragraphs 7 to 22 of the Applicants' legal brief previously filed on February 27, 2024 in support of the Transaction Approval Motion (the "**Prior RVO Brief**").

12. Following the conclusion of the Auction, the Companies and Badger, with the support of the Proposal Trustee, worked to finalize the Badger Subscription Agreement, which is to be implemented by way of an RVO. The Companies originally set down the Transaction Approval Motion returnable March 8, 2024, for approval of the Badger Subscription Agreement and RVO.

13. JMAC, the Companies' first secured creditor, 20% shareholder in AMI, and 50% partner in AMIS LLC, opposed the Transaction Approval Motion asserting that it had the right to exercise a ROFR contained in Section 11.02 of the LLC Operating Agreement respecting the Badger Transaction at a purchase price of $13.1 million.[5]

14. JMAC's opposition was twofold. First, JMAC commenced a civil complaint against AMI in the US District Court for North Dakota alleging, among other things, breach of contract and seeking various forms of injunctive relief. JMAC subsequently brought a motion for a temporary restraining order against AMI to prevent the Companies from proceeding with the approval of the Transaction in Canada (collectively, the "**US Proceedings**"). Second, JMAC filed a cross-application with this Court seeking various relief, including i) a stay of the Transaction Approval Motion, and ii) to lift the stay of proceedings to allow JMAC to continue the US Proceedings (the "**Cross-Application**").[6]

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[4] Fifth Churchill Affidavit at para 8.

[5] Fifth Churchill Affidavit at paras 9 and 12.

[6] Fifth Churchill Affidavit at paras 13 and 14.

15. On March 8, 2024, this Court granted orders approving, *inter alia*, a litigation schedule respecting the Transaction Approval Motion and the Cross-Application.[7]

16. Following several discussions between the parties, the Companies and JMAC have entered into the Settlement Agreement to resolve the dispute in regard to the applicability of the ROFR to the Transaction.[8]

17. As part of the terms of that Settlement Agreement, JMAC has also agreed to honour its Backup Bid submitted at the Auction at the purchase price of $29.1 million. The key terms of the JMAC Backup Bid are set out in detail at paragraphs 24 to 26 of the Fifth Churchill Affidavit.[9]

18. Other key terms of the Settlement Agreement include that:

    (a) The Settlement Amount will be paid from the sale proceeds upon closing of either: i) the Transaction with Badger, or ii) the JMAC Backup Bid;

    (b) In return for the Settlement Amount, JMAC will:

        (i) support the Companies' Transaction Approval Motion, including approval of the Settlement Agreement and the JMAC Backup Bid;

        (ii) take no further steps in the US Proceedings, and upon the conditions precedent to the Settlement Agreement having occurred, withdraw its motion for injunctive relief, and dismiss its existing claims against Athabasca Minerals Inc., with prejudice in the US Proceedings, all on a without costs basis; and

        (iii) fully and finally release the Companies and their successors in interest from any claims or assertions that, among other things, the ROFR was triggered with respect to the Transaction; and

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[7] Fifth Churchill Affidavit at para 15.

[8] Fifth Churchill Affidavit at para 16.

[9] Fifth Churchill Affidavit at para 21(d).

(c) It is conditional upon, among other things, Court approval of: i) the Settlement Agreement, ii) the Transaction and/or iii) the JMAC Backup Bid.[10]

19. The Companies negotiated and entered into the Settlement Agreement with JMAC, and kept the Proposal Trustee apprised of such negotiations. The Proposal Trustee is supportive of the Settlement Agreement, and will be filing a further report to this Court outlining their reasons for such support.[11]

20. In the event the Companies proceed to closing either transaction, the Companies are seeking authorization for the Proposal Trustee to make certain priority payments on their behalf, as more particularly discussed below.

## III. ISSUES:

21. The issues to be considered on this Application are:

(a) Should the Settlement Agreement be approved?

(b) Should the JMAC Backup Bid be approved?

(c) Should the priority payments be authorized?

(d) Should the Stay Extension be granted?

(e) Should the Settlement Agreement be sealed?

[10] Fifth Churchill Affidavit at para 18.

[11] Fifth Churchill Affidavit at para 22.

## IV. LAW & ARGUMENT:

### a. The Court Should Approve the Settlement Agreement

22. Canadian courts routinely approve settlements reached by a debtor company in insolvency proceedings[12], including in the context of proposal proceedings under the BIA.[13] Courts may rely on their inherent and equitable jurisdiction contained in section 183(1) of the BIA to approve such settlements in the context of Proposal Proceedings.[14] While discussed in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, the courts may approve such settlements during the stay of proceedings.[15]

23. The following three factors, developed in the context of CCAA proceedings, are to be considered by the courts when determining whether to approve a settlement:

(a) whether the settlement is fair and reasonable;

(b) whether the settlement provides substantial benefits to other stakeholders; and

(c) whether the settlement is consistent with the purpose and spirit of insolvency legislation.[16]

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[12] *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at para 22 [*Robertson*] [**TAB 2**] citing to *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3rd) 24 [**TAB 3**].

[13] Order of the Honourable Justice PR Jeffrey dated April 24, 2020, *In The Matter of Tartan Completion Systems Inc.*, Alberta Court of King's Bench Action No. 25-2618433, paras 3-4 [**TAB 4**]; Order of the Honourable Registrar Bergbrusch, dated April 14, 2023, *In The Matter of Tron Construction & Mining Inc. and Tron Construction & Mining Limited Partnership*, Saskatchewan Court of Queen's Bench Action No. 23-2828728, paras 3-4 [**TAB 5**]; Order of the Honourable Justice Gilmore, granted May 24, 2022, *In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc of the City of Toronto, In the Province of Ontario*, Ontario Superior Court of Justice (Commercial List) in Bankruptcy and Insolvency Court File No. BK-21-02734090-0031, para 2 [**TAB 6**]; Order of the Honourable C Tremblay, granted December 18, 2018, *In the Matter of the Notice of Intention to Make a Proposal of 2964-3277 Québec Inc*, Quebec Superior Court (Commercial Division) No. 500-11-0556929-188, paras 2-3 [**TAB 7**].

[14] BIA, *supra* at s 183 [**TAB 1**].

[15] *Robertson*, *supra* at para 22 [**TAB 2**]; *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504 at para 71 [*Calpine*] [**TAB 8**]; *Air Canada (Re)*, 2004 CanLII 11700 (ONSC), 47 CBR (4th) 169 [*Air Canada*] [**TAB 9**].

[16] *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 at para 49 [**TAB 10**]; *Robertson*, *supra* at para 22 [**TAB 2**]; *Calpine*, *supra* at para 59 [**TAB 8**]; *Air Canada*, *supra* at para 9 [**TAB 9**].

24. The Companies have met the above factors in support of approval of the Settlement Agreement as:

(a) the Settlement Agreement allows the Companies and JMAC to avoid incurring further costs from continuing lengthy and uncertain litigation in both Canada and the US;[17]

(b) the Settlement Agreement will provide a full and final resolution to the parties dispute in regard to JMAC's asserted ROFR, which will allow the Companies to proceed with the Transaction Approval Motion. The Transaction is the Companies' best option to maximize value for their stakeholders given the Companies anticipate that the proceeds from the Transaction will be sufficient to repay creditors in full and provide distributions to shareholders;[18]

(c) any other claims that JMAC may have in the Companies' estate as a creditor or as a shareholder in AMI will not be prejudiced by the Settlement Agreement;[19] and

(d) in the unlikely event that the Badger Transaction fails to close, the Settlement Agreement also resolves the issue of JMAC acting as the Backup Bidder at the full value of its Backup bid of $29.1 million, which was also previously in dispute.[20]

25. The Settlement Agreement is critical to the success of the Companies' Proposal Proceedings, as it will allow the Companies to either proceed to closing the Badger Transaction, or proceed to closing the JMAC Backup Bid. Under either scenario, even after the Settlement Amount is paid, the Companies expect that the proceeds from closing either transaction will allow all creditors to be paid in full and provide for distributions to AMI shareholders.[21] As such, the Settlement Agreement will maximize realizations for all of the Companies' creditors, shareholders, and other stakeholders, consistent with the spirit and

[17] Fifth Churchill Affidavit at para 21.
[18] Fifth Churchill Affidavit at paras 19, 21.
[19] Fifth Churchill Affidavit at para 21.
[20] Fifth Churchill Affidavit at para 21.
[21] Fifth Churchill Affidavit at paras 19, 21, and 43.

intention of the within Proposal Proceedings. It is therefore necessary and appropriate to approve the Settlement Agreement in the circumstances.

**b. The JMAC Backup Bid Should be Approved**

26. Canadian courts have previously approved backup bids at the same time approval of a primary transaction is sought in insolvency proceedings, including where a stalking horse bid process is utilized.[22] Approval of the backup bid in tandem with the primary transaction allows the debtor company to take all necessary steps to close the backup transaction, but only in the event that the primary transaction does not close for whatever reason.[23]

27. The JMAC Backup Bid, which resulted both from the conclusion of the Court-approved SISP and the Settlement Agreement, largely mirrors the proposed Badger Transaction, with the notable exception that it is contemplated to be implemented by way of two transactions, rather than one. As such, the Applicants intend to rely upon the law and authorities supporting transaction approvals, the granting of RVOs, treatment of ResidualCo corporate matters and the First Director, and third party releases, as previously set forth in the Prior RVO Brief at paragraphs 32 to 73.

28. To summarize the *Harte Gold* factors with respect to approval of the JMAC Subscription Agreement, the Applicants submit that the JMAC RVO should be approved for all of the same reasons that the RVO respecting the Badger Transaction should be approved. Namely, that:

    (a) the JMAC RVO is necessary in the circumstances to preserve the Applicants' Land Agreements, Licenses, Mineral Claims and Permits in order to continue its operations in the regulated aggregates and industrial minerals industry. This includes the preservation of certain Mineral Claims held by AMI in the Montney

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[22] Order of the Honourable Justice Osborne, granted August 29, 2023, *In the Matter of Plan of Compromise or Arrangement of Fire & Flower Holdings Corp et al*, Ontario Superior Court of Justice (Commercial List) Court File No. CV-23-00700581-00CL, paras 5-6 [*Fire & Flower Order*] [**TAB 11**]; Order of the Honourable Justice Hainey, granted January 28, 2020*, In the Matter of a Plan of Compromise or Arrangement of Clover Leaf Holdings Company et al*, Ontario Superior Court of Justice Commercial List Court File No. CV-19-631523-00CL, para 11 [*Clover Leaf Order*] [**TAB 12**].

[23] *Fire & Flower Order*, *supra* at para 5 [**TAB 11**]; *Clover Leaf Order*, *supra* at para 11 [**TAB 12**].

region of British Columbia, which region is currently subject to a moratorium on new mineral claims being granted put in place by the Government of British Columbia. It also includes preserving option to purchase agreements regarding five of AMI's Land Agreements respecting its Prosvita Sand Project interest. The Companies also have approximately $18.3 million in tax attributes which cannot otherwise be transferred to a purchaser through a traditional asset sale and would be preserved under an RVO structure;[24]

(b) the JMAC Share Transaction will preserve some employment opportunities as JMAC previously indicated that they would make offers of employment to at least five of the Companies' nine employees;[25]

(c) the JMAC RVO produces an economic result at least as favourable as any other viable alternative. In fact, both transactions before the Court contemplate the use of an RVO structure, and as such, the use of an RVO in this case is going to produce a more favourable economic result for the Companies' stakeholders. With the Companies' six month time period to approve a proposal with their creditors expiring on May 13th, 2024, there is insufficient time to pursue any other option. Converting the proceedings to a CCAA in order to pursue a plan of arrangement would simply create unnecessary costs and delay. As such, if the RVO transactions are not approved, the Companies will either: i) be forced to incur further expenses and delay in order to pursue a plan of arrangement under the CCAA, or ii) automatically be deemed to be bankrupt and their assets liquidated. In either case, they are at risk of losing not one, but two, transactions in excess of $29 million;[26]

(d) no stakeholders are worse off under the JMAC RVO than they would be under any other viable alternative, particularly as the expected realization respecting the Aggregate Purchase Price, even after the Settlement Amount is paid, will be sufficient to pay all of the Companies' creditors in full. The Companies are also

[24] Fifth Churchill Affidavit at paras 27-29.
[25] Fifth Churchill Affidavit at para 30.
[26] Fifth Churchill Affidavit at para 31.

still estimating returns to existing AMI shareholders in the range of $0.15 to $0.19 cents per common share;[27] and, finally

(e) the consideration being paid reflects the importance and value of the Land Agreements, Licenses, Mineral Claims, Permits, and Tax Attributes being preserved by the RVO structure. This is especially so considering that the Auction resulted in two transactions that both doubled the initial Stalking Horse purchase price.[28]

29. As with the Badger RVO, the Applicant respectfully submits that the JMAC RVO should be granted, particularly where the Companies operate in a highly regulated environment, creditors are expected to be paid out in full, and the Companies' shareholders are anticipated to receive distributions as a result of the JMAC Backup Bid.[29]

30. Another key component of the JMAC Backup Bid is of course the Purchase Agreement respecting the AMIS Unit Sale. The Purchase Agreement is conditional upon approval of the RVO respecting the JMAC Subscription Agreement, and is part and parcel of the overall JMAC Backup Bid.[30] The Aggregate Purchase Price payable under the JMAC Backup Bid is allocated as between these two agreements.[31]

31. As the Purchase Agreement also emanated from the Court-approved SISP, was confirmed pursuant to the Settlement Agreement, and is an integral component of the overall JMAC Backup Bid, the Applicants submit that it should also be approved by this Court.

**c. The Priority Distributions Should be Approved**

32. Subject to the Companies closing either the proposed Badger Transaction or the JMAC Backup Bid, the Companies will be obligated to pay certain Court-ordered priority charges.

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[27] Fifth Churchill Affidavit at paras 19, 31.
[28] Fifth Churchill Affidavit at paras 10-11.
[29] Fifth Churchill Affidavit at para 31.
[30] Fifth Churchill Affidavit at para 26(c).
[31] Fifth Churchill Affidavit at para 24.

Following payment of the Settlement Amount, the Companies are seeking authorization for the Proposal Trustee to remit on their behalf the following payments:

(a) **Administration Charge** – The outstanding reasonable fees and disbursements of the Proposal Trustee, the Proposal Trustee's counsel, and the Companies' counsel, in each case, incurred at their standard rates and charges, which priority payment shall collectively not exceed $350,000, being the quantum of the Administration Charge previously approved by this Court on December 12, 2023. The forms of order sought by the Companies contemplate that the Administration Charge would not otherwise be released or discharged at this time, and would continue to attach to ResidualCo and the Transferred Assets to secure payment of the ongoing professional fees that might be incurred by the Proposal Trustee, the Proposal Trustee's counsel, or the Companies' counsel;[32]

(b) **Interim Lender's Charge** –

(i) In the event the Companies proceed to close the Badger Transaction, it is contemplated that Badger would credit bid the amount owed to it by the Companies pursuant to the Interim Financing Facility as part of its purchase price. As such, the form of RVO sought respecting the Badger Transaction contemplates this credit bid, and subsequent release and discharge of the Interim Lender's Charge[33];

(ii) Otherwise, if the Companies close the JMAC Backup Bid, they are seeking approval of for the Proposal Trustee to remit on their behalf the outstanding indebtedness, interest, fees, liabilities, and obligations owed by the Companies to the Interim Lender pursuant to the Interim Financing Agreement between the Companies and Badger Mining Corporation dated March 4, 2024, which priority payment shall not exceed $5,300,000, being the quantum of the Interim Lender's Charge. The total anticipated priority

[32] Fifth Churchill Affidavit at para 35(a).

[33] Fifth Churchill Affidavit at para 35(b)(i).

payment to the Interim Lender is estimated to be $3.685 million. Upon payment of such amounts, the form of JMAC RVO sought by the Companies contemplates that the Interim Lender's Charge would be released and discharged as against ResidualCo and the Transferred Assets;[34]

(c) **Sale's Advisor Charge** – The outstanding obligations owing by the Companies to the Sales Advisor pursuant to the Engagement Letter between the parties dated December 5, 2023 and previously attached to the First Churchill Affidavit as Confidential Exhibit "1", which priority payment shall not exceed $450,000, being the quantum of the Sale's Advisor Charge. Pursuant to the terms of the Engagement Letter, the Sales Advisor is entitled to be paid a restructuring transaction fee upon the consummation of a transaction in the within Proposal Proceedings. The forms of order sought by the Companies contemplate that upon payment of such amount the Sale's Advisor Charge shall be released and discharged as against ResidualCo and the Transferred Assets;[35] and

(d) **KERP Charge** – The outstanding obligations owing by the Companies in accordance with the terms set forth in the Companies' key employee retention plan, which priority payment shall not exceed $260,000, being the quantum of the KERP Charge. Pursuant to the terms of the KERP, such payments are payable upon, amongst other things, the closing of a Transaction in the within Proposal Proceedings. The forms of order sought by the Companies contemplate that upon payment of such amounts the KERP Charge shall be released and discharged as against ResidualCo and the Transferred Assets.[36]

33. All of the contemplated priority payments are subject to Court-ordered priority charges granted by the First Order. As the proceeds of sale under either transaction are contemplated to be paid to the Proposal Trustee on behalf of and for the benefit of the Companies, it is possible that the Companies will not have sufficient cash on hand to satisfy

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[34] Fifth Churchill Affidavit at para 35(b)(ii).

[35] Fifth Churchill Affidavit at para 35(c). See also the Affidavit of John David Churchill, sworn December 6, 2023 (the "**First Churchill Affidavit**"), Confidential Exhibit "1".

[36] Fifth Churchill Affidavit at para 35(d). See also the First Churchill Affidavit, Confidential Exhibit "4".

the professional fees associated with closing a transaction.[37] As these fees are secured by the Administration Charge it is reasonable to authorize such payment.

34. Further, all obligations owed by the Companies to Badger under the Interim Financing Facility will become due and owing on the Maturity Date of April 30th, 2024, again necessitating their prompt payment to avoid any additional interest or fees charged thereunder.[38]

35. Lastly, each of the Sales Advisor and the beneficiaries under the KERP are entitled to be paid upon the closing of a transaction respecting the Companies.[39] As such, these payments are also justified in the circumstances.

36. The Companies are otherwise seeking to discharge the Directors' Charge, as no obligations have become due and owing by the Directors during the pendency of these Proposal Proceedings that would be secured by that charge.[40]

**d. The Stay Extension Should be Granted**

37. The Companies filed notices under the BIA on November 13, 2023. This Court subsequently granted three extensions of the Stay Period, with the current Stay Period extended up to and including April 22, 2024.

38. Section 50.4(8) of the BIA requires the Companies to file a proposal with the official receiver within 30 days of the initial filing date (the "**Proposal Period**"), unless they otherwise obtain an extension of time from the Court.[41] Any extension or further extensions of the Proposal Period may not exceed, in aggregate, five months after the expiry of the initial 30 day Proposal Period.[42] The Companies currently seek a further Stay Extension, which in aggregate with the Stay Extensions granted to date will be the last stay extension

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[37] Fifth Churchill Affidavit at para 36.
[38] Fifth Churchill Affidavit at para 37.
[39] Fifth Churchill Affidavit at para 38.
[40] Fifth Churchill Affidavit at para 39.
[41] BIA, *supra* s 50.4(8) [**TAB 1**].
[42] BIA, *supra* s 50.4(9) [**TAB 1**].

the Companies are permitted to obtain, taking them to the end of their time limitation to file a proposal.

39. Section 50.4(9) of the BIA provides that, before the expiry of the Proposal Period, a debtor in Proposal Proceedings may apply to the Court for an order extending the time within which it may file a proposal by a maximum of 45 days. The section further provides that for a Court to grant such an extension, it must be satisfied that:

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

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

(c) no creditor would be materially prejudiced if the extension being applied for were granted.[43]

40. To close the Transaction for the benefit of all of their creditors and stakeholders, the Applicants are seeking a 24 day stay extension from the current deadline of April 22, 2024, up to and including May 13, 2024.

41. The Applicants submit that they have satisfied the statutory prerequisites for the Stay Extension, and that it is reasonable and appropriate to grant the extension in the circumstances, as:

(a) since the commencement of these Proposal Proceedings, the Applicants have been acting, and are acting, in good faith and with due diligence to advance a viable restructuring.[44] Since their filings, the Applicants have, amongst other things,

(i) entered into an initial and replacement Interim Financing Facility;

(ii) negotiated the Stalking Horse Term Sheet;

(iii) developed the KERP;

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[43] BIA, *supra* s 50.4(9) **[TAB 1]**.

[44] Fifth Churchill Affidavit at para 40.

(iv) carried out and concluded the SISP resulting in both the Badger Transaction and the JMAC Backup Bid; and

(v) executed the Settlement Agreement,

all in consultation with the Proposal Trustee;

(b) the requested extension will not materially prejudice any creditor, and the Applicants' Cash Flow Forecast indicates that all post-filing operational expenses, with one exception, will be paid. That exception is that certain royalty payments in relation to the Prosvita sand project are being deferred until the closing of either the Badger Transaction or the JMAC Backup Bid (with both agreements specifying these amounts as cure costs thereunder);[45] and

(c) the requested extension will provide the Applicants with the additional time they require to further advance their restructuring efforts by closing either the Transaction or the JMAC Backup Bid, as the case may be, and increasing the likelihood that value will be maximized for all stakeholders. The additional time will allow the Applicants to implement and close either transaction.[46]

42. For those reasons, the Applicants submit that this Court should grant the requested Stay Extension.

**e. The Confidential Exhibit Should be Sealed**

43. Pursuant to Part 6, Division 4, of the *Alberta Rules of Court*, AR 124/2010, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.[47]

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[45] Fifth Churchill Affidavit at paras 41-42, Exhibit "A", Schedule "D": Cure Costs, and Exhibit "E". See also the Third Churchill Affidavit at Exhibit "K", s 6.12, and Schedule "C": Cure Costs.

[46] Fifth Churchill Affidavit at para 43.

[47] *Alberta Rules of Court*, Part 6, Division 4, AR 124/2010 [**TAB 13**].

44. The test to determine whether a sealing order is appropriate is set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* and reaffirmed by the same in *Sherman Estate v Donovan* as follows:

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

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

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[48]

45. In each of *Sierra Club* and *Sherman Estate*, the Supreme Court of Canada explicitly recognized that preserving confidential information that if otherwise disclosed could adversely harm a party's legitimate commercial interests, constituted an "important public interest" for the purposes of the above test.[49]

46. The rearticulated test for a sealing order from *Sherman Estate* has recently been applied in the insolvency context by Morawetz C.J. in the matter of *Bridging Finance*, where he directed that certain confidential and commercially sensitive documents appended to a receiver's report be sealed.[50]

47. Canadian courts have specifically commented on the importance of keeping settlement discussions and agreements confidential in order to promote settlement negotiations between parties involved in insolvency proceedings, and have granted sealing orders over such information as a result.[51] Justice Kimmel expands on the importance of maintaining confidentiality in regard to settlements in *Royal Bank of Canada v Distinct Infrastructure*

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[48] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*] [**TAB 14**]; *Sherman Estate v Donovan*, 2021 SCC 25 at paras 37-38 [*Sherman Estate*] [**TAB 15**].

[49] *Sierra Club*, *supra* at paras 55, 60-61 [**TAB 14**]; *Sherman Estate*, *supra* at para 41 [**TAB 15**].

[50] *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347 at paras 23-24 [**TAB 16**].

[51] Order of the Honourable Justice Kimmel, granted July 5, 2022, *Royal Bank of Canada v Distinct Infrastructure Group Inc et al*, Superior Court of Justice Court File No. CV-19-615270-00CL, at para 6 [**TAB 17**]; Order of the Honourable Justice McEwen, granted June 28, 2023, *In the Matter of the Plan of Compromise or Arrangement of Bondfield Construction Company Limited et al*, Ontario Superior Court of Justice Commercial List Court File No. CV-19-615560-00CL, at para 13 [**TAB 18**].

*Group Inc et al*, stating that the "public interest in promoting settlements and preserving commercially sensitive confidential information is clear and unassailable", particularly where a dispute involves multiple proceedings with multiple parties who are sophisticated commercial entities with ongoing business interests and dealings.[52] In such circumstances, preservation of this important public interest "outweighs any negative effects on the open court principle."[53] While in the context of CCAA proceedings, McEwen J similarly found that limited redactions to an approved settlement agreement were the only "reasonable means to protect" the important public interest of finding a resolution to significant litigation.[54]

48. Justice Sheehan in her reasons in the CCAA proceedings of Fortress Global Enterprises Inc. noted that settlement privilege protects both the discussions leading to a settlement and the settlement itself.[55] Further, settlement privilege is to be viewed as a "protective veil around the efforts parties make to settle their disputes" to ensure the same is inadmissible on the public record.[56]

49. The Confidential Exhibit contains settlement details and commercially sensitive information regarding the amount of the settlement payment by the Companies to JMAC. The Companies seek to limit the disclosure of such information to only this Court, the Proposal Trustee, JMAC, and Badger, given it could adversely impact the parties' future business dealings, specifically in relation to AMIS LLC, if revealed to the public. The Settlement Agreement expressly contemplated that it would be the subject of a Sealing Order.[57]

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[52] Endorsement of Justice Kimmel, July 5, 2022, *Royal Bank of Canada v Distinct Infrastructure Group Inc et al*, Superior Court of Justice Court File No. CV-19-615270-00CL, paras 13, 20, 24 [*RBC Endorsement*] [**TAB 19**].

[53] *RBC Endorsement*, *supra* at para 24 [**TAB 19**].

[54] Endorsement of Justice McEwen, June 28, 2023*, Bondfield Construction Company Limited, et al v The International Union of Operating Engineers, Local 793 et al*, Ontario Superior Court of Justice Court File No. CV-19-00615560-00CL, 3 [**TAB 20**].

[55] *In the Matter of The Companies' Creditors Arrangement Act, RSC 1985, c C-36 of Fortress Global Enterprises et al*, April 27, 2023, Quebec Superior Court (Commercial Division) No. 500-11-057679-199, at para 93 [*Fortress Global*] [**TAB 21**].

[56] *Fortress Global*, *supra* at para 93 [**TAB 21**] citing to *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, at paras 2, 18 [**TAB 22**].

[57] Fifth Churchill Affidavit at para 17.

50. Sealing Confidential Exhibit "1" is the least restrictive method available. The salutary effects of the sealing order, which are to protect the general commercial interest of maintaining confidentiality and commercially sensitive information and promoting settlement discussions, far outweigh the deleterious effects of restricting the accessibility of court proceedings.

51. The Applicants respectfully request that this Court seal the Confidential Exhibit to the Fifth Churchill Affidavit, which contains a copy of the Settlement Agreement.

## V. CONCLUSION:

52. Since commencing the within Proposal Proceedings, the Applicants have been acting in good faith and with due diligence to stabilize their business and pursue a restructuring in order to maximize value for all of their stakeholders, including shareholders.

53. Each of the Badger Transaction and the JMAC Backup Bid are the result of the Court-approved SISP, achieved after the conduct of the Auction by the Proposal Trustee where after 162 rounds of bidding, Badger was selected as the Winning Bidder with a purchase price in excess of $29.2 million and JMAC was declared the Backup Bidder with a purchase price of $29.1 million, each of which is more than double the initial Stalking Horse Bid of $13 million.

54. The Settlement Agreement, which will facilitate either the closing of the Badger Transaction or the JMAC Backup Bid, represents the highest and best price that could be achieved for the Companies' Business and assets, and is in the best interests of all of the Companies' stakeholders.

55. The relief requested by the Applicants is intended to facilitate the transactions, and is part and parcel of the Applicant's overall value maximization strategy. Accordingly, for the aforementioned reasons, the Applicants submit that it is necessary and appropriate in the given circumstances to grant the requested relief as set out in the proposed forms of order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF APRIL, 2024.**

**FASKEN MARTINEAU DUMOULIN LLP**

Per: _____

R. Gurofsky/J. Cameron
Solicitors for the Applicants

## LIST OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
3. *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3rd) 24
4. Order of the Honourable Justice PR Jeffrey dated April 24, 2020, *In The Matter of Tartan Completion Systems Inc.*, Alberta Court of King's Bench Action No. 25-2618433
5. Order of the Honourable Registrar Bergbrusch dated April 14, 2023, *In The Matter of Tron Construction & Mining Inc. and Tron Construction & Mining Limited Partnership*, Saskatchewan Court of Queen's Bench Action No. 23-2828728
6. Order of the Honourable Justice Gilmore, granted May 24, 2022, *In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc of the City of Toronto, In the Province of Ontario*, Ontario Superior Court of Justice (Commercial List) in Bankruptcy and Insolvency Court File No. BK-21-02734090-0031
7. Order of the Honourable C Tremblay, granted December 18, 2018, *In the Matter of the Notice of Intention to Make a Proposal of 2964-3277 Québec Inc*, Quebec Superior Court (Commercial Division) No. 500-11-0556929-188
8. *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504
9. *Air Canada (Re)*, 2004 CanLII 11700 (ONSC), 47 CBR (4th) 169
10. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078
11. Order of the Honourable Justice Osborne, granted August 29, 2023, *In the Matter of Plan of Compromise or Arrangement of Fire & Flower Holdings Corp et al*, Ontario Superior Court of Justice (Commercial List) Court File No. CV-23-00700581-00CL
12. Order of the Honourable Justice Hainey, granted January 28, 2020, *In the Matter of a Plan of Compromise or Arrangement of Clover Leaf Holdings Company et al*, Ontario Superior Court of Justice Commercial List Court File No. CV-19-631523-00CL
13. *Alberta Rules of Court*, Part 6, Division 4, AR 124/2010
14. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 4
15. *Sherman Estate v Donovan*, 2021 SCC 25
16. *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347

17. Order of the Honourable Justice Kimmel, granted July 5, 2022, *Royal Bank of Canada v Distinct Infrastructure Group Inc et al*, Superior Court of Justice Court File No. CV-19-615270-00CL

18. Order of the Honourable Justice McEwen, granted June 28, 2023, *In the Matter of the Plan of Compromise or Arrangement of Bondfield Construction Company Limited et al*, Ontario Superior Court of Justice Commercial List Court File No. CV-19-615560-00CL

19. Endorsement of Justice Kimmel, July 5, 2022, *Royal Bank of Canada v Distinct Infrastructure Group Inc et al*, Superior Court of Justice Court File No. CV-19-615270-00CL

20. Endorsement of Justice McEwen, June 28, 2023, *Bondfield Construction Company Limited, et al v The International Union of Operating Engineers, Local 793 et al*, Ontario Superior Court of Justice Court File No. CV-19-00615560-00CL, 3

21. In the Matter of The Companies' Creditors Arrangement Act, RSC 1985, c C-36 of *Fortress Global Enterprises et al*, April 27, 2023, Quebec Superior Court (Commercial Division) No. 500-11-057679-199

22. *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37

# TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Short Title

R.S.C. 1985, c. B-3, s. 1

# s 1. Short title

Currency

**1.Short title**
This Act may be cited as the *Bankruptcy and Insolvency Act*.

**Amendment History**
1992, c. 27, s. 2

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

**End of Document**

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

**50.4**

**50.4(1)Notice of intention**

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

**50.4(2)Certain things to be filed**

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

**50.4(3)Creditors may obtain statement**

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

**50.4(4)Exception**

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

**50.4(5)Trustee protected**

If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

**50.4(6)Trustee to notify creditors**
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

**50.4(7)Trustee to monitor and report**
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

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

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

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

**50.4(8)Where assignment deemed to have been made**
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

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

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

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

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

**50.4(9)Extension of time for filing proposal**
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

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

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

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

**50.4(10)Court may not extend time**
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

**50.4(11)Court may terminate period for making proposal**
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

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

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

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

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

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

**Amendment History**
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

**End of Document**

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

**183.**

**183(1)Courts vested with jurisdiction**

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

**183(1.1)Superior Court jurisdiction in the Province of Quebec**

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

**183(2)Courts of appeal — common law provinces**

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

**183(2.1)Court of Appeal of the Province of Quebec**

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

**183(3)Supreme Court of Canada**

The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

**Amendment History**

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

**Currency**

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

**End of Document**

# TAB 2

2011 ONSC 1647
Ontario Superior Court of Justice [Commercial List]

Robertson v. ProQuest Information & Learning Co.

2011 CarswellOnt 1770, 2011 ONSC 1647, [2011] O.J. No. 1160, 199 A.C.W.S. (3d) 757

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

HEATHER ROBERTSON (Plaintiff) and PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC. (Defendants)

Pepall J.

Judgment: March 15, 2011
Docket: 03-CV-252945CP, CV-10-8533-00CL

Counsel: Kirk Baert, for Plaintiff
Peter J. Osborne, Kate McGrann, for Canwest Publishing Inc.
Alex Cobb, for CCAA Applicants
Ashley Taylor, Maria Konyukhova, for Monitor

Subject: Civil Practice and Procedure; Insolvency

MOTION by representative plaintiff jounalist and defendant publishing company for approval of settlement of two actions.

***Pepall J.*:**

**Overview**

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

**Facts**

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:
>
> > (a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or
> >
> > (b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or
> >
> > (c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or
> >
> > (d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.
>
> Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.
>
> (Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)
>
> B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.
>
> (Persons included in clause B are hereinafter referred to as "Assignees")
>
> C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

> 1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
>
> 2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
>
> 3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
>
> 4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

> a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
>
> b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
>
> c) the action would be dismissed as against CPI;
>
> d) CPI did not admit liability; and
>
> e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic

media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the

settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

**Discussion**

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*" [1] :

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society*, *(Re:) Grace Canada Inc., Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

***(a) Approval***

*(i) CCAA Settlements in General*

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Lehndorff General Partner Ltd., Re*, [2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Calpine Canada Energy Ltd., Re* [3] ; *Air Canada, Re* [4] ; and *Playdium Entertainment Corp., Re*. [5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Air Canada, Re* [6] and *Calpine Canada Energy Ltd., Re*. [7]

*(ii) Class Proceedings Settlement*

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992 [8] . That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada* [9] .The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada* [10] :

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program v. Chevron Chemical Co.* [11]

*(iii) The Robertson Settlement*

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada Ltd.* [12]

.

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada Ltd.*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation. [13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

*Motion granted.*

Footnotes

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31 .

3 2007 ABQB 504 (Alta. Q.B.) at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A. [In Chambers]).

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

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, C.6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (Ont. S.C.J.) para. 20.

# TAB 3

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

# Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
*L. Crozier* , for Royal Bank of Canada.
*R.C. Heintzman* , for Bank of Montreal.
*J. Hodgson, Susan Lundy* and *James Hilton* , for Canada Trustco Mortgage Corporation.
*Jay Schwartz* , for Citibank Canada.
*Stephen Golick* , for Peat Marwick Thorne * Inc., proposed monitor.
*John Teolis* , for Fuji Bank Canada.
*Robert Thorton* , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey* ) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon* ) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine

whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a* ) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b* ) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c* ) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the

company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.) ). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.) ]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290 ] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained

> but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.) ] at pp. 4-7 [at pp. 308-310 C.B.R.].

**The Power to Stay**

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

**The Power to Stay in the Context of C.C.A.A. Proceedings**

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]
>
> I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.) ). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
>
> . . . . .
>
> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
> >
> > > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the

"Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and

the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

*Application allowed.*

Footnotes

* As amended by the court.

**End of Document** 

# TAB 4

| | |
|---|---|
| Court File Number | 25-2618433 |
| Court | COURT OF QUEEN'S BENCH OF ALBERTA |
| Judicial Centre | CALGARY |
| Matter | IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF TARTAN COMPLETION SYSTEMS INC. |
| Applicant | TARTAN COMPLETION SYSTEMS INC. |
| Document | ORDER |
| Address for Service and Contact Information of Party Filing this Document | **STIKEMAN ELLIOTT LLP**<br>4300 Bankers Hall West<br>888 – 3rd Street S.W.<br>T2P 5C5<br><br>Solicitor: Jakub Maslowski / Gordon Masson<br>Telephone: (403) 724-9465 / (403) 266-9043<br>Facsimile: (403) 266-9034<br>Email: JMaslowski@stikeman.com / GOMasson@stikeman.com<br>File Number: 147292.1001<br><br>**Counsel for the Applicant, Tartan Completion Systems Inc.** |

JUDICIAL CENTRE OF CALGARY
FILED
APR 24 2020
CLERK OF THE COURT

I hereby certify this to be a true copy of the original ORDER
Dated this 24 day of April 2020
for Clerk of the Court

| | |
|---|---|
| **DATE ON WHICH ORDER WAS PRONOUNCED:** | April 24, 2020 |
| **NAME OF JUDGE WHO MADE THIS ORDER:** | Justice P.R. Jeffrey |
| **LOCATION OF HEARING:** | Calgary, AB |

**UPON THE AMENDED APPLICATION** (the "**Application**") of Tartan Completion Systems Inc. (the "**Applicant**"); **AND UPON HAVING READ** MNP Ltd.'s (the "**Trustee**") second report (the "**Second Report**"), acting it is capacity as the proposal trustee to the Notice of Intention to Make a Proposal of the Applicant (the "**NOI**") filed in support thereof; **AND UPON HAVING READ** the affidavits of Bill Chu, sworn April 21, 2020 and April 23, 2020; **AND UPON HEARING** from some or all counsel for the parties present at the hearing of the Second Stay Application; **AND UPON NOTING** the provisions of the *Bankruptcy and Insolvency Act* (the "**BIA**");

**IT IS HEREBY ORDERED THAT:**

**Service**

1. The time for service of the Second Stay Application for this order (the "**Order**") is hereby abridged and deemed good and sufficient.

**Extension of NOI Stay of Proceedings**

2. The stay of proceedings resulting from the filing by the Applicant of its *Notice of Intention to Make a Proposal* pursuant to the BIA on February 14, 2020, is hereby extended until June 11, 2020.

**Approval of the Settlement Agreement**

3. The Settlement Agreement between the Applicant and Rapid Completion Systems Inc. ("**Rapid**") dated April 23, 2020 (the "**Rapid Settlement Agreement**") is hereby approved, with such minor amendments as Tartan and Rapid may deem necessary and agree upon.

4. Tartan is hereby authorized to take such additional steps and execute such additional documents as may be necessary or desirable for completion of the Rapid Settlement Agreement.

Amendments to the March 12, 2020 Order

5. Paragraph 4 of the order rendered by this Court in the present matter on March 12, 2020, and entered into on April 2, 2020 (the "**Extension & DIP Order**"), is hereby amended and replaced as follows:

> 4. The Applicant shall be and is hereby authorized to borrow, repay and reborrow from Tartan Energy Group Inc. ("TEGI") such amounts from time to time as the Applicant may consider necessary or desirable, up to a maximum principal amount of $970,000 outstanding at any time (the "**Updated Interim Financing Facility**"), on the terms and conditions as set forth in the Commitment Letter filed as Exhibit "D" of the Third Chu Affidavit (the "**Updated Commitment Letter**"), which Updated Commitment Letter may be revised to reflect the quantum of Updated Interim Financing Facility approved by this Court, to fund the ongoing expenditures of the Applicant and to pay such other amounts as are permitted by this Order or any other order of this Court and by the Updated Commitment Letter, the terms of which are hereby ratified.

6. Paragraph 7 of the Extension & DIP Order is hereby amended and replaced as follows:

> 7. All of the Applicant's present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated (collectively, the "**Property**") is hereby subject to a charge and security for an aggregate amount of $1,070,000,000 (such charge and security is referred to herein as the "**Updated Interim Financing Charge**") in favour of TEGI as security for all of the Applicant's obligations under or in connection with the Updated Commitment Letter and the Updated Interim Financing Documents, which may be revised to reflect the quantum of Updated Interim Financing Facility approved by this Court. The Updated Interim Financing Charge shall have the priority established by paragraphs 14 and 15 of this Order.

General

7. The provisional execution of this Order is ordered to be rendered notwithstanding any appeal and without the necessity of furnishing any security.

8. There shall be no costs associated with this Order.

Justice of the Court of Queen's Bench of Alberta

# TAB 5

| | | | |
|---|---|---|---|
| **CANADA** | ) | **COURT FILE NUMBER** | **BKY-RG-00143-2022** |
| | ) | | |
| **PROVINCE OF SASKATCHEWAN** | ) | **ESTATE NO.:** | **23-2828728** |
| | ) | | |



**IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN**
**IN BANKRUPTCY AND INSOLVENCY**

**JUDICIAL CENTRE** **SASKATOON**

**APPLICANT** **TRON CONSTRUCTION & MINING LIMITED PARTNERSHIP AND TRON CONSTRUCTION & MINING INC.**

**IN THE MATTER OF SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C. B-3, AS AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRON CONSTRUCTION & MINING LIMITED PARTNERSHIP AND TRON CONSTRUCTION & MINING INC.**

# ORDER

**(Approving Settlement)**

Before the Honourable Bergbusch in Chambers on the 29th day of March, 2023.

UPON THE APPLICATION OF Tron Construction & Mining Inc. ("**Tron Inc.**") and Tron Construction & Mining Limited Partnership ("**Tron**") (together, the "**Companies**"), AND UPON HAVING read the Application filed by the Companies and the Affidavit of Preston Kalyniuk, sworn on March 7, 2023 (the "**March Kalyniuk Agreement**"; AND UPON HEARING counsel for the Companies and all other interested parties present; IT IS HEREBY ORDERED THAT:

**SERVICE AND WAIVER OF RULE 10-4(2)**

1. The time for service of the Application and all materials in support is hereby abridged, if necessary, and declared to be good and sufficient and no other Person is required to have been served with such documents, and this hearing is properly returnable before this Honourable Court today and further service thereof is dispensed with.

2. Queen's Bench Rule 10-4(2) is hereby waived.

**SETTLEMENT AGREEMENT**

3. The Settlement Agreement attached to the March 7th, 2023 Kalyniuk Affidavit as Exhibit "A" (the "**Settlement Agreement**"), is hereby approved, subject to correcting the reference to "section 10 in s. 3.9".

4. Tron is authorized to execute the Settlement Agreement and to perform all acts and duties required by the terms of the Settlement Agreement.

5. This Order shall be served on the Service List.

ISSUED at Saskatoon, Saskatchewan this 14th day of ~~March~~ April, 2023

(Deputy) Local Registrar

***NOTICE***

*Take notice that, unless the order is consented to by the respondent or a person affected by the order or unless otherwise authorized by law, ever order made without notice to the respondent or a person affected by the order may set aside or varied on application to the Court. You should consult your lawyer as to your rights*

CONTACT INFORMATION AND ADDRESS FOR SERVICE


| | |
|---|---|
| Name of Firm: | Field LLP |
| Name of Lawyer in charge of file: | Trevor Batty |
| Address of legal firm: | 400, 444 – 7 Avenue S.W., Calgary, AB T2P 0X8 |
| Telephone: | 403-260-8500 |
| Fax: | 403-264-7084 |
| Email: | tbatty@fieldlaw.com |

# TAB 6

Court File No. BK-21-02734090-0031

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
**IN BANKRUPTCY AND INSOLVENCY**

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE 24TH |
| | ) | |
| MADAM JUSTICE GILMORE | ) | DAY OF MAY, 2022 |

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**ORDER**
(Settlement Approval)

**THIS MOTION**, made by KSV Restructuring Inc. ("**KSV**"), in its capacity as the proposal trustee (the "**Proposal Trustee**") in connection with the Notices of Intention to Make a Proposal filed on April 30, 2021 by YG Limited Partnership and YSL Residences Inc. (collectively, "**YSL**") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") for an order approving, among other things, the settlement agreements between the Proposal Trustee and each of Messrs. Cicekian, Catsiliras, Giannakopoulos, Mancuso and Millar as outlined and described in the Fifth Report of the Proposal Trustee dated May 11, 2022 (the "**Report**") was heard this day by judicial videoconference due to the COVID-19 pandemic.

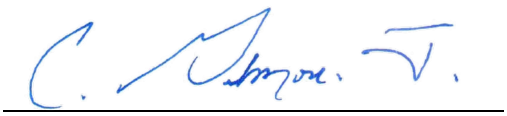
**ON READING** the Report and on hearing the submissions of counsel for the Proposal Trustee, and counsel for those other parties as listed on the Counsel Slip, no one else appearing although served, as evidenced by the Affidavit of Service, filed:

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion is hereby validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

**SETTLEMENT APPROVAL**

2. **THIS COURT ORDERS** that the settlement agreements between the Proposal Trustee and each of Messrs. Cicekian, Catsiliras, Giannakopoulos, Mancuso and Millar as outlined and described in the Report (collectively, the "**Settlement Agreements**") be and are hereby approved. The Proposal Trustee is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Settlement Agreements.



**Court File No.** BK-21-02734090-0031

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**
**IN BANKRUPTCY AND INSOLVENCY**

**(PROCEEDING COMMENCED AT TORONTO)**

**ORDER**
(Settlement Approval)

**Davies Ward Phillips & Vineberg LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for the Proposal Trustee

# TAB 7

**SUPERIOR COURT**
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-11-0556929-188

Date: December 18, 2018

---

**PRESIDING: THE HONOURABLE CHANTAL TREMBLAY, J.S.C.**

---

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:**

**2964-3277 QUÉBEC INC.**

Insolvent Person

-and-

**RICHTER ADVISORY GROUP INC.**

Trustee

-and-

**ORIENTAL WEAVERS INTERNATIONAL SAE**

Petitioner

-and-

**CANADIAN IMPERIAL BANK OF COMMERCE**

Secured Creditor / Impleaded Party

---

**SETTLEMENT APPROVAL ORDER**

---

**CONSIDERING** the Petitioner's *De Bene Esse Motion to Lift the Stay of Proceedings and for Additional Relief* dated December 12, 2018 (the "**Motion**");

**CONSIDERING** that the Petitioner, the Secured Creditor / Impleaded Party and the Insolvent Person (collectively, the "**Settlement Parties**") have agreed to settle the dispute arising out of the Motion in accordance with the terms and conditions of a

Settlement Agreement, which has been submitted to the Court for approval and to which the Trustee has intervened (the "**Settlement Agreement**");

**CONSIDERING** the submissions of counsel;

**CONSIDERING** the provisions of the *Bankruptcy and Insolvency Act* ("**BIA**");

**WHEREFORE, THE COURT:**

[1] **ORDERS** that the Settlement Agreement shall be filed under confidential seal as **Schedule A** to the present Settlement Approval Order (this "**Order**") and be kept out of the public record;

[2] **ORDERS** that the Settlement Agreement is hereby ratified and approved and rendered binding and effective on the Settlement Parties;

[3] **ORDERS** the Settlement Parties to perform their obligations under the Settlement Agreement in accordance with its terms and conditions;

[4] **DECLARES** that the Settlement Agreement constitutes a settlement of the Dispute (as defined therein) and a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec*;

[5] **ORDERS** that the Motion as well as any exhibits or other documents filed by the Petitioner in support thereof be withdrawn from the record of court file number 500-11-0556929-188;

[6] **AUTHORIZES** and **DIRECTS** the Trustee to remove the Motion from the website maintained by it in connection with these proceedings;

[7] **ORDERS** that notwithstanding:

(a) the pendency of these proceedings;

(b) any petition for a receiving order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such petition; or

(c) the provisions of any federal or provincial legislation;

the Settlement Agreement and the transactions contemplated therein is to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA, the *Companies' Creditors Arrangement Act* or any other applicable federal or provincial legislation;

[8] **ORDERS** the provisional execution of this Order notwithstanding any appeal.

**THE WHOLE, WITHOUT COSTS**

Chantal Tremblay JSC
CHANTAL TREMBLAY, J.S.C.

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# SCHEDULE A

# UNDER CONFIDENTIAL SEAL

# TAB 8

2007 ABQB 504
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 1050, 2007 ABQB 504, [2007] A.J. No. 923, 161
A.C.W.S. (3d) 369, 33 B.L.R. (4th) 68, 35 C.B.R. (5th) 1, 415 A.R. 196

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

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: July 24, 2007
Judgment: July 31, 2007 *
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Sean F. Collins, Jay A. Carfagnini, Fred Myers, Brian Empey, Joseph Pasquariello for CCAA Debtors
Patrick McCarthy, Q.C., Josef A. Krueger for Monitor
Robert I. Thornton, John L. Finnigan, Rachelle F. Moncur for Ad Hoc Committee
Sean F. Dunphy, Elizabeth Pillon for ULC2 Trustee
Howard A. Gorman for ULC1 Noteholders Committee
Peter H. Griffin, Peter J. Osborne for U.S. Debtors
Peter T. Linder, Q.C., Emi R. Bossio for Fund
Ken Lenz for HSBC Bank USA, N.A., as ULC1 Indenture Trustee
Jay A. Swartz for Lehman Brothers
Rinus De Waal for Unsecured Creditors' Committee
Neil Rabinovitch for Unofficial Committee of 2nd Lien Debtholders
B.A.R. Smith, Q.C. for Alliance Pipelines
Douglas I. McLean for TransCanada Pipelines Limited

Subject: Insolvency

APPLICATION by debtors for approval of settlement.

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

**Introduction**

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

 

2 Both Courts approved the settlement. These are my reasons for that approval.

**Background**

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

> a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
>
> b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
>
> c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
>
> d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
>
> e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;
>
> f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
>
> g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
>
> h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
>
> i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

> 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA

  

> Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
>
> 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
>
> 12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
>
> 13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
>
> 14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...
>
> 17. The [GSA] is subject to the following conditions:
>
> > a. The approval of both this Court and the U.S. Bankruptcy Court;
> >
> > b. The execution of the [GSA]; and
> >
> > c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the "key elements" of the GSA as follows:

> a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;
>
> b The withdrawal of the BDCs advanced by the U.S. Debtors...;
>
> c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
>
> d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;
>
> e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:
>
> > i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;

  

ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");

v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and

vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;

g. The settlement of the Greenfield Action;

h. The withdrawal of the UL1 Indenture Trustee Marker Claim;

i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;

j The resolution of the quantum of the cross-border intercompany claims...;

k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;

l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan...;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

**The Applications**

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to

  

the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

> a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:
>
> > ...While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.
>
> b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

**The Ad Hoc Committee's Objections**

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to

  

ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

  

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3

 

million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly $3\ ^{1/2}$ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

**The Fund's Objections**

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA

  

Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

**The ULC2 Trustee's Objections**

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

**Analysis of Law re: Plan of Arrangement**

  

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal.".

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction,

  

except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed

 

previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of $25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at paras. 11 and 23 and *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium Entertainment Corp., Re*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium Entertainment Corp., Re* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada, Re*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd....* In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

  

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

  

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
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> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
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> > [Emphasis in *Red Cross*.]

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* sale transaction and the GSA in this case, what the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *Air Canada, Re* and *Playdium Entertainment Corp., Re*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the

remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

**Conclusion**

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

*Application granted.*

Footnotes

* Leave to appeal refused *Calpine Canada Energy Ltd., Re* (2007), 2007 ABCA 266, 2007 CarswellAlta 1097, 35 C.B.R. (5th) 27, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]).

**End of Document**

# TAB 9

**COURT FILE NO.:** 03-CL-4932
**DATE:** 20040116

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



| | |
|---|---|
| IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED | *Sean F. Dunphy* and *Ashley John Taylor*, for Air Canada |
| AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED | *Peter J. Osborne* and *Peter H. Griffin*, for the Monitor |
| AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A" | *Howard Gorman*, for the Ad Hoc Unsecured Creditors Committee |
| APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED | *Aubrey Kauffman*, for the Ad Hoc Committee of Various Creditors |
| | *Jay Swartz*, for Deutsche Bank |
| | *Mark Gelowitz*, for Trinity Time Investments |
| | *Robert Thornton* and *Gregory Azeff*, for GE Capital Aviation Services Inc. |
| | *J. Porter*, for Cerberus |
| | *Kevin McElcheran*, for CIBC |
| | *Murray Gold*, for CUPE |
| | *Ian Dick*, for AG Canada |
| | *James Tory*, for Air Canada Board |
| | *Joseph J. Bellissimo*, for the Aircraft Lessor/Lender Group |
| | *Terri Hilborn*, for Unionized Retiree Committee |
| | *William Sasso* and *Sharon Strosberg*, for Mizuho International, PLC |
| | *Jim Dube*, for Deutsche Lufthansa A.G. |
| | **HEARD:** January 16, 2004 |

**FARLEY J.:**

[1] These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

(1) the Merrill Lynch (ML) indemnity;

(2) the entering into the amendments to the Trinity Agreement; and

(3) the Global Restructuring Agreements (GRA).

ML Indemnity

[2] There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

[3] As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

[4] I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

[5] I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Ltd. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), aff'd (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

[6] There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis)

relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from

Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".



[7] At paragraph 71 of its 19th report, the Monitor stated:

> 71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

[8] I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

[9] As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 at 201 (B.C.C.A.). In *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Blair J. at p. 316 adopted the principles in *Royal Bank of Canada v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are

compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi*, equitable treatment is not necessarily equal treatment.

[10] The Monitor's 19th report at paragraphs 20-21 indicates that:

> 20. The GRA provides the following benefits for Air Canada:
>
> - The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
>
> - The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
>
> - Exit financing of approximately US$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
>
> - Aircraft financing up to a maximum of US$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
>
> - The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.
>
> 21. In return for these restructuring and financing commitments, the GRA provides for the following:
>
> - Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;

- The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring) including one note convertible into equity of the restructured Air Canada at GECC's option;

- The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and

- The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

> 70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US $585 million of exit financing and US$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

[11] The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

[12] I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of $1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its $2 billion claim for existing commitments down to $1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

[13] With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests – and that everyone should focus on that and give every reasonable assistance and cooperation.

[14] With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it as a side note that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality – and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

[15] I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in Trinity Amendments.

[16] Orders accordingly.

J. M. Farley

**Released:** January 16, 2004

# TAB 10

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by Merger to Banc of America Securities LLC), Defendants

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

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

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

**Introduction**

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

**Facts**

***Class Action Proceedings***

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

***CCAA Proceedings***

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp., Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.)].

***Ernst & Young Settlement***

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

> (a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
>
> (b) the issuance of the Settlement Trust Order;
>
> (c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
>
> (d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
>
> (e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

**Law and Analysis**

***Court's Jurisdiction to Grant Requested Approval***

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

***Should the Court Exercise Its Discretion to Approve the Settlement***

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

***CCAA Interpretation***

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel*"); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or

the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

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

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

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

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

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

. . .

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

. . .

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

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

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

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

***Relevant CCAA Factors***

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

***Counsel Submissions***

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

> (a) class members are not releasing their claims to a greater extent than necessary;
>
> (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
>
> (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
>
> (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

***Analysis and Conclusions***

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young

as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders.

The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

***Miscellaneous***

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

**Disposition**

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

*Motion granted.*

# TAB 11

Court File No. CV-23-00700581-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE 29TH DAY |
| | ) | |
| JUSTICE OSBORNE | ) | OF AUGUST, 2023 |

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.

Applicants

**ORDER**
**(Approval and Reverse Vesting Order)**

**THIS MOTION**, made by Fire & Flower Holdings Corp. ("**FFHC**" or the "**Company**"), Fire & Flower Inc., 13318184 Canada Inc., 11180703 Canada Inc., 10926671 Canada Ltd., Friendly Stranger Holdings Corp., Pineapple Express Delivery Inc., and Hifyre Inc. (collectively, the "**F&F Group**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, among other things: (a) approving the subscription agreement dated as of August 17, 2023 between FFHC, as company, and 2759054 Ontario Inc. ("**FIKA**"), as purchaser (the "**Subscription Agreement**") and the transactions contemplated therein (the "**Transactions**"); (b) approving the amended and restated subscription agreement dated as of August 27, 2023 between FFHC, as company, and 2707031 Ontario Inc. ("**ACT Investor**"), as purchaser (the "**Back-Up Subscription Agreement**") and the transactions contemplated therein (the "**Back-Up Transactions**"), only to the extent that the Subscription Agreement and the Transactions contemplated therein do not close; (c) adding 15315441 Canada Inc. ("**Residual Co.**") as an applicant to these proceedings (the "**CCAA Proceedings**"); (d) transferring and vesting all of the F&F Group's right, title and interest in and to the Excluded Assets, Excluded Contracts, Excluded Leases, and Excluded Liabilities to and in Residual Co.; (e) authorizing and directing the Company to file the Articles of Amendment; (f) terminating and cancelling all the Equity Interests of FFHC for no consideration; (g) authorizing and directing the Company to issue the Purchased Shares, and vesting in FIKA, all right, title and interest in and to

the Purchased Shares, free and clear of any Encumbrances; and (h) granting certain ancillary relief, was heard this day by videoconference.

**ON READING** the Motion Record of the F&F Group, including the affidavit of Stephane Trudel sworn August 23, 2023 (the "**Trudel Affidavit**") and the Exhibits thereto, the Third Report of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as the Court-appointed monitor of the F&F Group (in such capacity, the "**Monitor**") dated August 26, 2023 (the "**Third Report**"), and on hearing the submissions of counsel for the F&F Group, counsel for the Monitor, counsel for FIKA, counsel for ACT Investor and ACT Investor in its capacity as the debtor-in-possession lender to the F&F Group (in such capacity, the "**DIP Lender**"), and counsel for those other parties appearing as indicated by the Participant Information Form, no one appearing for any other party, although duly served as appears from the affidavits of service of Philip Yang, as filed,

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion was properly returnable on August 29, 2023, and hereby dispenses with further service thereof.

**DEFINED TERMS**

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined herein shall have the meanings given to them in the Subscription Agreement and the Order of Justice Osborne dated June 19, 2023 (the "**SISP Approval Order**").

**EXTENSION OF STAY PERIOD**

3. **THIS COURT ORDERS** that the Stay Period, as defined in the Amended and Restated Initial Order granted by this Court on June 15, 2023, is hereby extended until October 15, 2023.

**APPROVAL AND VESTING**

4. **THIS COURT ORDERS AND DECLARES** that the Subscription Agreement and the Transactions, be and are hereby approved and that the execution of the Subscription Agreement by the Company is hereby authorized and approved, with such minor amendments as the parties thereto may deem necessary with the approval of the Monitor. The Company is hereby authorized and directed to perform its obligations under the Subscription Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for

the completion of the Transactions, including the filing of the Articles of Amendment, the cancellation of the Equity Interests and the issuance of the Purchased Shares to FIKA.

5. **THIS COURT ORDERS AND DECLARES** that the Back-Up Subscription Agreement and the Back-Up Transactions, be and are hereby approved and that the execution of the Back-Up Subscription Agreement by the Company is hereby authorized and approved, with such minor amendments as the parties thereto may deem necessary with the approval of the Monitor. For certainty, such authorization and approval shall only be effective if FIKA cannot close the Transactions contemplated by the Subscription Agreement. The Company is in that circumstance authorized and directed to perform its obligations under the Back-Up Subscription Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Back-Up Transactions.

6. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Company to proceed with the Transactions and the Back-Up Transactions, and that no shareholder or other approval shall be required in connection therewith.

7. **THIS COURT ORDERS AND DECLARES** that upon the delivery of the Monitor's certificate (the "**Monitor's Closing Certificate**") to the F&F Group and FIKA (the "**Closing Time**"), substantially in the form attached as **Schedule "A**" hereto, the following shall occur and shall be deemed to have occurred at the Closing Time in the following sequence:

(a) first, all of the F&F Group's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co., with all applicable Claims and Encumbrances (each as defined below) continuing to attach to the Excluded Assets and to the Purchase Price in accordance with paragraph 11 of this Order, in either case with the same nature and priority as they had immediately prior to the transfer;

(b) second, all Excluded Contracts, Excluded Leases, and Excluded Liabilities shall be channeled to, assumed by and vested absolutely and exclusively in Residual Co. such that the Excluded Contracts, Excluded Leases and Excluded Liabilities shall become the obligations of Residual Co., and shall no longer be obligations of the F&F Group and all of the F&F Group's respective assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate, including property held in trust for the F&F

Group (the "**F&F Group's Property**"), shall be and are hereby forever released and discharged from such Excluded Contracts, Excluded Leases and Excluded Liabilities and all related Claims and all Encumbrances affecting or relating to the F&F Group's Property are to be expunged and discharged as against the F&F Group's Property;

(c) third, the Articles of Amendment shall be filed or deemed to have been filed;

(d) fourth, in consideration for the Purchase Price, the Company shall issue the Purchased Shares to FIKA, and all of the right, title and interest in and to the Purchased Shares shall vest absolutely in FIKA, and the F&F Group's assets, other than the Excluded Assets, will be retained by the F&F Group, free and clear of and from any and all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise, including any and all encumbrances, security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order or any other Order of the Court in the CCAA Proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry systems; and (iii) any charges, security interests or claims evidenced by registrations pursuant to the *Land Titles Act* (Ontario), the *Registry Act* (Ontario), the *Land Registration Reform Act* (Ontario) or any other real property or real property related registry or recording system (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances listed on **Schedule "B"** hereto with respect to the Subscription Agreement);

(e) fifth, pursuant to the Articles of Amendment, all Equity Interests of the Company outstanding prior to the issuance of the Purchased Shares, including all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (defined below) which are convertible or exchangeable for any securities of the Company or which require the issuance, sale or transfer by the Company, of any shares or other securities of the Company and/or the share capital of the Company, or otherwise relating thereto, shall be deemed terminated and cancelled without consideration and the only Equity Interests of the Company that shall remain shall be the Purchased Shares; and

(f) sixth, the F&F Group shall be deemed to cease being Applicants in these CCAA Proceedings, and the F&F Group shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings, save and except for this Order, the provisions of which (as they relate to the F&F Group) shall continue to apply in all respects.

8. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Closing Certificate, forthwith after delivery thereof in connection with the Transactions.

9. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Company and FIKA regarding the satisfaction or waiver of conditions to closing under the Subscription Agreement and shall have no liability with respect to delivery of the Monitor's Closing Certificate.

10. **THIS COURT ORDERS** that upon delivery of the Monitor's Closing Certificate, and upon filing of a copy of this Order, together with any applicable registration fees, all governmental authorities and any other applicable registrar or government ministries or authorities exercising jurisdiction with respect to the F&F Group, the F&F Group's Property, or the Excluded Assets (collectively, the "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Monitor's Closing Certificate and a copy of this Order as though they were originals and to register such transfers and interest authorizations as may be required to give effect to the terms of this Order and the Subscription Agreement. Presentment of this Order and the Monitor's Closing Certificate shall be the sole and sufficient authority for the Governmental

Authorities to make and register transfers of interest against any of the F&F Group's Property and the Monitor and FIKA are hereby specifically authorized to discharge the registrations on the F&F Group's Property and the Excluded Assets, as applicable.

11. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the Closing Time, subject to the funding of the Priority Payments and the Administrative Expense Amount, all Claims and Encumbrances transferred, assumed, released, expunged and discharged pursuant to paragraph 7 hereof, including against the F&F Group, the F&F Group's Property and the Purchased Shares and Equity Interests of the Company held by FIKA shall attach to the Excluded Assets with the same priority as they had with respect to the F&F Group's Property immediately prior to the Transactions as if the Transactions had not occurred.

12. **THIS COURT ORDERS** that, pursuant to clause 7(3) (c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, as amended, the F&F Group or the Monitor, as the case may be, is authorized, permitted and directed to, at the Closing Time, disclose to FIKA, all human resources and payroll information in the F&F Group's records pertaining to past and current employees of the F&F Group. FIKA shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner that is in all material respects identical to the prior use of such information by the F&F Group.

13. **THIS COURT ORDERS AND DECLARES** that, at the Closing Time and without limiting the provisions of paragraph 7 hereof, FIKA, the F&F Group, and the Monitor shall be deemed released from any and all claims, liabilities, (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to the F&F Group, provided, as it relates to FIKA and the F&F Group, such release shall not apply to (a) Taxes in respect of the business and operations conducted by the F&F Group after the Closing Time; or (b) Taxes expressly assumed as Retained Liabilities pursuant to the Subscription Agreement, including without limiting the generality of the foregoing, all Taxes that could be assessed against FIKA or the F&F Group (including their affiliates and any predecessor corporations) pursuant to sections 160 and 160.01 of the *Income Tax Act*, R.S.C. 1985 c. 1 (5$^{th}$ Supp.), or any provincial or foreign tax equivalent, in connection with the F&F Group. For greater certainty, nothing in this paragraph shall release or discharge any Claims with respect to Taxes that are transferred to Residual Co.

14. **THIS COURT ORDERS** that except to the extent expressly contemplated by the Subscription Agreement (and, for greater certainty, excluding the Excluded Assets and Excluded Liabilities and contracts relating thereto), all contracts to which any of the F&F Group are a party at the time of delivery of the Monitor's Closing Certificate will be and remain in full force and effect upon and following delivery of the Monitor's Closing Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

(a) any event that occurred on or prior to the Closing Time and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any of the F&F Group);

(b) the insolvency of any F&F Group entity or the fact that the F&F Group obtained relief under the CCAA;

(c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transactions, the provisions of this Order, or any other Order of this Court in these CCAA proceedings; or

(d) any transfer or assignment, or any change of control of any of the F&F Group arising from the implementation of the Subscription Agreement, the Transactions, or the provisions of this Order.

15. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 14 hereof shall waive, compromise or discharge any obligations of the F&F Group or FIKA, in respect of any Retained Liabilities, and (b) the designation of any Claim as a Retained Liability is without prejudice to any of the F&F Group's or FIKA's right to dispute the existence, validity or quantum of any such Retained Liability, and (c) nothing in this Order or the Subscription Agreements shall affect or waive the F&F Group's or FIKA's rights and defences, both legal and equitable, with

respect to any Retained Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Retained Liability.

16. **THIS COURT ORDERS** that from and after the Closing Time, all Persons shall be deemed to have waived any and all defaults of any of the F&F Group then existing or previously committed by any of the F&F Group, or caused by any one of the F&F Group, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition, or obligation, expressed or implied in any contract, or lease existing between such Person and any of the F&F Group (including for certainty, those contracts, or leases constituting the F&F Group's Property) arising directly or indirectly from the filing by the F&F Group under the CCAA and implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 14 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a contract, or a lease shall be deemed to have been rescinded and of no further force or effect, provided that nothing herein shall be deemed to excuse any of the F&F Group or FIKA from performing their obligations under the Subscription Agreement, or be a waiver of defaults by any of the F&F Group or FIKA under the Subscription Agreement and the related documents.

17. **THIS COURT ORDERS** that, from and after the Closing Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against the F&F Group or FIKA relating in any way to or in respect of any Excluded Assets, Excluded Liabilities, Excluded Leases, or Excluded Contracts and any other claims, obligations and other matters that are waived, released, expunged or discharged pursuant to this Order.

18. **THIS COURT ORDERS** that from and after the Closing Time:

(a) the nature of the Retained Liabilities, as retained by the F&F Group, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

(b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residual Co.;

(c) any Person that prior to the Closing Time had a valid right or claim against the F&F Group under or in respect of any Excluded Contract, Excluded Lease, or Excluded Liability (each an "**Excluded Liability Claim**") shall no longer have an Excluded Liability Claim against the F&F Group, but will have an equivalent Excluded Liability Claim against Residual Co. in respect of the Excluded Contract, Excluded Lease, or Excluded Liability from and after the Closing Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residual Co.; and

(d) any Person with an Excluded Liability Claim against Residual Co. following the Closing Time shall have the same rights, priority and entitlement as against Residual Co. as such Person, with an Excluded Liability Claim, had against the applicable F&F Group entity prior to the Closing Time.

19. **THIS COURT ORDERS AND DECLARES** that, as of the Closing Time:

(a) Residual Co. shall be a company to which the CCAA applies; and

(b) Residual Co. shall be added as an Applicant in these CCAA Proceedings and all references in any Order of this Court in respect of these CCAA Proceedings to (i) an "Applicant" shall refer to and include Residual Co.; and (ii) "Property" shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, of Residual Co. (collectively the "**Residual Co. Property**"), and, for greater certainty, each of the Charges (as defined in the Initial Order), shall constitute a charge on the Residual Co. Property.

**PRIORITY PAYMENTS**

20. **THIS COURT ORDERS AND DIRECTS** that the Priority Payments, as necessary and permitted by the Subscription Agreement, shall be distributed by the Company from the cash on hand on the Closing Date consistent with the Implementation Steps.

21. **THIS COURT ORDERS** that, notwithstanding:

(c) the pendency of these CCAA proceedings;

(d) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C 195, c. B-3, as amended (the "**BIA**"), in respect of Residual Co. and any bankruptcy order issued pursuant to any such applications; and

(e) any assignment in bankruptcy made in respect of any of the F&F Group or Residual Co.;

the Subscription Agreement, the implementation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, Excluded Contracts, Excluded Leases and Excluded Liabilities in and to Residual Co., the transfer and vesting of the Purchased Shares in and to FIKA, the payment of the Priority Payments by the Company and any payments by or to FIKA, any of the F&F Group entities, Residual Co., or the Monitor authorized herein, or pursuant to the Subscription Agreement) shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the F&F Group and/or Residual Co. and shall not be void or voidable by creditors of the F&F Group, or Residual Co., as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, the BIA or any other applicable federal, provincial or foreign legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

**MONITOR**

22. **THIS COURT ORDERS** that the First Report of the Monitor dated June 14, 2023, the Supplement to the First Report of the Monitor dated June 15, 2023, the Second Report of the Monitor dated July 5, 2023, the Third Report dated August 26, 2023, and the activities of the

Monitor as set out therein be and are hereby approved provided, however, that only the Monitor, in its personal capacity and only with respect to its own liability, shall be entitled to rely upon or utilize in any way such approval.

23. **THIS COURT ORDERS** that nothing in this Order, including the release of the F&F Group from the purview of these CCAA Proceedings pursuant to paragraph 7(f) hereof and the addition of Residual Co. as an Applicant in these CCAA Proceedings, shall affect, vary, derogate from, limit or amend any rights, approvals and protections afforded to the Monitor in these CCAA Proceedings and FTI shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, any other Orders in these CCAA proceedings or otherwise, including all approval, protections and stays of proceedings in favour of FTI in its capacity as Monitor, all of which are expressly continued and confirmed.

24. **THIS COURT ORDERS** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except with leave of the Court following a motion brought on not less than fifteen (15) days' notice to the Monitor and its legal counsel. The entities related or affiliated with the Monitor or belonging to the same group as the Monitor (including, without limitation, any agents, employees, legal counsel or other advisors retained or employed by the Monitor) shall benefit from the protection granted to the Monitor under the present paragraph.

25. **THIS COURT ORDERS** that the Monitor shall not, as a result of this Order or any matter contemplated hereby: (a) be deemed to have taken part in the management or supervision of the management of the F&F Group, or Residual Co. or to have taken or maintained possession or control of the business or property of any of the F&F Group or Residual Co., or any part thereof; or (b) be deemed to be in Possession (as defined in the Initial Order) of any property of the F&F Group or Residual Co. within the meaning of any applicable Environmental Legislation and Cannabis Legislation (both as defined in the Initial Order) or otherwise.

26. **THIS COURT ORDERS** that notwithstanding anything contained in this Order, the Monitor, its employees and representatives are not and shall not be or be deemed to be, a director, officer, or employee of Residual Co. *de facto* or otherwise, and shall incur no liability as a result of acting in accordance with this Order, other than any liability arising as a direct result of the gross negligence or wilful misconduct of the Monitor.

27. **THIS COURT ORDERS** that nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of Residual Co.

**RELEASES**

28. **THIS COURT ORDERS** that effective upon the filing of the Monitor's Closing Certificate, (a) the current directors, officers, employees, consultants, legal counsel and advisors to the F&F Group; (b) the current directors, officers, employees, consultants legal counsel and advisors to Residual Co.; (c) the Monitor and its legal counsel and their respective current directors, officers, partners, employees, consultants and advisors; (the Persons listed in (a), (b), and (c) being collectively, the "**Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future liabilities, claims (including, without limitation, claims for contribution or indemnity), indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) arising in connection with or relating to the CCAA Proceedings, the Subscription Agreement, or the Back-Up Subscription Agreement, as the case may be, the completion of the Transactions or the Back-Up Transactions, as the case may be (collectively, the "**Released Claims**") which Released Claims are hereby and shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, and are not vested nor transferred to Residual Co. or to any other entity and are extinguished, provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim for fraud or wilful misconduct or any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA. For greater certainty, "current" in this paragraph refers to individuals who remain in their respective role(s) up to one day prior to closing of the Transactions or Back-Transactions, as applicable.

29. **THIS COURT ORDERS** that effective upon the filing of the Monitor's Closing Certificate, the F&F Group, ACT Investor in its capacity as the DIP Lender, and FIKA in its capacity as Successful Bidder and, if applicable, the replacement DIP Lender (the "**Other Released Parties**") shall be deemed to be forever irrevocably released and discharged from any and all present and future liabilities, claims (including, without limitation, claims for contribution or indemnity),

indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part of any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Closing Certificate, undertaken or completed in connection with or pursuant to the terms of this Order and that relate in any manner whatsoever to the Subscription Agreement or Back-Up Subscription Agreement, as the case may be, the completion of the Transactions or the Back-Up Transactions, as the case may be, the closing documents, any agreement, document, instrument, matter or transaction involving the F&F Group arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions or the Back-Up Transactions, as the case may be (collectively, the "**Released F&F Claims**"), which Released F&F Claims are hereby and shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Other Released Parties.

30. **THIS COURT ORDERS** that notwithstanding any other provision of this Order, for any real property lease that is not excluded from the Transactions ("**Lease**"), the landlord of any such Lease shall be entitled to enforce all of its rights and remedies as against the tenant with respect to any breach of a non-monetary obligation under the Lease, if (a) such non-monetary breach under the Lease arises or continues after the Closing Time; (b) such non-monetary breach is capable of being cured; and (3) the tenant has failed to remedy the default after having received notice of such default pursuant to the terms of the Lease. Without limiting the foregoing, the landlord under the Lease shall not rely on a notice of default sent prior to the filing of the Monitor's Closing Certificate ("**Prior Default Notice**") to terminate or otherwise enforce the terms of the Lease as against the tenant and any such Prior Default Notice shall be deemed unenforceable.

31. **THIS COURT ORDERS** that notwithstanding paragraph 28 of this Order, any creditor of Residual Co. may make a Claim (as defined in the Claims Process Order dated August 29, 2023) within the ambit of the Claims Process Order.

**SEALING PROVISION**

32. **THIS COURT ORDERS** that Confidential Appendix "A" to the Third Report dated August 26, 2023 is hereby sealed pending further order of the Court and shall not form part of the public record.

**GENERAL**

33. **THIS COURT ORDERS** that, having been advised of the provisions of Multilateral Instrument 61-101 "Protection of Minority Security Holders in Special Transactions" relating to the requirement for "minority" shareholder approval in certain circumstances, no meeting of shareholders or other holders of Equity Interests in the F&F Group is required to be held in respect of the Transactions, and accordingly, there is no requirement to send any disclosure document related to the Transactions, to such shareholders or other holders of Equity Interests.

34. **THIS COURT ORDERS** that in the event of a conflict between the terms of this Order and those of the Initial Order or any other Order of this Court, the provisions of this Order shall govern.

35. **THIS COURT ORDERS** that, following the Closing Time, FIKA and the F&F Group shall be authorized to take all steps as may be necessary to affect the discharge of the Claims and Encumbrances as against the F&F Group, the Purchased Shares, those Equity Interests of the Company held by FIKA, and the F&F Group's Property.

36. **THIS COURT ORDERS** that, following the Closing Time, the title of these proceedings is hereby changed to

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 15315441 CANADA INC.

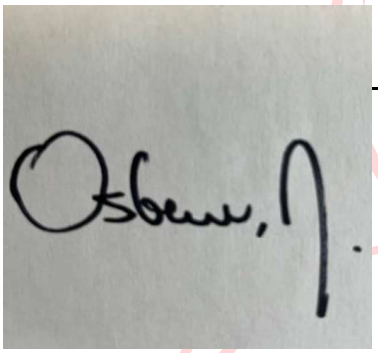
37. **THIS COURT ORDERS** that, notwithstanding Rule 59.05, this Order is effective from the date that it is made and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party may nonetheless submit a formal order for original signing, entry and filing when the Court returns to regular operations.

38. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

39. **THIS COURT DECLARES** that the Monitor or the F&F Group shall be authorized to apply as they may consider necessary or desirable, with or without notice, to any other court, tribunal or administrative body whether in Canada, the United States, or elsewhere, for orders which aid and complement this Order. All courts, tribunals and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the F&F Group and the Monitor as may be deemed necessary or appropriate for that purpose.

40. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Company, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Company, the Monitor and their respective agents in carrying out the terms of this Order.

41. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern time on the date hereof; provided that, the transaction steps set out in paragraph 7 hereof shall be deemed to have occurred sequentially, on after the other, in the order set out in paragraph 7 hereof.



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**Schedule A – Form of Monitor's Closing Certificate**

Court File No. CV-23-00700581-00CL

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

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.

**MONITOR'S CERTIFICATE**

**RECITALS**

A. Pursuant to the Initial Order of Justice Osborne of the Ontario Superior Court of Justice (Commercial List), (the "**Court**") dated June 5, 2023, as amended and restated on June 15, 2023, Fire & Flower Holdings Corp. (the "**Company**"), Fire & Flower Inc., 13318184 Canada Inc., 11180703 Canada Inc., 10926671 Canada Ltd., Friendly Stranger Holdings Corp., Pineapple Express Delivery Inc., and Hifyre Inc. (collectively, the "**F&F Group**") were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and FTI Consulting Canada Inc., was appointed as the monitor of the F&F Group (in such capacity, the "**Monitor"**).

C. Capitalized terms not otherwise defined herein shall have the meanings given to them in the Approval and Reverse Vesting Order of this Court dated August 29, 2023 (the "**ARVO**")

B. Pursuant to the ARVO, the Court approved the Transactions contemplated by the Subscription Agreement dated August 16, 2023 between the Company and FIKA, and ordered, *inter alia*, that: (i) all of the F&F Group's right, title and interest in and to the Excluded Assets shall vest absolutely and exclusively in Residual Co.; (ii) all of the Excluded Contracts, Excluded Leases and Excluded Liabilities shall be transferred to, assumed by and vest in Residual Co.; and (iii) all of the right, title and interest in and to the Purchased Shares shall vest absolutely and exclusively in FIKA free and clear of and from any Claims and Encumbrances, which vesting is to be effective upon the delivery by the Monitor to FIKA and the Company of a certificate confirming that the Monitor has received written confirmation in the form and substance

satisfactory to the Monitor from the Company and FIKA that all conditions to closing have been satisfied or waived by the parties to the Subscription Agreement.

**THE MONITOR CERTIFIES** the following:

1. The Monitor has received written confirmation from the Company, in form and substance satisfactory to the Monitor, that the Priority Payments have been paid by the Company.

2. The Monitor has received written confirmation from the Company and FIKA, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the Subscription Agreement.

3. This Monitor's closing certificate was delivered by the Monitor at Toronto on _____, 2023.

**FTI Consulting Canada Inc., in its capacity as Monitor of the F&F Group and not in its personal or corporate capacity.**

Per:_____
Name:
Title:

## Schedule "B" - Permitted Encumbrances

- Encumbrances securing Retained Liabilities to the extent that such Retained Liabilities are secured by Encumbrances as of the Closing Time;

- Encumbrances given to a public utility or any Governmental Authority when required by such utility or authority in connection with the operations of that person in the ordinary course of the business but only insofar as they relate to any amounts not due as at the Closing Date;

- The reservations, limitations, provisos and conditions (if any) expressed in any original grant from the Crown;

- Encumbrances for Taxes, assessments or governmental charges incurred in the ordinary course that are not yet due and payable or the validity of which is being actively and diligently contested in good faith by the F&F Group and in respect of which the F&F Group has established on its books reserves considered by it and its auditors to be adequate therefor;

- Normal and customary rights of setoff or compensation upon deposits in favour of depository institutions, and liens of a collecting bank on cheques and other payment items in the course of collection;

- Servitudes, easements, rights of way or similar rights in land granted to or reserved by other persons including minor title defects effecting real property such as reservations and limitations expressed in any original grant from the Crown or as a result of statutory reservations and exceptions to title;

- Encumbrances imposed by Applicable Law including, but not limited to, Encumbrances of mechanics, labourers, workmen, builders, contractors, suppliers of material or architects or other similar Encumbrances incidental to construction, maintenance or repair operations, provided such Encumbrances secure amounts which are not yet due or delinquent and have not been registered on title to any real property or written notice thereof has not been received by Company or FIKA;

- Encumbrances associated with, and financing statements evidencing, the rights of equipment lessors under any of the personal property leases;

- Undetermined or inchoate liens and charges incidental to construction or repairs or operations which have not at such time been filed pursuant to law against Company or which relate to obligations not due or delinquent; and

- The right reserved to or vested in any municipality or government, or to any statutory or public authority, by the terms of any lease, license, franchise, grant or permit acquired by Company or any statutory provision to terminate any such lease, license, franchise, grant or permit, or to require annual or other periodic payments as a condition to the continuance thereof.

Electronically issued / Délivré par voie électronique : 30-Aug-2023
Toronto Superior Court of Justice / Cour supérieure de justice

Court File**Court File No./N° du dossier du greffe :** CV-23-00700581-00CL

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.

Applicants

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

PROCEEDING COMMENCED AT TORONTO

**ORDER**
**(APPROVAL AND REVERSE VESTING ORDER)**

**STIKEMAN ELLIOTT LLP**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

**Maria Konyukhova (LSO #52880V)**
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Lawyers for the Applicants

# TAB 12

Court File No. CV-19-631523-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | TUESDAY, THE 28th |
| | ) | |
| JUSTICE HAINEY | ) | DAY OF JANUARY, 2020 |

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

**Applicants**

## APPROVAL AND VESTING ORDER

**THIS MOTION**, made by the Applicants for an order approving the sale (the "**Transaction**") contemplated by the asset purchase agreement among the Applicants (each a "**Canadian Seller**" and together the "**Canadian Sellers**"), each of the Persons identified on Schedule I of the Sale Agreement as a U.S. Seller, and the Person identified on Schedule I of the Sale Agreement as the Equity Seller, and Tonos US LLC, as U.S. Buyer, Melissi 4 Inc., as Equity Buyer, FCF Co., Ltd., as Guarantor and Tonos 1 Operating Corp., as Canadian buyer (the "**Canadian Buyer**") dated November 21, 2019, (the "**Stalking Horse APA**"), appended to the Affidavit of Gary Ware dated January 21, 2020 (the "**Ware Affidavit**"), and the amendment to the

Stalking Horse APA dated January 22, 2020 (the "**APA Amendment**", and together with the Stalking Horse APA, the "**Sale Agreement**"), appended to the Affidavit of Aiden Nelms dated January 27, 2020 (the "**Nelms Affidavit**"), and vesting in the Canadian Buyer the Canadian Sellers' right, title and interest in and to the assets described in the Sale Agreement (the "**Canadian Assets**"), was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Ware Affidavit, the Nelms Affidavit and the Third Report of Alvarez & Marsal Canada Inc., in its capacity as the court appointed monitor of the Applicants (the "**Monitor**"), dated January 27, 2020 (the "**Report**") and on hearing the submissions of counsel for the Applicants, the Monitor, the Canadian Buyer, Brookfield Principal Credit LLC in its capacity as administrative agent under the DIP Term Documents (the "**DIP Term Agent**"), Wells Fargo Capital Finance, LLC in its capacity as administrative agent and collateral agent under the DIP ABL Documents (the "**DIP ABL Agent**" and with the DIP Term Agent, the "**DIP Agents**") and counsel for those other parties appearing as indicated by the counsel sheet, no one appearing for any other person on the service list, although properly served as appears from the affidavit of service filed:

**DEFINITIONS**

1. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning given to it in the Sale Agreement.

**SERVICE**

2. **THIS COURT ORDERS** that the time for service of notice of this motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

**APPROVAL AND VESTING**

3. **THIS COURT ORDERS** that the Transaction is hereby approved, and the execution of the Sale Agreement by the Canadian Sellers is hereby authorized and approved, with such minor amendments as the Canadian Sellers may deem necessary with the consent of the Canadian Buyer and the Monitor and in consultation with the DIP Agents. The Canadian Sellers

are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Canadian Assets to the Canadian Buyer. The Monitor shall be authorized to take such additional steps in furtherance of its responsibilities under this Order and shall not incur any liability as a result thereof.

4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of the Monitor's certificate to the Canadian Buyer substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of the Canadian Sellers' right, title and interest in and to the Canadian Assets, including the real property legally described in Schedule B (the "**New Brunswick Property**"), shall vest absolutely in the Canadian Buyer, including any assignee thereof permitted under the Sale Agreement, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, title retention agreements, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered, recorded or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Orders of the Honourable Justice Hainey in these proceedings dated November 25, 2019 and December 20, 2019, as amended and restated, and any other Orders made in the within CCAA proceeding; (ii) all Claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), *Personal Property Security Act* (Nova Scotia), *Personal Property Security Act* (New Brunswick) or any other personal property registry system; (iii) all Claims against title to the New Brunswick Property, whether or not they have been recorded or registered in the Registry Office pursuant to the *Registry Act* (New Brunswick) or in the Land Titles Office pursuant to the *Land Titles Act* (New Brunswick), or any other land registry system or other Claims; and (iv) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D (collectively, the "**Permitted Encumbrances**") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Canadian Assets are hereby expunged and discharged as against the Canadian Assets. Notwithstanding the foregoing, nothing in this Order shall derogate from the assumption of the Assumed Canadian Liabilities as set forth in the Sale Agreement.

5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Canadian Assets shall stand in the place and stead of the Canadian Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Canadian Assets with the same priority as they had with respect to the Canadian Assets immediately prior to the sale, as if the Canadian Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Canadian Sellers and the Canadian Buyer, which notice shall be copied to the DIP Agents, regarding the fulfillment of conditions to Closing under the Sale Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

7. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

**REAL AND IMMOVABLE PROPERTY REGISTRATIONS**

8. **THIS COURT ORDERS** that the Registrar of Deeds or the Registrar of Land Titles shall record or register this Approval and Vesting Order in the Registry Office pursuant to the *Registry Act* (New Brunswick) or in the Land Titles Office pursuant to the *Land Titles Act* (New Brunswick), as applicable, and shall enter the Canadian Buyer as the owner of the New Brunswick Property in fee simple and delete and expunge from title to the New Brunswick Property all of the Encumbrances relating to the New Brunswick Property, other than the Permitted Encumbrances identified in Schedule D. Upon the recording or registration of this Approval and Vesting Order in the Registry Office or the Land Titles Office, as applicable, all rights, title and interest in and to the New Brunswick Property shall vest absolutely in the Canadian Buyer, free and clear of and from any and all Encumbrances, other than the Permitted Encumbrances identified in Schedule D.

**ADDITIONAL PROVISIONS**

9. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Canadian Sellers and the Monitor are

authorized and permitted to disclose and transfer to the Canadian Buyer all human resources and payroll information in the Canadian Sellers' records pertaining to the Canadian Sellers' past and current employees, including personal information of those employees listed on Schedule 4.11 to the Sale Agreement. The Canadian Buyer shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to them in a manner which is in all material respects identical to the prior use of such information by the Canadian Sellers and in accordance with applicable law.

10. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") in respect of any of the Canadian Sellers and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Canadian Sellers;

the vesting of the Canadian Assets in the Canadian Buyer pursuant to this Order and the completion of the steps contemplated by the Sale Agreement shall be binding on any trustee in bankruptcy that may be appointed in respect of the Canadian Sellers and shall not be void or voidable by creditors of the Canadian Sellers, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

**APPROVAL OF THE BACK UP BID**[1]

11. **THIS COURT ORDERS** that the Term Loan Agent, the DIP Term Agent and Honey Blue Canada Acquisition Inc. (the "**Backup Bidder**") is hereby approved as the Backup Bidder for the Canadian Assets, and the Bid submitted by the Backup Bidder is hereby approved and authorized as the Backup Bid and shall remain open as the Backup Bid pursuant to the terms of the Bidding Procedures. In the event that the Canadian Buyer cannot or does not consummate the Transaction, the Canadian Sellers may designate the Backup Bidder to be the Successful Bidder and the Backup Bid to be the Successful Bid upon service of a notice to such effect on the service list and filing such notice with the Court, in which case: (i) Honey Blue Canada Acquisition Inc. shall be deemed to be the "Canadian Buyer" for all intents and purposes under this Order; (ii) the Backup Bidder's executed Purchase Agreement and Qualified Bid Documents shall be deemed to be, collectively, the "Sale Agreement" for all intents and purposes under this Order; (iii) the transactions contemplated under the Backup Bidder's executed Purchase Agreement and Qualified Bid Documents shall be deemed to be the "Transaction" for all intents and purposes under this Order; (iv) the assets of the Canadian Sellers purchased under such Purchase Agreement and Qualified Bid Documents shall be deemed to be the "Canadian Assets" for all intents and purposes under this Order; and (v) the Canadian Sellers shall be authorized to take all actions necessary or appropriate to consummate the Backup Bid as are contemplated by this Order with respect to the Sale Agreement and the Transaction. For the avoidance of doubt, in the event a Backup Bid is designated the Successful Bid as contemplated by this paragraph 11, all of the relief granted pursuant to this Order, including, without limitation, the relief granted pursuant to paragraphs 3, 4, 8, 9 and 10 of this Order shall apply to the transactions contemplated by the Backup Bid *mutatis mutandis*.

**DISTRIBUTION OF CASH PROCEEDS**

12. **THIS COURT ORDERS AND DIRECTS** that the cash proceeds of the Transaction shall be applied and distributed in the manner and on the terms set forth on Schedule E hereto.

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[1] Capitalized terms used in this paragraph have the meaning ascribed to them in the Bidding Procedures approved by this Court in its Order (Bidding Procedures, Stalking Horse Approval and Stay Extension) dated December 20, 2019.

13. **THIS COURT ORDERS** that notwithstanding any of the matters referenced in subparagraphs 10(a), (b) or (c) of this Order, the distributions contemplated by Schedule E hereof (the "**Approved Distributions**") shall be made free and clear of all Encumbrances and Permitted Encumbrances, shall be binding on any trustee in bankruptcy or receiver that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the CCAA, the BIA or any other applicable federal or provincial legislation, as against the Canadian Sellers, the Monitor, the DIP Agents, the Term Loan Agent, the Secured Lenders or any other person entitled to received Approved Distributions hereunder, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor as may be necessary or desirable to give effect to this Order or to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 28 2020

PER / PAR:

**Schedule A – Form of Monitor's Certificate**

Court File No. CV-19-631523-00CL

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

**Applicants**

**MONITOR'S CERTIFICATE**

**RECITALS**

A. Pursuant to the Initial Order of the Honourable Justice Hainey of the Ontario Superior Court of Justice (the "**Court**") dated November 14, 2019, the Applicants were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act* and Alvarez & Marsal Canada Inc. was appointed as the monitor (the "**Monitor**") of the Applicants.

B. Pursuant to an Order of the Court dated December 20, 2019, the Court approved the agreement of purchase and sale among the Applicants (each a "**Canadian Seller**" and together the "**Canadian Sellers**"), each of the Persons identified on Schedule I of the Sale Agreement as a U.S. Seller, and the Person identified on Schedule I of the Sale Agreement as the Equity Seller, and Tonos LLC, as U.S. Buyer, Melissi 4 Inc., as Equity Buyer, FCF Co. Ltd., as Guarantor, and Tonos 1 Operating Corp. (the "**Canadian Buyer**") dated November 21, 2019, and the amendment to the thereto dated January 22, 2020 (together, the "**Sale Agreement**"), and provided for the vesting in

the Canadian Buyer, including any assignee thereof permitted under the Sale Agreement, of the Canadian Sellers' right, title and interest in and to the assets described in the Sale Agreement (the "**Canadian Assets**"), which vesting is to be effective with respect to the Canadian Assets upon the delivery by the Monitor to the Canadian Buyer of a certificate confirming that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Canadian Sellers and the Canadian Buyer that the conditions to Closing as set out in Article VIII of the Sale Agreement have been satisfied or waived by the applicable Parties.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Canadian Sellers and the Canadian Buyer, in form and substance satisfactory to the Monitor, that the conditions to Closing as set out in Article VIII of the Sale Agreement have been satisfied or waived by the Canadian Sellers and the Canadian Buyer as applicable.

2. This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

**Alvarez & Marsal Canada Inc., in its capacity as court-appointed monitor of Clover Leaf Holdings Company, Connors Bros. Clover Leaf Seafoods Company, K.C.R. Fisheries Ltd., 6162410 Canada Limited, Connors Bros. Holdings Company and Connors Bros. Seafoods Company and not in its personal capacity**

Per:

_____

Name:

Title:

## Schedule B – New Brunswick Property

| PID # | Description |
|---|---|
| 01219476 | Wellington Road Shorefront |
| 01221043 | Jackson Farm Wells – Fresh Water Supply |
| 01223692 | Tunaville - Waterfront on BH & Letang |
| 01226075 | Wallace Cove Road / Small piece of land across from Pea Point |
| 01235407 | Bayside Warehouse |
| 01337245 | Small triangular lot near Pennfield Baptist Church - water line crosses this. This is on Beaver Harbour road southeast of intersection of Beaver Harbour Road and Justasons Lane. |
| 15000151 | Land East of Jackson Farm - retained as possible site for future water exploration. New highway crosses this lot. |
| 15173800 | Parcel of land to the south of Buckman's Creek Hatchery adjacent to our Blueberry Field Property (Billed under PID 15000151) |
| 15000672 | Woodland - Road to Blacks Harbour. Wooded lot on Justasons Lane, Pennfield held due to water supply line crosses. |
| 15029093 | Small parcel of land across from Pea Point Nature Preserve (SNB combined with 01226075) |
| 15032394 | Vacant - Wellington Road next Bonnie Hooper. |
| 15032402 | Narrow strip along road across from PID 15032394. On Wellington Road, Black Harbour directly across Harbour from plant |
| 15053416 | Small lot behind church parking lot. Small triangular shaped lot on Hospital Street, Blacks Harbour – behind Wesleyan Church parking lot. |
| 15075187 | Remnant from Pea Point Parcel |
| 15091853 | BH shorefront across from Plant |
| 15092604 | BH shorefront across from Plant |
| 15148968 | Salt Water pump house lot |
| 15151574 | Wharf, Plant & Waterfront |

| PID # | Description |
|---|---|
| 15152283 | Blacks Hr Road (Mill Brook area). Small vacant lot on Main Street, Blacks Harbour – being donated to Village |
| 15152481 | Wharf, Plant & Waterfront (billed under PID 15151574) |
| 15197676 | Wharf, Plant & Waterfront (billed under PID 15151574) |
| 15152267 | Farm Rd reservoir lot. Farm Road Frontage lot north/northwest of Main Street, Blacks Harbour – has water supply line and reservoir on it. Small portion south of water, supply line along Blacks Harbour Road is in assets held for sale. |
| 15152309 | Warehouse 4 and lab building. Garage land from garage to Warehouses |
| 15152309 | Corner in front of Garage (curve in road) |
| 15152317 | Lot between plant and Hillside Drive |
| 15152374 | #260 Building - 63 Willow Ct |
| 15152382 | Portion of vacant Land on Deadman's Harbour |
| 15152416 | Lot that follows powerline & FW main along Route 776 |
| 15152457 | Bowtie shaped lot on corner around Baptist Church At corner of Main Street & Deadman's Harbour Road – Blacks Harbour |
| 15156227 | House, Garage & Lot "Connors" property at 127 Brunswick Street, Blacks Harbour |
| 15156235 | Vacant Lot Small triangular shaped lot adjacent to 127 Brunswick Street on the north west side |
| 15158215 | Vacant Rear Lot Wooded lot adjacent to 127 Brunswick Street on the south east side |
| 15162126 | Land Parcel in front of Garage (apart of PID 15152309) |
| 15170988 | Lot near Pennfield that FW main crosses. |
| 15170996 | Lot adjacent to PID 15170988 - kept for possible water source |
| 15152572 | Land behind Main Office - 304 acres (BH) Large lot south/southeast of Main Street, Blacks Harbour – in assets held for sale<br>Land behind Main Office - (Pennfield) Small lot that is the continuation of immediately above lot that extends outside the Blacks Harbour village limit into Pennfield – in assets held for sale |
| 15011620 | Southern Bliss Island in Bay of Fundy and is in assets held for sale |
| 01242791 | Frye Island in Bay of Fundy and is in assets held for sale |

| PID # | Description |
|---|---|
| 15001183 | Lot at Mill stream with lift station Not at Mill Stream, but is on Wallace Cove Road – being donated to Village of Blacks Harbour |
| 15158223 | Vacant Lot Small lot adjacent to 127 Brunswick Street on the north west side |

# Schedule C – Encumbrances

## I. *Personal Property Security Act* (Ontario) security

| Secured Party(ies) | Debtor(s) | Reference File No. & Registration Number (Registration Period) | Collateral Classification | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | 757925802 - 20191126 0806 1590 1138 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 2. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Holdings Company<br>Connors Bros. Seafoods Company | 757895787 - 20191125 1037 1590 1063 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 3. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd.<br>6162410 Canada Limited | 730721034 - 20170809 1607 1590 0003 (8 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 4. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | 666565569 - 20101214 1818 1862 8213 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Renewed by 20180205 1523 1862 5634<br>5 years |
| 5. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | 649909458 - 20081113 1117 1862 3411 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Amended by 20101214 1823 1862 8218<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed by 20180205 1521 1862 5632<br>7 years |
| 6. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | 649909548 - 20081113 1118 1862 3417 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Amended by 20081118 1423 1862 3759<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor |

| Secured Party(ies) | Debtor(s) | Reference File No. & Registration Number (Registration Period) | Collateral Classification | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|---|
| | | | | | Amended by 20101214 1823 1862 8217<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed by 20180205 1522 1862 5633<br>7 years |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | 757925784 - 20191126 0805 1590 1136 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | 666565542 - 20101214 1817 1862 8211 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Renewed by 20180205 1527 1862 5641<br>5 years |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | 649909503 - 20081113 1117 1862 3415 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Amended by 20101214 1823 1862 8220<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed by 20180205 1527 1862 5640<br>7 years |
| 10. Wells Fargo Capital Finance, LLC, as Agent | K.C.R. Fisheries Ltd. | 757925793 - 20191126 0805 1590 1137 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 11. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | 666565578 - 20101214 1818 1862 8214 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Renewed by 20180205 1526 1862 5639<br>5 years |
| 12. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | 649909422 - 20081113 1116 1862 3409 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Amended by 20101214 1823 1862 8216<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed by 20180205 1525 1862 5638<br>7 years |
| 13. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | 757925829 - 20191126 0806 1590 1140 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |

| Secured Party(ies) | Debtor(s) | Reference File No. & Registration Number (Registration Period) | Collateral Classification | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|---|
| 14. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | 666565587 - 20101214 1819 1862 8215 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Renewed by 20180205 1525 1862 5637<br>5 years |
| 15. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | 649909476 - 20081113 1117 1862 3413 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | Amended by 20101214 1823 1862 8219<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed by 20180205 1524 1862 5635<br>7 years |
| 16. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | 757925811 - 20191126 0806 1590 1139 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |
| 17. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | 757925739 - 20191126 0803 1590 1135 (10 years) | Inventory, Equipment, Accounts, Other, Motor Vehicles | | |

## II. *Personal Property Security Act (New Brunswick) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 16912297<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 16920696<br>Amendment to add serial numbered collateral<br>Amended on Nov. 17, 2008 by 16921082<br>Amendment to add and remove serial numbered collateral<br>Amended on Nov. 17, 2008 by 16921165<br>Amendment to add and remove serial numbered collateral<br>Amended on Dec. 10, 2010 by 19563113<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC" |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | Renewed on Feb. 5, 2018 by 30153274<br>7 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 16912354<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Nov. 18, 2008 by 16927345<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor<br>Amended on Dec. 10, 2010 by 19563121<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 30153308<br>7 years *(included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 19564061<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Renewed on Feb. 5, 2018 by 30153316<br>5 years *(included in expiry date)* |
| 4. Brookfield Principal Credit LLC as Administrative Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 29342151<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868 | Amended on Sep. 4, 2019 by 32675183<br>Amendment to add serial numbered goods |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 29347150<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>A security interest is taken in all of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | K.C.R. Fisheries Ltd.<br>6162410 Canada Limited | | | |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Seafoods Company<br>Connors Bros. Holdings Company<br>Clover Leaf Seafood S.a r.l. | Regn No.: 33029240<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>A security interest is taken in all of the debtors' present and after-acquired personal property.<br>Serial Numbered Collateral:<br>Rowan & Evan Boat, S/N 833305<br>Canada 100 Boat, S/N 328939<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Michael Eileen Boat, S/N 318586<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192 | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 33030834<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | <u>General Collateral:</u><br>All of the debtor's present and after acquired personal property<br><u>Serial Numbered Collateral:</u><br>Brunswick Provider Boat, S/N 828873<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905 | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | 2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192<br>Fundy Monarch Boat, S/N 838868 | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 16912321<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Dec. 10, 2010 by 19563170<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 30153290<br>7 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 19564210<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Renewed on Feb. 5, 2018 by 30153357<br>5 years *(included in expiry date)* |
| 10. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 33030776<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 11. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 16912289<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Amended on Nov. 17, 2008 by 16920688<br>Amendment to include serial numbered collateral<br>Amended on Dec. 10, 2010 by 19563139<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 30153266<br>7 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 12. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 19564186<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Renewed on Feb. 5, 2018 by 30153332<br>5 years *(included in expiry date)* |
| 13. Brookfield Principal Credit LLC as Administrative Agent | K.C.R. Fisheries Ltd. | Regn No.: 29342102<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | |
| 14. Wells Fargo Capital Finance, LLC, as Agent | K.C.R. Fisheries Ltd. | Regn No.: 33030826<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939<br>Rowan & Evan Boat, S/N 833305 | |
| 15. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 16912305<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 16920704<br>Amendment to add serial numbered goods<br>Amended on Nov. 17, 2008 by 16921090<br>Amendment to add and remove serial numbered goods<br>Amended on Nov. 17, 2008 by 16921173<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 19563154<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Amended on Jun. 13, 2016 by 27528140<br>Amendment to remove serial numbered goods<br>Renewed on Feb. 5, 2018 by 30153282<br>7 years *(included in expiry date)* |
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 19564194<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685 | Amended on Dec. 14, 2010 by 19589464<br>Amendment to add serial number goods<br>Amended on Jun. 13, 2016 by 27528165<br>*The reason for amendment is not apparent* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Strathaven Boat, S/N 323666<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495<br>Judy & Jason Boat, S/N 393098 | Amended on Jun. 13, 2016 by 27528223<br>Amendment to remove serial numbered goods<br>Renewed on Feb. 5, 2018 by 30153340<br>5 years *(included in expiry date)* |
| 17. Brookfield Principal Credit LLC as Administrative Agent | 6162410 Canada Limited | Regn No.: 29342136<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339 | |
| 18. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 33030990<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Andrew & Deane Boat, S/N 314339<br>Capelco Boat, S/N 318596<br>Caroline B. Boat, S/N 328495<br>Michael Eileen Boat, S/N 318586<br>Senator Neil Boat, S/N 314685<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Judy & Jason Boat, S/N 393098 | |
| 19. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 33030800<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 33030818<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 21. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Seafood S.a r.l. | Regn No.: 33030784<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |

## III. *Personal Property Security Act (Nova Scotia) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 14649719<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 14659643<br>Amendment to add serial numbered goods<br>Amended on Nov. 17, 2008 by 14659957<br>Amendment to add and remove serial numbered goods<br>Amended on Nov. 17, 2008 by 14660021<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 17489170<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 28881902<br>7 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 14649784<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Nov. 18, 2008 by 14666812<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor.<br>Amended on Dec. 10, 2010 by 17489196<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 28881936<br>7 years *(included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 17490350<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Renewed on Feb. 5, 2018 by 28881969<br>5 years *(included in expiry date)* |
| 4. Brookfield Principal | Connors Bros. Clover Leaf | Regn No.: 28082709<br>Regn Date: Aug. 9, | General Collateral:<br>The serial numbered collateral described | Amended on Sep. 4, 2019 by 31721665 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| Credit LLC as Administrative Agent | Seafoods Company | 2017<br>Expiry Date: Aug. 9, 2025 | herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868 | Amendment to add serial numbered goods |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd.<br>6162410 Canada Limited<br>Clover Leaf Seafood S.a r.l. | Regn No.: 28087294<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>A security interest is taken in all of the debtors' present and after-acquired personal property. | Amended on Aug. 10, 2017 by 28091494<br>Amendment to correct the name of one of the debtors<br>Amended on Aug. 14, 2017 by 28104701<br>Amendment to correct the name of one of the debtors |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Seafoods Company<br>Connors Bros. Holdings Company<br>Clover Leaf Seafood S.a r.l. | Regn No.: 32107377<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>A security interest is taken in all of the debtors' present and after-acquired personal property.<br>Serial Numbered Collateral:<br>Rowan & Evan Boat, S/N 833305<br>Canada 100 Boat, S/N 328939<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Michael Eileen Boat, S/N 318586<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608 | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | 2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192 | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 32109530<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | <u>General Collateral:</u><br>All of the debtor's present and after acquired personal property.<br><u>Serial Numbered Collateral:</u><br>Brunswick Provider Boat, S/N 828873<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192<br>Fundy Monarch Boat, S/N 838868 | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 14649750<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Dec. 10, 2010 by 17489220<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 28881928<br>7 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 17490483<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Renewed on Feb. 5, 2018 by 28882009<br>5 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 10. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 32109399<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 11. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 14649701<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Amended on Nov. 17, 2008 by 14659635<br>Amendment to include serial numbered goods<br>Amended on Dec. 10, 2010 by 17489204<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 28881886<br>7 years *(included in expiry date)* |
| 12. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 17490459<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Renewed on Feb. 5, 2018 by 28881985<br>5 years *(included in expiry date)* |
| 13. Brookfield Principal Credit LLC as Administrative Agent | K.C.R. Fisheries Ltd. | Regn No.: 28082634<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | |
| 14. Wells Fargo Capital Finance, LLC, as Agent | K.C.R. Fisheries Ltd. | Regn No.: 32109506<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939<br>Rowan & Evan Boat, S/N 833305 | |
| 15. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 14649735<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 14659650<br>Amendment to include serial numbered goods<br>Amended on Nov. 17, 2008 by 14659973<br>Amendment to include and remove serial numbered goods<br>Amended on Nov. 17, 2008 by 14660039<br>Amendment to include and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 17489212<br>Amendment to change the name of the secured party |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 28881910<br>7 years *(included in expiry date)* |
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 17490467<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495<br>Judy & Jason Boat, S/N 393098 | Amended on Dec. 14, 2010 by 17516881<br>Amendment to include serial numbered goods<br>Renewed on Feb. 5, 2018 by 28881993<br>5 years *(included in expiry date)* |
| 17. Brookfield Principal Credit LLC as Administrative Agent | 6162410 Canada Limited | Regn No.: 28082667<br>Regn Date: Aug. 9, 2017<br>Expiry Date: Aug. 9, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles<br>Serial Numbered Collateral:<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339 | |
| 18. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 32109498<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Andrew & Deane Boat, S/N 314339<br>Capelco Boat, S/N 318596<br>Caroline B. Boat, S/N 328495<br>Michael Eileen Boat, S/N 318586<br>Senator Neil Boat, S/N 314685<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Judy & Jason Boat, S/N 393098 | |
| 19. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 32109423<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 32109449<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 21. Wells Fargo Capital Finance, LLC | Clover Leaf Seafood S.A R.L. | Regn No.: 31125149<br>Regn Date: May 9, 2019<br>Expiry Date: May 9, 2025 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 22. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Seafood S.A R.L. | Regn No.: 32109407<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |

## IV. *Personal Property Security Act (British Columbia) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros Clover Leaf Seafoods Company | Regn No.: 691575E<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All present and after-acquired personal property. | Amended on Dec. 14, 2010 by 911955F<br>Amendment to change the name of the secured party from "Wells Fargo Foothill LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 551801K<br>7 years *(included in expiry date)*<br>Renewed on Aug. 7, 2018 by 943641K<br>10 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros Clover Leaf Seafoods Company | Regn No.: 691585E<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All present and after-acquired personal property. | Amended on Nov. 19, 2008 by 701397E<br>Amendment to include "Connors Bros Clover Leaf Seafoods Company" as an additional debtor<br>Amended on Dec. 14, 2010 by 911953F<br>Amendment to change the name of the secured party from "Wells Fargo Foothill LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 551803K<br>7 years *(included in expiry date)*<br>Renewed on Aug. 7, 2018 by 943649K<br>10 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 3. Wells Fargo Capital Finance, LLC | Connors Bros Clover Leaf Seafoods Company | Regn No.: 911962F<br>Regn Date: Dec. 14, 2010<br>Expiry Date: Dec. 14, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 551813K<br>5 years *(included in expiry date)* |
| 4. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros Clover Leaf Seafoods Company<br>K C R Fisheries Ltd<br>6162410 Canada Limited | Regn No.: 746111L<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>All present and after-acquired personal property of the debtors | |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros Clover Leaf Seafoods Company<br>K C R Fisheries Ltd *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros Seafoods Company<br>Connors Bros Holdings Company | Regn No.: 911157L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All present and after-acquired personal property of the debtors | |
| 6. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros Clover Leaf Seafoods Company | Regn No.: 913323L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 7. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 691583E<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All present and after-acquired personal property. | Amended on Dec. 14, 2010 by 911951F<br>Amendment to change the name of the secured party from "Wells Fargo Foothill LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 551833K<br>7 years *(included in expiry date)*<br>Renewed on Aug. 7, 2018 by 943637K<br>10 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 911963F<br>Regn Date: Dec. 14, 2010<br>Expiry Date: Dec. 14, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 551834K<br>5 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 913322L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 10. Wells Fargo Capital Finance, LLC | KCR Fisheries Ltd | Regn No.: 691573E<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All present and after-acquired personal property. | Amended on Dec. 14, 2010 by 911944F<br>Amendment to change the name of the secured party from "Wells Fargo Foothill LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 551827K<br>7 years *(included in expiry date)*<br>Renewed on Aug. 7, 2018 by 943654K<br>10 years *(included in expiry date)* |
| 11. Wells Fargo Capital Finance, LLC | KCR Fisheries Ltd | Regn No.: 911958F<br>Regn Date: Dec. 14, 2010<br>Expiry Date: Dec. 14, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 551830K<br>5 years *(included in expiry date)* |
| 12. Wells Fargo Capital Finance, LLC, as Agent | KCR Fisheries Ltd | Regn No.: 913326L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 13. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 691579E<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All present and after-acquired personal property. | Amended on Dec. 14, 2010 by 911949F<br>Amendment to change the name of the secured party from "Wells Fargo Foothill LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 551818K<br>7 years *(included in expiry date)*<br>Renewed on Aug. 7, 2018 by 943634K<br>10 years *(included in expiry date)* |
| 14. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 911960F<br>Regn Date: Dec. 14, 2010<br>Expiry Date: Dec. 14, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 551822K<br>5 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 15. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 913321L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 16. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros Holdings Company | Regn No.: 913324L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 17. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros Seafoods Company | Regn No.: 913325L<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |

## V. *Personal Property Security Act (Alberta) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 08111303587<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 10121503625<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 18020527795<br>*(Renewal included in expiry date)*<br>Renewed on Aug. 7, 2018 by 18080727481<br>*(Renewal included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 08111303693<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Amended on Nov. 18, 2008 by 08111826814<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor<br>Amended on Dec. 15, 2010 by 10121503658<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 18020527856<br>*(Renewal included in expiry date)*<br>Renewed on Aug. 7, 2018 by 18080727437 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | *(Renewal included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 10121503703<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 18020527601<br>*(Renewal included in expiry date)* |
| 4. Wells Fargo Bank, National Association | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 10121530485<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2020 | General Collateral:<br>All present and after acquired personal property of the debtor.<br>Additional Information:<br>Wells Fargo Bank, National Association acts as Trustee and Collateral Agent. | |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R Fisheries Ltd.<br>6162410 Canada Limited | Regn No.: 19090508601<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>All present and after-acquired personal property of the debtors. | |
| 6. Brookfield Principal Credit LLC | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Holdings Company<br>Connors Bros. Seafoods Company | Regn No.: 19112515672<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All present and after-acquired personal property of the debtors.<br>Additional Information:<br>Please note that the full name and address of the secured party is:<br>Brookfield Principal Credit LLC, As Administrative Agent<br>250 Vesey Street, 15th Floor<br>New York, New York<br>USA, 10281 | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 19112611363<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 8. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 19112619622<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Infinity<br>Type: Land Charge | General Collateral:<br>*N/A* | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 08111303667<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 10121503695<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 18020527953<br>*(Renewal included in expiry date)*<br>Renewed on Aug. 7, 2018 by 18080727384<br>*(Renewal included in expiry date)* |
| 10. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 10121503734<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 18020527758<br>*(Renewal included in expiry date)* |
| 11. Wells Fargo Bank, National Association | Clover Leaf Holdings Company | Regn No.: 10121530553<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2020 | General Collateral:<br>All present and after acquired personal property of the debtor<br>Additional Information:<br>Wells Fargo Bank, National Association acts as Trustee and Collateral Agent | |
| 12. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 19112611292<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 13. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 19112619758<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Infinity<br>Type: Land Charge | General Collateral:<br>*N/A* | |
| 14. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 08111303542<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 10121503678<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 18020527927<br>*(Renewal included in expiry date)*<br>Renewed on Aug. 7, 2018 by 18080727516<br>*(Renewal included in expiry date)* |
| 15. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 10121503711<br>Regn Date: Dec. 15, | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 18020527705 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | 2010<br>Expiry Date: Dec. 15, 2025 *(including renewal)* | | *(Renewal included in expiry date)* |
| 16. Wells Fargo Bank, National Association | K.C.R Fisheries Ltd. | Regn No.: 10121530605<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2020 | General Collateral:<br>All present and after acquired personal property of the debtor<br>Additional Information:<br>Wells Fargo Bank, National Association acts as Trustee and Collateral Agent | |
| 17. Wells Fargo Capital Finance, LLC, as Agent | K.C.R Fisheries Ltd. | Regn No.: 19112611222<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 18. Wells Fargo Capital Finance, LLC, as Agent | K.C.R Fisheries Ltd. | Regn No.: 19112619286<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Infinity<br>Type: Land Charge | General Collateral:<br>*N/A* | |
| 19. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 08111303638<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2035 *(including renewals)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 10121503689<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 18020527882<br>*(Renewal included in expiry date)*<br>Renewed on Aug. 7, 2018 by 18080727298<br>*(Renewal included in expiry date)* |
| 20. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 10121503723<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018 by 18020527661<br>*(Renewal included in expiry date)* |
| 21. Wells Fargo Bank, National Association | 6162410 Canada Limited | Regn No.: 10121530508<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Dec. 15, 2020 | General Collateral:<br>All present and after acquired personal property of the debtor<br>Additional Information:<br>Wells Fargo Bank, National Association acts as Trustee and Collateral Agent | |
| 22. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 19112611147<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 23. Wells Fargo Capital | 6162410 Canada Limited | Regn No.: 19112619382<br>Regn Date: Nov. 26, | General Collateral:<br>*N/A* | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| Finance, LLC, as Agent | | 2019<br>Expiry Date: Infinity<br>Type: Land Charge | | |
| 24. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 19112612266<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 25. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 19112619456<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Infinity<br>Type: Land Charge | General Collateral:<br>*N/A* | |
| 26. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 19112612281<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Nov. 26, 2029 | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | |
| 27. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 19112619528<br>Regn Date: Nov. 26, 2019<br>Expiry Date: Infinity<br>Type: Land Charge | General Collateral:<br>*N/A* | |

## VI. *Personal Property Security Act (Saskatchewan) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 300396143<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property of the debtor. | Amended on Dec. 15, 2010<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018<br>7 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 300396167<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property of the debtor. | Amended on Nov. 20, 2008<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor<br>Amended on Dec. 15, 2010<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | 7 years *(included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 300667676<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018<br>5 years *(included in expiry date)* |
| 4. Wells Fargo Bank, National Association as Trustee and Collateral Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 300667912<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>A security interest is taken in all of the Debtor's present and after-acquired personal property. | |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd.<br>6162410 Canada Limited | Regn No.: 301948658<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 10, 2025 | General Collateral:<br>All present and after-acquired personal property of the debtor | |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Holdings Company<br>Connors Bros. Seafoods Company | Regn No.: 301979192<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 1, 2029 | General Collateral:<br>All present and after-acquired personal property of the debtors. | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 301979629<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 300396158<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. | General Collateral:<br>All present and after-acquired personal property of the debtor. | Amended on Dec. 15, 2010<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | 18, 2025 *(including renewal)* | | LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018<br>7 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 300667688<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018<br>5 years *(included in expiry date)* |
| 10. Wells Fargo Bank, National Association as Trustee and Collateral Agent | Clover Leaf Holdings Company | Regn No.: 300667914<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>A security interest is taken in all of the Debtor's present and after-acquired personal property. | |
| 11. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 301979628<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 12. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 300396139<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All present and after-acquired personal property of the debtor. | Amended on Dec. 15, 2010<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018<br>7 years *(included in expiry date)* |
| 13. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 300667682<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018<br>5 years *(included in expiry date)* |
| 14. Wells Fargo Bank, National Association as Trustee and Collateral Agent | K.C.R Fisheries Ltd. | Regn No.: 300667916<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>A security interest is taken in all of the Debtor's present and after-acquired personal property. | |
| 15. Wells Fargo Capital Finance, LLC, as Agent | K.C.R Fisheries Ltd. | Regn No.: 301979632<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 300396154<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. | General Collateral:<br>All present and after-acquired personal property of the debtor. | Amended on Dec. 15, 2010<br>Amendment to change the name of the secured party from "Wells Fargo Foothill, |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | 18, 2025 *(including renewal)* | | LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018<br>7 years *(included in expiry date)* |
| 17. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 300667685<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 *(including renewal)* | General Collateral:<br>All of the Debtor's present and after-acquired personal property. | Renewed on Feb. 5, 2018<br>5 years *(included in expiry date)* |
| 18. Wells Fargo Bank, National Association as Trustee and Collateral Agent | 6162410 Canada Limited | Regn No.: 300667913<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>A security interest is taken in all of the Debtor's present and after-acquired personal property. | |
| 19. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 301979627<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 301979630<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |
| 21. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 301979631<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |

## VII. *Personal Property Security Act (Manitoba) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 201020945600<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Feb. 5, 2018 by 201802119416<br>Sections Changed: Expiry Date |
| 2. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf | Regn No.: 201920313901<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 1, 2029 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Holdings Company<br>Connors Bros. Seafoods Company | | | |
| 3. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R Fisheries Ltd.<br>6162410 Canada Limited | Regn No.: 201915232006<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 10, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 4. Wells Fargo Bank, National Association as trustee and collateral agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 201020975500<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 5. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 200821888505<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Nov. 19, 2008 by 200822276414<br>Sections Changed: Business Debtors<br>Amended on Dec. 15, 2010 by 201020952917<br>Sections Changed: Secured Parties<br>Amended on Feb. 5, 2018 by 201802119211<br>Sections Changed: Expiry Date |
| 6. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 200821886006<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 201020958214<br>Sections Changed: Secured Parties<br>Amended on Feb. 5, 2018 by 201802119114<br>Sections Changed: Expiry Date |
| 7. Wells Fargo Capital | Connors Bros. Clover Leaf | Regn No.: 201920375303<br>Regn Date: Nov. 25, | General Collateral:<br>All of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| Finance, LLC, as Agent | Seafoods Company | 2019<br>Expiry Date: Nov. 25, 2029 | | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 201020947409<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Feb. 5, 2018 by 201802120511<br>Sections Changed: Expiry Date |
| 9. Wells Fargo Bank, National Association as trustee and collateral agent | Clover Leaf Holdings Company | Regn No.: 201020976204<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 10. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 200821887401<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 201020959210<br>Sections Changed: Secured Parties<br>Amended on Feb. 5, 2018 by 201802120317<br>Sections Changed: Expiry Date |
| 11. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 201920378604<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>The Security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 12. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 201020946003<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Feb. 5, 2018 by 201802120112<br>Sections Changed: Expiry Date |
| 13. Wells Fargo Bank, National Association as trustee and collateral agent | K.C.R Fisheries Ltd. | Regn No.: 201020977804<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 14. Wells Fargo Capital Finance, LLC | K.C.R Fisheries Ltd. | Regn No.: 200821885409<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 201020958419<br>Sections Changed: Secured Parties<br>Amended on Feb. 5, 2018 by 201802119912<br>Sections Changed: Expiry Date |
| 15. Wells Fargo Capital Finance, LLC, as Agent | K.C.R Fisheries Ltd. | Regn No.: 201920375605<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>The Security interest is taken in all of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 201020946909<br>Regn Date: Dec. 15, 2010<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Feb. 5, 2018 by 201802119815<br>Sections Changed: Expiry Date |
| 17. Wells Fargo Bank, National Association as trustee and collateral agent | 6162410 Canada Limited | Regn No.: 201020975801<br>Regn Date: Dec. 16, 2010<br>Expiry Date: Dec. 16, 2020 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 18. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 200821887002<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Aug. 18, 2025 | General Collateral:<br>The security interest is taken in all of the debtor's present and after-acquired personal property. | Amended on Dec. 15, 2010 by 201020959016<br>Sections Changed: Secured Parties<br>Amended on Feb. 5, 2018 by 201802119513<br>Sections Changed: Expiry Date |
| 19. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 201920378000<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>The Security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 201920375400<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>The Security interest is taken in all of the debtor's present and after-acquired personal property. | |
| 21. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 201920375508<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>The Security interest is taken in all of the debtor's present and after-acquired personal property. | |

## VIII. *Personal Property Security Act (Newfoundland and Labrador) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 6998779<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685 | Amended on Nov. 17, 2008 by 7004733<br>Amendment to add serial numbered goods<br>Amended on Nov. 17, 2008 by 7004948<br>Amendment to add and remove serial numbered goods |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 7004993<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 8725329<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 15671712<br>7 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 6998804<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Nov. 18, 2008 by 7008891<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor.<br>Amended on Dec. 10, 2010 by 8725338<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 15671746<br>7 years *(included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 8725935<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Renewed on Feb. 5, 2018 by 15671753<br>5 years *(included in expiry date)* |
| 4. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd.<br>6162410 Canada Limited | Regn No.: 17262676<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>A security interest is taken in all of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 5. Brookfield Principal Credit LLC as Administrative Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 17262759<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868 | |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Seafoods Company<br>Connors Bros. Holdings Company | Regn No.: 17483827<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>A security interest is taken in all of the debtors' present and after-acquired personal property.<br>Serial Numbered Collateral:<br>Rowan & Evan Boat, S/N 833305<br>Canada 100 Boat, S/N 328939<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Michael Eileen Boat, S/N 318586<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192 | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 17484908<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626 | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192<br>Fundy Monarch Boat, S/N 838868 | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 6998797<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Dec. 10, 2010 by 8725365<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 15671738<br>7 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 8725999<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Renewed on Feb. 5, 2018 by 15671787<br>5 years *(included in expiry date)* |
| 10. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 17484874<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 11. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 6998760<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Amended on Nov. 17, 2008 by 7004724<br>Amendment to add serial numbered goods<br>Amended on Dec. 10, 2010 by 8725347 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 15671704<br>7 years *(included in expiry date)* |
| 12. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 8725962<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Renewed on Feb. 5, 2018 by 15671761<br>5 years *(included in expiry date)* |
| 13. Brookfield Principal Credit LLC as Administrative Agent | K.C.R. Fisheries Ltd. | Regn No.: 17262585<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | |
| 14. Wells Fargo Capital Finance, LLC, as Agent | K.C.R. Fisheries Ltd. | Regn No.: 17484924<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939<br>Rowan & Evan Boat, S/N 833305 | |
| 15. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 6998788<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 7004742<br>Amendment to add serial numbered goods<br>Amended on Nov. 17, 2008 by 7004957<br>Amendment to add and remove serial numbered goods<br>Amended on Nov. 17, 2008 by 7005019<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 8725356<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 15671720<br>7 years *(included in expiry date)* |
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 8725971<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral: | Amended on Dec. 14, 2010 by 8737218<br>Amendment to add serial numbered goods |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | 2025 *(including renewal)* | Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495<br>Judy & Jason Boat, S/N 393098 | Renewed on Feb. 5, 2018 by 15671779<br>5 years *(included in expiry date)* |
| 17. Brookfield Principal Credit LLC as Administrative Agent | 6162410 Canada Limited | Regn No.: 17262619<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles<br>Serial Numbered Collateral:<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339 | |
| 18. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 17484791<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Andrew & Deane Boat, S/N 314339<br>Capelco Boat, S/N 318596<br>Caroline B. Boat, S/N 328495<br>Michael Eileen Boat, S/N 318586<br>Senator Neil Boat, S/N 314685<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Judy & Jason Boat, S/N 393098 | |
| 19. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 17484890<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 17484916<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |

## IX. *Personal Property Security Act (Prince Edward Island) security*

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 2146699<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral: | Amended on Nov. 17, 2008 by 2148679<br>Amendment to add serial numbered goods |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | 13, 2025 *(including renewal)* | Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 2148777<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 2589906<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 4445434<br>7 years *(included in expiry date)* |
| 2. Wells Fargo Capital Finance, LLC | 3231021 Nova Scotia Company<br>Connors Bros. Clover Leaf Seafoods Company | Regn No.: 2146724<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Nov. 18, 2008 by 2150031<br>Amendment to include "Connors Bros. Clover Leaf Seafoods Company" as an additional debtor.<br>Amended on Dec. 10, 2010 by 2589915<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 4445504<br>7 years *(included in expiry date)* |
| 3. Wells Fargo Capital Finance, LLC | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 2590075<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Renewed on Feb. 5, 2018 by 4445461<br>5 years *(included in expiry date)* |
| 4. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd.<br>6162410 Canada Limited | Regn No.: 4954428<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>A security interest is taken in all of the debtor's present and after-acquired personal property. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 5. Brookfield Principal Credit LLC as Administrative Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 4954446<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868 | |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company<br>Connors Bros. Clover Leaf Seafoods Company<br>K.C.R. Fisheries Ltd. *(two addresses listed)*<br>6162410 Canada Limited *(two addresses listed)*<br>Connors Bros. Seafoods Company<br>Connors Bros. Holdings Company | Regn No.: 5026571<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>A security interest is taken in all of the debtors' present and after-acquired personal property.<br>Serial Numbered Collateral:<br>Rowan & Evan Boat, S/N 833305<br>Canada 100 Boat, S/N 328939<br>Brunswick Provider Boat, S/N 828873<br>Capelco Boat, S/N 318596<br>Andrew & Deane Boat, S/N 314339<br>Fundy Monarch Boat, S/N 838868<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Michael Eileen Boat, S/N 318586<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626<br>Forklift - Toyota - 8FBCU25 Motor | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192 | |
| 7. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Clover Leaf Seafoods Company | Regn No.: 5027026<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Brunswick Provider Boat, S/N 828873<br>Clark Forklift Slip Sheet Motor Vehicle, C2332L06329664<br>Doosan Forklift Motor Vehicle, G18S5LP<br>Forklift #719 Motor Vehicle, GXC17E<br>Doosan Forklift G25P-5 Motor Vehicle, MN01109<br>2012 Chevrolet Silverado 2500HD 4x4 Plow Truck Motor Vehicle, 1GC0KVCG1CZ125816<br>Electric Cat Forklift Motor Vehicle, AT3534941<br>Propane Cat Forklift Motor Vehicle, A4EC241789<br>2012 Kenworth T660 Tractor Motor Vehicle, 1XKAD49X2CJ949990<br>2013 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEXXDZ248608<br>2013 Chevrolet Silverado 1500 4x4 Motor Vehicle, 1GCNKPEA9DZ392360<br>Fish Meal Forklift Toyota 8FGU25 Motor Vehicle, 50139<br>FM Forklift Toyota 8FU25 Motor Vehicle, 22840<br>2014 Chevrolet Silverado 1500 Motor Vehicle, 1GCNCPEH7EZ370501<br>2015 Kenworth T880 Tractor Motor Vehicle, 1XKZDP9X2FJ975899<br>Forklift - Toyota - 8FBCU20 Motor Vehicle, 67626 | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Forklift - Toyota - 8FBCU25 Motor Vehicle, 67717<br>2011 Vanguard Trailers Dry-Box Trailer Trailer, 5V8VA5325BM101444<br>Toyota Forklift 8FGU25 Motor Vehicle, 69636<br>Toyota Forklift 8FGU25 Motor Vehicle, 72113<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5333GS658506<br>1996 Pacific Truck & Trailer Sludge Disp Motor Vehicle, 2LT162V49TR000905<br>2014 Utility Trailers Dry-Box Trailer Trailer, 1UYVS2533EG087911<br>Toyota Forklift & Rotator - 8FBCU20 Motor Vehicle, 73526<br>Toyota Forklift - 8FBE18U Motor Vehicle, 11568<br>Toyota Forklift Model 8FGU25 Motor Vehicle, 80455<br>2016 Stoughton Trailers Dry-Box Trailer Trailer, 1DW1A5334GS658501<br>2017 Ford F-150 Motor Vehicle, 1FTEX1CP8HFB94446<br>Front Loader Motor Vehicle, 171278<br>2017 Dodge Grand Caravan Motor Vehicle, 2C4RDGBG8HR599231<br>Forklift, Toyota, Model 8FBCU25 Motor Vehicle, 210091800203<br>2017 Ford Transit Motor Vehicle, 1FBZX2YG4HKA79192<br>Fundy Monarch Boat, S/N 838868 | |
| 8. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 2146715<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Amended on Dec. 10, 2010 by 2589942<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 4445452<br>7 years *(included in expiry date)* |
| 9. Wells Fargo Capital Finance, LLC | Clover Leaf Holdings Company | Regn No.: 2590128<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property. | Renewed on Feb. 5, 2018 by 4445498<br>5 years *(included in expiry date)* |
| 10. Wells Fargo Capital Finance, LLC, as Agent | Clover Leaf Holdings Company | Regn No.: 5026973<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property. | |
| 11. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 2146680<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Amended on Nov. 17, 2008 by 2148660<br>Amendment to add serial numbered goods<br>Amended on Dec. 10, 2010 by 2589924 |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | | Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 4445425<br>7 years *(included in expiry date)* |
| 12. Wells Fargo Capital Finance, LLC | K.C.R. Fisheries Ltd. | Regn No.: 2590100<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | Renewed on Feb. 5, 2018 by 4445470<br>5 years *(included in expiry date)* |
| 13. Brookfield Principal Credit LLC as Administrative Agent | K.C.R. Fisheries Ltd. | Regn No.: 4954400<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939 | |
| 14. Wells Fargo Capital Finance, LLC, as Agent | K.C.R. Fisheries Ltd. | Regn No.: 5027017<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Canada 100 Boat, S/N 328939<br>Rowan & Evan Boat, S/N 833305 | |
| 15. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 2146706<br>Regn Date: Nov. 13, 2008<br>Expiry Date: Nov. 13, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666<br>Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495 | Amended on Nov. 17, 2008 by 2148688<br>Amendment to add serial numbered goods<br>Amended on Nov. 17, 2008 by 2148786<br>Amendment to add and remove serial numbered goods<br>Amended on Dec. 10, 2010 by 2589933<br>Amendment to change the secured party from "Wells Fargo Foothill, LLC" to "Wells Fargo Capital Finance, LLC"<br>Renewed on Feb. 5, 2018 by 4445443<br>7 years *(included in expiry date)* |
| 16. Wells Fargo Capital Finance, LLC | 6162410 Canada Limited | Regn No.: 2590119<br>Regn Date: Dec. 10, 2010<br>Expiry Date: Dec. 10, 2025 *(including renewal)* | General Collateral:<br>A security interest is taken in all of the debtor's present and after acquired personal property.<br>Serial Numbered Collateral:<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Senator Neil Boat, S/N 314685<br>Strathaven Boat, S/N 323666 | Amended on Dec. 14, 2010 by 2592778<br>Amendment to add serial numbered goods<br>Renewed on Feb. 5, 2018 by 4445489<br>5 years *(included in expiry date)* |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| | | | Strathlorne Boat, S/N 323649<br>Andrew & Deane Boat, S/N 314339<br>Caroline B. Boat, S/N 328495<br>Judy & Jason Boat, S/N 393098 | |
| 17. Brookfield Principal Credit LLC as Administrative Agent | 6162410 Canada Limited | Regn No.: 4954419<br>Regn Date: Sep. 5, 2019<br>Expiry Date: Sep. 5, 2025 | General Collateral:<br>The serial numbered collateral described herein and all proceeds of the foregoing in any form including goods, documents of title, chattel paper, investment property, instruments, money and intangibles<br>Serial Numbered Collateral:<br>Judy & Jason Boat, S/N 393098<br>Senator Neil Boat, S/N 314685<br>Caroline B. Boat, S/N 328495<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Capelco Boat, S/N 318596<br>Michael Eileen Boat, S/N 318586<br>Andrew & Deane Boat, S/N 314339 | |
| 18. Wells Fargo Capital Finance, LLC, as Agent | 6162410 Canada Limited | Regn No.: 5026964<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property<br>Serial Numbered Collateral:<br>Andrew & Deane Boat, S/N 314339<br>Capelco Boat, S/N 318596<br>Caroline B. Boat, S/N 328495<br>Michael Eileen Boat, S/N 318586<br>Senator Neil Boat, S/N 314685<br>Silver King Boat, S/N 328483<br>Strathburn Boat, S/N 328474<br>Judy & Jason Boat, S/N 393098 | |
| 19. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Holdings Company | Regn No.: 5026991<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |
| 20. Wells Fargo Capital Finance, LLC, as Agent | Connors Bros. Seafoods Company | Regn No.: 5027008<br>Regn Date: Nov. 25, 2019<br>Expiry Date: Nov. 25, 2029 | General Collateral:<br>All of the debtor's present and after acquired personal property | |

## X. *Register of Personal and Movable Real Rights (Quebec) security*

| | Registration Registration No. Reg. Date & Time Expiry Date Date: YY/MM/DD | Parties | Nature of Registration Amount (Cdn $) Interest Rate | Collateral Affected (summary only) | Ancillary Registrations & Comments |
|---|---|---|---|---|---|
| 1. | 10-0880893-0001<br>2010-12-15 10:35<br><br>2025-08-18<br>(extended from 2020-12-14) | Holder:<br>Wells Fargo Capital Finance, LLC<br><br>Grantor:<br>Connors Bros. Clover Leaf Seafoods Company | Conventional hypothec without delivery<br>$660,000,000<br>25% per annum | The universality of all of the Grantor's movable and immovable property, corporeal and incorporeal, present and future, of any nature whatsoever and wheresoever situate. | Renewal registered on 2018-02-06 under 18-0106524-0001 extending the expiry date to 2025-08-18<br><br>The hypothec is granted to secure payment of bonds or other titles of indebtedness (C.c.Q. art. 2692) |
| 2. | 17-0880312-0001<br>2017-08-21 12:40<br><br>2027-08-21 | **Holder:**<br>Brookfield Principal Credit LLC<br>**Grantor:**<br>Connors Bros. Clover Leaf Seafoods Company | Conventional hypothec without delivery<br>$1,200,000,000<br>25% per annum | The universality of all of movable and immovable property of the Grantor, corporeal and incorporeal, present and future, of any nature whatsoever and wheresoever situate. | *The hypothec is constituted in favour of the Fondé de pouvoir (Article 2692 of the Civil Code of Québec)* |
| 3. | 19-1331646-0001<br>2019-11-25 09:00<br><br>2029-11-25 | **Holder:**<br>Brookfield Principal Credit LLC<br>**Grantor:**<br>Connors Bros. Clover Leaf Seafoods Company | Conventional hypothec without delivery<br>$240,000,000<br>25% per annum | The universality of all of movable and immovable property of the Grantor, corporeal and incorporeal, present and future, of any nature whatsoever and wheresoever situate. | *The hypothec is constituted in favour of the Fondé de pouvoir (Article 2692 of the Civil Code of Québec)* |
| 4. | 19-1332330-0001<br>2019-11-25 09:00<br><br>2029-11-22 | **Holder:**<br>Wells Fargo Capital Finance, LLC<br><br>**Grantor:**<br>Connors Bros. Clover Leaf Seafoods Company | Conventional hypothec without delivery<br>$600,000,000<br>25% per annum | The universality of all of the Grantor's movable and immovable property, corporeal and incorporeal, present and future, of any nature whatsoever and wheresoever situate. | *The hypothec is constituted in favour of the Fondé de pouvoir (Article 2692 of the Civil Code of Québec)* |

## XI. *Uniform Commercial Code* (District of Columbia) security:

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 1. Brookfield Principal Credit LLC, as Administrative Agent | Connors Bros. Clover Leaf Seafoods Company | File No.:<br>2019129089<br>Regn Date:<br>Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |

| Secured Party(ies) | Debtor(s) | Registration Number (Registration Period) | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|
| 2. Brookfield Principal Credit LLC, as Administrative Agent | 6162410 Canada Limited | File No.: 2019129087 Regn Date: Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |
| 3. Brookfield Principal Credit LLC, as Administrative Agent | Clover Leaf Holdings Company | File No.: 2019129088 Regn Date: Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |
| 4. Brookfield Principal Credit LLC, as Administrative Agent | K.C.R. Fisheries Ltd. | File No.: 2019129114 Regn Date: Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |
| 5. Brookfield Principal Credit LLC, as Administrative Agent | Connors Bros. Holdings Company | File No.: 2019129115 Regn Date: Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |
| 6. Brookfield Principal Credit LLC, as Administrative Agent | Connors Bros. Seafoods Company | File No.: 2019129116 Regn Date: Nov. 27, 2019 | General Collateral Description<br>All of the Debtor's right, title and interest in, to and under all assets of the Debtor, in each case whether now owned or existing, or hereafter acquired or arising, and wherever located, including all proceeds thereof. | |

## XII. Any and all Claims recorded or existing against the following Canadian trademarks owned by the Applicant, including any such Claims listed in the Canadian Intellectual Property Office's Canadian Trademarks Database:

| | Mark | Application Number | Registration Number | Owner | Status |
|---|---|---|---|---|---|
| 1. | "SURF" | 203092 | UCA32539 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 2. | "THUNDERBIRD" | 212096 | UCA39184 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 3. | BANQUET BRAND | 118463 | TMDA35670 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 4. | BEACH CLIFF | 1152386 | TMA655023 | Connors Bros. Clover Leaf Seafoods Company | Registered |

| | Mark | Application Number | Registration Number | Owner | Status |
|---|---|---|---|---|---|
| 5. | Boat Design | 701484 | TMA411271 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 6. | BRUNSWICK | 701055 | TMA408223 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 7. | BRUNSWICK and Design (CONNAISSEUR) | 428386 | TMA241315 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 8. | BRUNSWICK BRAND | 60963 | TMDA12489 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 9. | BRUNSWICK; and Design | 1976647 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 10. | BRUNSWICK; and Design - Colour Claim | 1976648 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 11. | cb Design | 361406 | TMA201803 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 12. | CLOVER LEAF | 173162 | UCA10040 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 13. | CLOVER LEAF and Clover Leaf Design | 152833 | TMDA50882 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 14. | CLOVER LEAF and Design | 154095 | TMDA51955 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 15. | CLOVER LEAF and Design | 345655 | TMA185996 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 16. | CLOVER LEAF and Design | 585315 | TMA339931 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 17. | CLOVER LEAF BISTRO BOWLS (word mark) | 1850006 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 18. | CLOVER LEAF BISTRO BOWLS and design (design mark) | 1941863 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 19. | CLOVER LEAF BOLS BISTRO (word) | 1971559 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 20. | CLOVER LEAF CRAB DELECTABLES & Design | 1188545 | TMA685130 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 21. | CLOVER LEAF Design | 1975159 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 22. | CLOVER LEAF design - colour claim | 1975138 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 23. | CLOVER LEAF design - English Language Tag Line | 1975160 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |

| | Mark | Application Number | Registration Number | Owner | Status |
|---|---|---|---|---|---|
| 24. | CLOVER LEAF design - English Tag line Colour claim | 1975161 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 25. | CLOVER LEAF design - French Language Tag Line | 1975163 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 26. | CLOVER LEAF design - French Language Tag Line - Colour Claim | 1975162 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 27. | CLOVER LEAF GARNIT-TOUT and Design | 694236 | TMA409510 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 28. | CLOVER LEAF INSPIRATIONS | 1318324 | TMA733393 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 29. | CLOVER LEAF INSPIRATIONS and Design | 1318325 | TMA733394 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 30. | CLOVER LEAF LOBSTER DELECTABLES and Design | 1188541 | TMA655091 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 31. | CLOVER LEAF TOPPERS | 1692385 | TMA912996 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 32. | CLOVER LEAF TOPPERS and Design | 694237 | TMA409206 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 33. | CLOVER LEAF TOPPERS BOUCHÉES | 1652979 | TMA907321 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 34. | CONNORS | 117800 | TMDA37482 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 35. | CONNORS BROS. INCOME FUND & DESIGN | 1243953 | TMA713962 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 36. | CONNORS FAMOUS SEA FOOD | 494822 | TMDA37532 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 37. | FIGARO | 334808 | TMA177977 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 38. | GUEULETHON | 1993781 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 39. | JUTLAND | 375314 | TMA216481 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 40. | JUTLAND and Design | 117875 | TMDA35603 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 41. | MAPLE LEAF | 562122 | TMA330834 | Connors Bros. Clover Leaf Seafoods Company | Registered |

| | Mark | Application Number | Registration Number | Owner | Status |
|---|---|---|---|---|---|
| 42. | NUTRITION "NATURALLY" | 361407 | TMA197419 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 43. | NUTRITION "NATURELLEMENT" | 361408 | TMA197420 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 44. | ORLEANS | 844367 | TMA528688 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 45. | PARAMOUNT | 164868 | UCA4043 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 46. | PARAMOUNT | 1972118 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 47. | PARAMOUNT; AND DESIGN | 1972117 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 48. | PREMIUM and Design | 679426 | TMA412283 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 49. | PREMIUM CHOICE SOCKEYE SALMON and Label Design | 105321 | TMDA29052 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 50. | RED ROSE BRAND | 163351 | UCA2125 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 51. | RICHELIEU | 592588 | TMA361784 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 52. | RIP'N READY | 1966634 | N/A | Connors Bros. Clover Leaf Seafoods Company | Filed |
| 53. | Seal Boat and Design | 705785 | TMA411293 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 54. | SURFSIDE | 616877 | TMA361956 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 55. | THE WORDS MAPLE LEAF BRAND & DESIGN | 26624 | TMDA5392 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 56. | THUNDERBIRD THE MARK OF QUALITY & DESIGN | 615683 | TMA361076 | Connors Bros. Clover Leaf Seafoods Company | Registered |
| 57. | Bee & Design | 284797 | TMA140375 | Bumble Bee Foods, LLC | Registered |
| 58. | BUMBLE BEE | 271509 | TMA130895 | Bumble Bee Foods, LLC | Registered |
| 59. | SAVOY | 688868 | TMA448489 | Bumble Bee Foods, LLC | Registered |
| 60. | SNOW'S and Ship Design | 757695 | TMA461185 | Bumble Bee Foods, LLC | Registered |
| 61. | SWIFT WATER Design | 469109 | TMA264745 | Bumble Bee Foods, LLC | Registered |
| 62. | WILD SELECTIONS | 1620176 | TMA938363 | Bumble Bee Foods, LLC | Registered |

**XIII. Any and all Claims recorded or existing against the following Canadian patent owned by the Applicant, including any such Claims registered pursuant to sections 49 or 50 of the *Patents Act*:**

1. Canadian Patent No. 2464553, issued January 15, 2008, titled "Seafood Preservation Process", Owner: Anova Food, LLC.

**XIV. Any claims raised, or which could have been raised, in connection with the following actions, including any plea or settlement agreement entered into in connection therewith:**

1. In Re: Packaged Seafood Products Antitrust Litigation Case No. 15-MD-2670 JLS (MDD).

2. Lilleyman v. Bumble Bee Foods, LLC et al (Ontario, Canada), Case No. CV-17-585108CP.

3. Meekins v. Connor Bros., Clover Leaf Seafood Company, Saint John Court of Queen's Bench Case No. SJC-200-2016.

4. In Re: Tuna Price-Fixing Investigation (WA AG) Office of the Attorney General of the State of Washington.

5. Class action between Miguel Rodriguez and Bumble Bee Foods, LLC.

6. Stipulated Consent Judgment filed June 20, 2014 in the Superior Court of the State of California, County of Marin.

*Employment Proceedings*

7. Tanya Corbett v. Connors Bros. Clover Leaf Seafoods Company – wage claims.

8. Sandra Ramsey – workers' compensation proceeding

**XV. Real property Encumbrances**

| | Encumbrance | Parcel Identifier Number(s) |
|---|---|---|
| 1. | Norampac Inc.<br>232 Baig BLVD<br>Moncton NB<br>E1E 1C8<br>Claimant I Reclamant<br>Notice of Security Interest I Avis de sorete<br>Charlotte 2005-05-06 20218922 | 15151574<br>15197676<br>15152481 |
| 2. | Wells Fargo Capital Finance, LLC<br>2450 Colorado AVE SUITE 300 W<br>Santa Monica CA United States<br>90404<br>Debenture Holder I Titulaire de la debenture<br>Debenture or Other Voluntary Charge I Debenture ou autre charge facultative<br>Charlotte 2011-03-09 29875763 | 15151574<br>15197676<br>15152481 |
| 3. | Brookfield Principal Credit LLC<br>in capacity as AdminAgentSecuredCreditors<br>250 Vessey ST Floor 15th<br>New York NY United States<br>10281<br>Debenture Holder I Titulaire de la debenture | 15151574<br>15197676<br>15152481 |

| | Encumbrance | Parcel Identifier Number(s) |
|---|---|---|
| | Debenture or Other Voluntary Charge I Debenture ou autre charge facultative<br>Charlotte 2017-12-19 37673481 | |
| 4. | PID 01224328<br>Pennfield NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1912-03-28 75 – 56 14398 | 15170988 |
| 5. | Rogers Cable Communications Inc.<br>c/o Stewart McKelvey<br>644 Main St. Suite 601<br>PO Box 28051<br>Moncton, NB E1C 9N4<br>Claimant<br>Land Titles Caution or Caveat<br>Charlotte 2007-10-11 24632029 | 15000672 |

## Schedule D – Permitted Encumbrances

### I. General Encumbrances

1. Any Encumbrance for Taxes, including without limitation real property, HST and withholding Taxes, owing by the Canadian Sellers which ranks prior to or pari passu with the Encumbrances created in connection with the indebtedness owing by the Canadian Sellers to the Secured Lenders.

2. Any Encumbrance for amounts owing to Her Majesty in right of Canada or a province which are deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* or any provincial equivalent of any of the foregoing.

3. Any Encumbrance for amounts owing to the Canadian Pension Plans which ranks prior to or *pari passu* with the Encumbrances created in connection with the indebtedness owing by the Canadian Sellers to the Secured Lenders.

4. Any Encumbrances in respect of wages, salaries, commissions, vacation pay, or compensation for services rendered during the period beginning six months prior to the Canadian Filing Date and ending on the Closing Date, owing by the Canadian Sellers which ranks prior to or *pari passu* with the Encumbrances created in connection with the indebtedness owing by the Canadian Sellers to the Secured Lenders.

5. Any Encumbrances granted in favour of (a) the Exit Term Lenders (as defined in the Sale Agreement), or any agent on their behalf, in connection with the Term Debt Financing (as defined in the Sale Agreement) and (b) the Exit ABL Lenders (as defined in the Sale Agreement), or any agent on their behalf, in connection with the ABL Financing (as defined in the Sale Agreement).

### II. The following *Personal Property Security Act* security:

| Secured Party(ies) | Debtor(s) | Reference File No. & Registration Number (Registration Period) | Collateral Classification | General Collateral Description | Amendments/Assignments Discharges/Renewals Transfers/Subordinations |
|---|---|---|---|---|---|
| 1. Xerox Canada Ltd | Connors Brothers Ltd<br>Connors Bros. Clover Leaf Seafoodcompany *(sic)* | 719931663 - 20160824 1704 1462 6716 (5 years) | Equipment, Other | | |

### III. Leasehold interests

The following leases:

| | Lessee | Parcel Identifier Number(s) |
|---|---|---|
| 1. | True North Salmon Co. Ltd.<br>874 Main Street<br>Blacks Harbour, NB<br>E5H 1E6<br>Lessee I Locataire<br>Lease, Notice of Lease or Sub-Lease I Bail, avis de bail ou sous-bail<br>Charlotte 2002-03-26 13878617<br><br>As such lease has been assigned or affected by amalgamations involving the lessee as follows:<br><br>Assignment of Lease by Heritage Salmon Limited to 619297 N.B. Ltd.<br>Charlotte 2005-06-20 20457991<br><br>Amalgamation of 619297 N.B. Ltd. with Phoenix Salmon Ltd. to become Heritage Salmon Ltd.<br>Charlotte 2005-08-29 20855970<br><br>Amalgamation of Heritage Salmon Ltd. with other corporations to become Kelly Cove Salmon Ltd.<br>Charlotte 2006-11-10 23052773<br><br>Assignment of Lease by Kelly Cove Salmon Ltd. to True North Salmon Co. Ltd. (current lessee)<br>Charlotte 2006-11-15 23069587 | 15197676<br>15151574<br>15152481 |
| 2. | Ardagh Metal Packaging Canada Limited<br>c/o 6th Floor, Brunswick House<br>44 Chipman Hill<br>Saint John, NB<br>E2L 2A9<br>Lease I Locataire<br>Lease, Notice of Lease or Sub-Lease I Bail, avis de bail ou sous-bail<br>Charlotte 2005-06-13 20411048<br><br>As such lease has been affected by the following corporate change to the Lessee as a result of a continuance into the Province of British Columbia and consequential name change:<br>Lessee I Locataire<br>Corporate Affairs Change of Name I Changement de nom des Affaires corporatives<br>Charlotte 2011-02-16 29806214 | 15197676<br>15151574<br>15152481 |

## IV. Real property Permitted Encumbrances

With the exception of those real property Encumbrances listed under Section IV of Schedule C, above:

- any easements or rights of way and other similar interests, including prescriptive interests in the New Brunswick Property;
- any registered restrictions or covenants that run with the New Brunswick Property;
- any registered municipal agreements and registered agreements with any publicly regulated utilities;
- any easements for the supply of domestic utility or telephone services;
- any easements for drainage, storm or sanitary sewers or other services; and

- without limiting the generality of the foregoing, the following easements:

| | Easement | Parcel Identifier Number(s) |
|---|---|---|
| 1. | New Brunswick Power Corporation<br>515 King ST<br>PO BOX 2000<br>Fredericton NB<br>E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Easement, Right-of-Way \| Servitude, droit de passage<br>Charlotte 1961-08-29 158 - 123 54576 | 15000672<br>15152267<br>15152416 |
| 2. | New Brunswick Power Corporation<br>515 King ST PO BOX 2000<br>Fredericton NB E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Easement, Right-of-Way \| Servitude, droit de passage<br>Charlotte 1976-08-03 214 – 886 76890 | 15152572<br>15148968<br>15152267<br>15152382 |
| 3. | New Brunswick Power Corporation<br>515 King ST PO BOX 2000<br>Fredericton NB E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Easement, Right-of-Way \| Servitude, droit de passage<br>Charlotte 1978-05-04 230 – 207 81267 | 15152572<br>15152382 |
| 4. | New Brunswick Power Corporation<br>515 King ST PO BOX 2000<br>Fredericton NB E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Agreement \| Convention<br>Charlotte 1991-05-01 460 – 402 118725 | 15000151 |
| 5. | New Brunswick Power Distribution and Customer Service Corporation<br>515 King ST Fredericton NB E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Easement \| Servitude<br>Charlotte 2010-09-17 - 29231637 | 15152267 |
| 6. | New Brunswick Electric Power Commission<br>515 King ST PO BOX 2000<br>Fredericton NB E3B 4X1<br>Easement Holder \| Titulaire de la servitude<br>Land Titles First Application \| Première demande de titre foncier<br>Charlotte 2006-01-20 - 21615571 | 15170988 |
| 7. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1979-06-05 241 – 793 84462 | 15152374<br>15152382 |
| 8. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Easement or Right-of-Way \| Servitude ou droit de passage<br>Charlotte 1979-06-05 - 2739 | 15152374 |
| 9. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1979-06-13 241 – 970 84509 | 15152374 |
| 10. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB | 15152283<br>15152267 |

| | Easement | Parcel Identifier Number(s) |
|---|---|---|
| | E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Easement or Right-of-Way \| Servitude ou droit de passage<br>Charlotte 1980-12-04 - 3005 | 15152309<br>15152374 |
| 11. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB<br>E5H 1E5<br>Easement Holder \| Titulaire de la servitude Agreement \| Convention<br>Charlotte 1982-12-02 275 - 301 93692 | 15152283<br>15152572<br>1219476<br>1223692<br>15091853<br>15152309<br>15152382<br>15001183 |
| 12. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Easement or Right-of-Way \| Servitude ou droit de passage<br>Charlotte 1982-12-02 - 3284 | 15152267 |
| 13. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Subdivision & Amalgamations \| Lotissement et fusions<br>Charlotte 1990-02-08 - 4673 | 1223692 |
| 14. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Agreement \| Convention<br>Charlotte 1990-09-24 4 44 – 11 116928 | 1219476<br>1223692<br>15091853 |
| 15. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB<br>E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Agreement \| Convention<br>Charlotte 1991-02-11 454 - 376 118048 | 15152283<br>15152267<br>15152309 |
| 16. | Village of Blacks Harbour<br>881 Main ST UNIT 2<br>Blacks Harbour NB E5H 1E5<br>Easement Holder \| Titulaire de la servitude<br>Agreement \| Convention<br>Charlotte 1992-08-21 500 – 179 122938 | 1219476<br>1223692<br>15091853 |
| 17. | Connors CL GP Limited, as general partner of the Limited Partnership Clover Leaf Seafoods, L.P.<br>1 Brunswick SQ SUITE 1500<br>PO BOX 1324<br>Saint John NB E2L 4H8<br>Easement Holder \| Titulaire de la servitude<br>Agreement \| Convention<br>Charlotte 1962-05-28 159 – 205 55280 | 15170988 |
| 18. | Connors CL GP Limited, as general partner of the Limited Partnership Clover Leaf Seafoods,L.P.<br>1 Brunswick SQ SUITE 1500<br>PO BOX 1324<br>Saint John NB E2L 4H8<br>Assignee \| Cessionnaire<br>Other Assignment \| Autre cession<br>Charlotte 2004-05-14 - 18342122 | 15170988 |

| | Easement | Parcel Identifier Number(s) |
|---|---|---|
| 19. | J.D. Irving, Limited<br>300 Union ST<br>PO BOX 5777<br>Saint John NB<br>E2L 4M3<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1974-11-08 202 - 516 73323 | 15152267 |
| 20. | PID/NID 01222868<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1949-12-15 137 – 24 42695 | 15152572 |
| 21. | PID/NID 01225150<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1958-01-04 150 – 679 50678 | 15152572 |
| 22. | PID 01234616<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Subdivision & Amalgamations \| Lotissement et fusions<br>Charlotte 1980-09-25 - 2984 | 15152267 |
| 23. | PID 01222918<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Other \| Autres<br>Charlotte 1995-08-03 576 – 116 132111 | 1219476 |
| 24. | PID 15152713<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Subdivision & Amalgamations \| Lotissement et fusions<br>Charlotte 2001-11-07 - 13197612 | 1226075 |
| 25. | Lots on Mountain Court<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Administration \| Administration<br>Charlotte 1962-09-25 - 1041 | 15152572 |
| 26. | Lots on Mountain Court<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Subdivision & Amalgamations \| Lotissement et fusions<br>Charlotte 1983-06-06 - 3415 | 15152572 |
| 27. | PID/NID 15150691<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1966-03-10 166 – 680 59893 | 15152572 |
| 28. | PID/NID 15150709<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1966-03-10 166 – 681 59894 | 15152572 |
| 29. | PID/NID 15150717<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Deed/Transfer \| Acte de transfert/Transfert<br>Charlotte 2001-05-30 749 – 516 12157005 | 15152572 |

| | Easement | Parcel Identifier Number(s) |
|---|---|---|
| 30. | PID/NID 01234624<br>Blacks Harbour NB<br>Easement Holder \| Titulaire de la servitude<br>Easement \| Servitude<br>Charlotte 2010-10-06 - 29319176 | 15152267 |
| 31. | PID 01224328<br>Pennfield NB<br>Easement Holder \| Titulaire de la servitude<br>Deed \| Acte de transfert<br>Charlotte 1912-03-28 75 – 56 14398 | 15170988 |
| 32. | Aliant Telecom Inc.<br>One Brunswick Square<br>PO BOX/CP 5555<br>Saint John NB E2L 4K2<br>Easement Holder \| Titulaire de la servitude<br>Easement, Right-of-Way \| Servitude, droit de passage<br>Charlotte 1978-05-04 230 - 207 81267 | 15152572<br>15152382 |
| 33. | Bell Aliant Regional Communications Inc. Bell Aliant Regional Communications, LP<br>1 Brunswick SQ Saint John NB<br>E2L 4H8<br>Easement Holder \| Titulaire de la servitude<br>Easement \| Servitude<br>Charlotte 2010-09-17 - 29231637 | 15152267 |

## SCHEDULE E

The cash proceeds of the Transaction shall be applied and distributed as follows and each of the following shall constitute Approved Distributions:

1. all amounts necessary to repay the obligations outstanding as of the Closing under the DIP ABL Credit Agreement and the Prepetition ABL Credit Agreement to the secured lenders thereunder;

2. all amounts necessary to repay the obligations outstanding as of the Closing under the DIP Term Loan Agreement to the secured lenders thereunder; and

3. an amount equal to the Prepetition Term Loan Repayment Amount of the obligations outstanding as of the Closing under the Prepetition Term Loan Agreement.

The following defined terms used in this Schedule "E" shall have the following meanings, provided that if a defined term used in this Schedule "E" is not defined herein or otherwise in this Order it shall have the meaning given to it in the U.S. Sale Order (as defined below):

The "**DIP ABL Credit Agreement**" shall mean that certain Senior Secured Super-Priority Debtor-in-Possession Credit Agreement, dated as of November 26, 2019 (the "DIP ABL Credit Agreement"), among Bumble Bee Foods S.à r.l., Connors Bros. Clover Leaf Seafoods Company, the lenders from time to time party thereto, Wells Fargo Capital Finance, LLC as administrative agent (as amended, restated, modified, waived or supplemented through the date hereof).

The "**DIP Term Loan Agreement**" shall mean that certain Superpriority Secured Debtor-in Possession Term Loan Agreement, dated as of November 26, 2019, among Bumble Bee Foods S.à r.l., Bumble Bee Foods, LLC, the lenders from time to time party thereto and Brookfield Principal Credit LLC, as administrative agent (as amended, restated, modified, waived or supplemented through the date hereof).

The "**Prepetition ABL Credit Agreement**" shall mean that certain Amended and Restated Credit Agreement, dated as of August 18, 2017, by and among Bumble Bee Foods S.à r.l., Connors Bros. Clover Leaf Seafoods Company, the lenders from time to time party thereto, Wells Fargo Capital Finance, LLC as U.S. agent, and Wells Fargo Capital Finance Corporation Canada, as Canadian agent (as amended, restated, modified, waived or supplemented through the date hereof).

The "**Prepetition Term Loan Agreement**" shall mean that certain Term Loan Agreement, dated as of August 15, 2017, by and among Bumble Bee Foods S.à r.l, Bumble Bee Holdings, Inc., Connors Bros. Clover Leaf Seafoods Company, the lenders party thereto and Brookfield Principal Credit LLC, as administrative agent (as amended, restated, modified, waived or supplemented through the date hereof).

The "**Prepetition Term Loan Repayment Amount**" shall be the result of:

a) $275.0 million; *minus*

b) the amount necessary to be repaid under the DIP ABL Credit Agreement and, to the extent not otherwise discharged prior to Closing, the Prepetition ABL Credit Agreement such that, upon the consummation of the Transaction and the application of proceeds thereof (including any drawings under the Exit ABL Facility), the undrawn amount that is available to be drawn under the asset-based revolving facility (which shall have an aggregate amount of commitments of no less than the

Minimum ABL Commitment Amount and no greater than $225 million) incurred by the Buyers to finance the Transaction (the "**Exit ABL Facility**") shall not be less than $30,000,000[2]; *minus*

c) the amount necessary to repay all of the Existing DIP Term Loan Obligations; *minus*

d) the amount of the Winddown Cash actually required to be allocated to the Equity Seller under the Acquisition Agreement (the "Winddown Cash"); *minus*

e) an aggregate amount equal to the greater of (such greater amount, the "**Value to the Estate**") (x) $0 and (y) an amount equal to (1) the Purchase Price less (2) $17.0 million with respect to the DOJ Payment (as defined in the Prepetition Term Loan Agreement) *less* (3) the total amount of Existing DIP ABL Obligations and Existing DIP Term Loan Obligations (such amount the "**Total Funded DIP Amount**") less (4) the Winddown Cash *less* (5) the Existing Prepetition Term Loan Obligations.

The "**Term Loan Rollover Amount**" (which shall also constitute an Approved Distribution hereunder) shall be the result of:

1) the Purchase Price; *minus*

2) the Total Funded DIP Amount; *minus*

3) $17.0 million with respect to the DOJ Payment (as defined in the Prepetition Term Loan Agreement); *minus*

4) the Winddown Cash; *minus*

5) the Value to the Estate; *minus*

6) the Prepetition Term Loan Repayment Amount.

The term "**U.S. Sale Order**" shall mean the Order of the United States Bankruptcy Court for the District of Delaware dated January 24, 2020, in re: Bumble Bee Parent, Inc., *et al.* (Case No. 19-12502 (LSS) (Docket 326), *inter alia*, approving the stalking horse agreement and approving the sale to the stalking horse bidder of substantially all of the purchased assets of the debtors pursuant to section 363 of the U.S. bankruptcy code.

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[2] If the Buyer provides an additional equity investment in cash in the form of common equity in lieu of all or a portion of the asset-based revolving facility described in this clause (b), the calculation set forth in this definition of "**Prepetition Term Loan Repayment Amount**" shall be made as if the Buyer had obtained an asset-based revolving facility in the Minimum ABL Commitment Amount.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

Court File No. CV-19-631523-00CL

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

Proceedings commenced in Toronto

**APPROVAL AND VESTING ORDER**

**BENNETT JONES LLP**
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M5X 1A4

Kevin Zych (LSO 33129T)
Sean Zweig (LSO 57307I)
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Fax: 416-863-1716

Lawyers for the Applicants

# TAB 13

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court

Alta. Reg. 124/2010

Currency

made under the *Judicature Act*

Alta. Reg. 124/2010, as am. Alta. Reg. 124/2010, r. 15.15(3); 163/2010; 143/2011; 216/2011; 31/2012, s. 4(zz); 122/2012; 170/2012, s. 10(g); 62/2013, ss. 2, 7(b); 140/2013; 41/2014; 36/2015 [Not in force at date of publication. Repealed Alta. Reg. 145/2015, s. 4.]; 71/2015, s. 3; 76/2015, s. 3; 128/2015; 85/2016, s. 1; 25/2019; 156/2019, s. 2; 36/2020; 194/2020; 23/2021; 139/2021, s. 3; 72/2022; 136/2022, s. 1 [s. 1(13)(a) cannot be applied.]; 216/2022, s. 3; 218/2022, s. 10; 61/2023; 76/2023, s. 3; 126/2023.

**Currency**
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

Alta. Reg. 124/2010, s. 6.28

# s 6.28 Application of this Division

Currency

**6.28Application of this Division**

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

(a) to ban publication of court proceedings,

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

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

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

(e) for use of a pseudonym.

**Currency**

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

Alta. Reg. 124/2010, s. 6.29

# s 6.29 Restricted court access applications and orders

Currency

**6.29Restricted court access applications and orders**

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

**Currency**

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

Alta. Reg. 124/2010, s. 6.30

# s 6.30 When restricted court access application may be filed

Currency

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

**Amendment History**
Alta. Reg. 194/2020, s. 2

**Currency**
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

Alta. Reg. 124/2010, s. 6.31

# s 6.31 Timing of application and service

Currency

**6.31Timing of application and service**

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

(a) file the application in Form 32, and

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

**Currency**

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**End of Document**

Alta. Reg. 124/2010, s. 6.32

# s 6.32 Notice to media

Currency

**6.32Notice to media**

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

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

(b) any other person named by the Court.

**Amendment History**

Alta. Reg. 163/2010, s. 3

**Currency**

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

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

Alta. Reg. 124/2010, s. 6.33

# s 6.33 Judge or applications judge assigned to application

Currency

**6.33Judge or applications judge assigned to application**

A restricted court access application must be heard and decided by

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

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

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

**Amendment History**

Alta. Reg. 194/2020, s. 3; 136/2022, s. 1(5)

**Currency**

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

**End of Document**

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

Alta. Reg. 124/2010, s. 6.34

# s 6.34 Application to seal or unseal court files

Currency

**6.34Application to seal or unseal court files**

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

**6.34(2)** The application must be made to

(a) the Chief Justice, or

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

**6.34(3)** The Court may direct

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

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

(c) any other matter that the circumstances require.

**Currency**

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**End of Document**

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

Alta. Reg. 124/2010, s. 6.35

# s 6.35 Persons having standing at application

Currency

**6.35Persons having standing at application**

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

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

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

**Currency**

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

Alta. Reg. 124/2010, s. 6.36

# s 6.36 Confidentiality of information

Currency

**6.36Confidentiality of information**

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

**Currency**

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**End of Document**

# TAB 14

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

# Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
*Timothy J. Howard* and *Franklin S. Gertler*, for respondent Sierra Club of Canada
*Graham Garton, Q.C.*, and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

**The judgment of the court was delivered by *Iacobucci J.*:**

## I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

 

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

**II. Facts**

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

  

**III. Relevant Statutory Provisions**

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

**IV. Judgments below**

***A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400***

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

  

that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

***B. Federal Court of Appeal, [2000] 4 F.C. 426***

*(1) Evans J.A. (Sharlow J.A. concurring)*

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

 

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

*(2) Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

  

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

**V. Issues**

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

**VI. Analysis**

**A. The Analytical Approach to the Granting of a Confidentiality Order**

***(1) The General Framework: Herein the Dagenais Principles***

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

  

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

 

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

***(2) The Rights and Interests of the Parties***

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

 

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

  

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

**B. Application of the Test to this Appeal**

***(1) Necessity***

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

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

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

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

  

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

***(2) The Proportionality Stage***

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

*(a) Salutary Effects of the Confidentiality Order*

  

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

*(b) Deleterious Effects of the Confidentiality Order*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents

  

relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

  

confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

  

be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

**VII. Conclusion**

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

*Appeal allowed.*

*Pourvoi accueilli.*

**End of Document**

# TAB 15

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

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

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

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

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

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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.

  

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

**V. Analysis**

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

  

free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., R. v. Henry, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

  

### *A. The Test for Discretionary Limits on Court Openness*

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

  

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

***B. The Public Importance of Privacy***

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in

 

various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in F.N. (Re), 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 2013 SCC 62, [2013] 3 S.C.R. 733 ("UFCW"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289

  

C.C.C. (3d) 549, at paras. 40-41 and 44; Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., Privacy Act, R.S.C. 1985, c. P-21; Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., R. v. Paterson(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see S. v. Lamontagne, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., Himel v. Greenberg, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related

  

and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., A.B. v. Canada (Citizenship and Immigration), 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., R. v. Pickton, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

***C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity***

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (ibid).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310* Canada inc. v. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

  

render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

  

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

  

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

  

threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily

  

accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

***D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest***

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

*(1) The Risk to Privacy Alleged in this Case Is Not Serious*

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

  

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

  

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

*(2) The Risk to Physical Safety Alleged in this Case is Not Serious*

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

  

B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

***E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy***

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

  

by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

**VI. Conclusion**

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

# TAB 16

2021 ONSC 4347
Ontario Superior Court of Justice

Ontario Securities Commission v. Bridging Finance Inc.

2021 CarswellOnt 9200, 2021 ONSC 4347, 333 A.C.W.S. (3d) 243, 90 C.B.R. (6th) 102

# ONTARIO SECURITIES COMMISSION (Applicant) and BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND (Respondents)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: June 16, 2021
Judgment: June 22, 2021
Docket: CV-21-00661458-00CL

Counsel: John Finnigan, Grant Moffat, Adam Driedger, for Receiver
Carlo Rossi, Adam Gotfried, for Ontario Securities Commission
Lawrence Thacker, for Natasha Sharpe
David Bish, for Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco
Marc Wasserman, Justine Erickson, for BlackRock Financial Management, Inc.
Kyla Mahar, for RC Morris Capital Management Ltd. and RCM NGB Holdings Limited
Alex MacFarlane, James MacLellan, Charlotte Chien, for Zurich Insurance Company Ltd
Natasha MacParland, for Willoughby Asset Management Inc.
Steven Weisz, Shaun Parsons, for University of Minnesota Foundation
Steve Graff, for Investors in various Bridging Funds
Melissa MacKewn, for David Sharpe
Fraser Dickson, for Former Employee of Bridging Finance Inc.
Caitlin Fell, Sharon Kour, Pat Corney, Andy Kent, for Ad-Hoc Group of Retail Investors
David Ullmann, for Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

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

MOTION by receiver for relief including approval of retention plan; MOTION by investors in bankrupt company for appointment of representative counsel.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 This endorsement addresses the motion brought by PricewaterhouseCoopers Inc. ("PwC"), receiver of each of the Respondents (the "Receiver") for an order requesting, among other things, approval of the Key Employee Retention Plan ("KERP") and the KERP Charge; approving the formation, composition, and mandate of the Limited Partner Advisory Committees; tolling the applicable limitation periods in respect of any Misrepresentation Rights until the Tolling Termination Date; approving the Receiver's recommended course of action in connection with partial repayment of amounts owing under a

 

credit facility made available by certain of the Respondents as described in Confidential Appendix "B" to the Third Report of the Receiver, dated June 9, 2021 (the "Third Report"); sealing Confidential Appendix "A" and Confidential Appendix "B" to the Third Report until further Order of the Court; and approval of the Third Report.

2 This endorsement also addresses the motion brought by a group of retail investors in the Bridging Funds (the "Ad Hoc Group of Retail Investors") for an order appointing Weisz, Fell, Kour LLP ("WFK") as representative counsel ("Representative Counsel") for all retail investors holding units of the Bridging Funds, excluding investment advisors and institutional investors (the "Retail Investors").

3 Capitalized terms not expressly defined herein are as defined in the Third Report.

4 The factual background is set out in the Third Report.

5 The Receiver is in the process of developing and implementing a strategy to maximize value for all stakeholders. This strategy will include a review of the consolidated portfolio of loans held by all of the Bridging Funds. There will also have to be a reconciliation of inter-fund accounts and review of inter-fund cash allocations.

6 The objective of all stakeholders should be aligned with respect to the development and implementation of a strategy to maximize the value of the loan portfolio.

7 However, the alignment of interests may very well be different when it comes to the reconciliation of inter-fund accounts and the review of inter-fund cash allocations. The Third Report indicates that investors participated through the purchase of units of the Bridging Funds. The Bridging Funds marketed to investors include five limited partnership fund offerings, three RSP fund offerings and two investment trust fund offerings.

8 It is premature to comment on how the assets realized from the loan portfolio will be divided among the funds, but it is conceivable that there will be disputes between the various funds with respect to asset allocation.

9 It is against this background that the motions have to be considered.

10 Certain relief sought by the Receiver was not opposed.

11 The Receiver is of the view that in order to incentivize certain eligible employees to remain as employees of Bridging Finance Inc. ("BFI") during the course of these proceedings, a KERP should be approved, together with a related charge on the property of the Respondents in the maximum amount of $366,000 (the "KERP Charge") as security for payments under the KERP, which will ranks subordinate to the Receiver's Charge, the Receiver's Borrowing Charge and each Intercompany Charge, but in priority to all other security interests.

12 As set out in Confidential Appendix "A" to the Third Report, the Receiver has allocated among Eligible Employees approximately $266,000 of the requested KERP Payments. The remaining $100,000 may be allocated among Eligible Employees or additional key Employees provided they meet certain criteria set out in the Bridging KERP.

13 Courts have frequently recognized the utility and importance of KERPs in restructuring proceedings and have approved KERPs in numerous debtor-in-possession proceedings under both the *Companies' Creditors Arrangement Act* (the "CCAA") and receivership proceedings pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") and the *Courts of Justice Act* (the "CJA").

14 The CCAA, the BIA and the CJA, as well as the *Securities Act* are silent with respect to the approval of KERPs and the granting of a charge to secure a KERP. Counsel to the Receiver submits that as such, the approval of a KERP and a KERP Charge are matters within the discretion of the court, grounded in the court's inherent and/or statutory jurisdiction to make any orders it sees fit. (See, for example: Aralez Pharmaceuticals Inc(Re), 2018 ONSC 6980 (Ont. S.C.J. [Commercial List]) ; *Cinram International Inc., (Re)*, 2012 ONSC 3767 and *Grant Forest Products Inc., (Re)*, [2009] O.J. No. 3344.)

  

15 The factual and legal basis for the granting of the KERP is set out in the Receiver's factum at paragraphs 5 — 14.

16 The Receiver recommends that the court exercise its discretion to approve the Bridging KERP and grant the KERP Charge.

17 I accept this recommendation. The KERP and the KERP Charge are approved.

18 The Receiver also seeks an order tolling the statutory limitation periods applicable to any "Misrepresentation Rights", as defined at paragraph 16 of the factum, until the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders is terminated.

19 The factual and legal basis for granting such relief is set out at paragraphs 16 — 22 of the factum.

20 The Receiver recommends that the proposed Tolling Order be granted.

21 I accept this recommendation. The Tolling Order is granted.

22 The Receiver also recommends that its proposed course of action, as described in Confidential Appendix "B" to the Third Report in connection with a partial repayment of amounts owing under a Credit Facility made available to a borrower by certain of the Respondents should be approved. Having reviewed Confidential Appendix "B" to the Third Report, I am satisfied that the Receiver's recommended course of action should be approved.

23 The considerations involved in the granting of sealing order must take into account the recent Supreme Court decision in Sherman Estatev. Donovan, 2021 SCC 25 (S.C.C.) at paras. 37 — 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (MacIntyre, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> > (1) court openness poses a serious risk to an important public interest;
> >
> > (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

24 Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

 

25 Confidential Appendix "A" contains the Bridging KERP, which contains confidential and personal information with respect to the compensation of each Eligible Employee.

26 Confidential Appendix "B" contains the Receiver's recommended course of action in connection with the proposed transaction. The terms of the proposed transactions are confidential and the Receiver submits the disclosure of such confidential commercially sensitive information at this time would undermine its efforts to maximize value for stakeholders.

27 I am satisfied that no stakeholders will be materially prejudiced by sealing the Confidential Appendices and that the salutary effects of granting the Sealing Order outweigh any deleterious effects. As such, I am satisfied that the sealing order should be granted, pending further order of the court.

28 In its Notice of Motion, the Receiver requested approval of payments to RC Morris. The request for such approval was deferred.

29 The Receiver also requested approval of its activities as set out in the draft order. There was no opposition to this request which is granted.

30 The balance of this endorsement addresses the Receiver's request for approval of limited partner advisory committees and the motion of the Ad Hoc Group of Retail Investors.

31 The Receiver seeks court approval of the following two Limited Partner Advisory Committees:

(a) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Funds generally (the "LPAC"); and

(b) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Indigenous Impact Fund (the "BIIF LPAC").

(the LPAC and the BIIF LPAC are referred to as the "Committees").

32 The Receiver states that the primary functions of the Committees, will be to, among other things:

(a) provide the Receiver with a confidential forum to obtain input and feedback on behalf of Unitholders in the Bridging Funds regarding actions or decisions of the Receiver, as considered appropriate by the Receiver; and

(b) provide such other input and assistance to the Receiver regarding matters involving Bridging as the Receiver may reasonably request from time to time.

33 The Receiver contends that the Committees will provide an efficient and cost-effective means for Unitholders to provide direct input to the Receiver but will not have any decision-making authority with respect to any of the Respondents or the Property. The proposed Committee Members represent a diverse cross-section of both retail and institutional Unitholders and each Committee Member will be bound by a confidentiality agreement satisfactory to the Receiver.

34 Mr. Graff states that he represents 15 different investors in various Bridging Funds with over $400MM of claims, and he does not oppose the relief requested by the Receiver. He points out that his clients have received regular and effective communications from the Receiver.

35 The appointment of the Committees is challenged by the Ad Hoc Group of Retail Investors. The Ad Hoc Group of Retail Investors are of the view that it is more appropriate to appoint WFK as Representative Counsel for all Retail Investors holding units of the Bridging Funds, excluding investment advisors and institutional investors.

36 In its factum, counsel points out that the Retail Investors are concerned about recovery of their investments and the protection of their rights and are most concerned about fairness. There are over 25,000 Retail Investors who will bear the brunt of

  

any shortfall. Counsel submits that this receivership was not commenced with the Retail Investors in mind and makes reference to an OSC publicly made statement that, "as a regulatory body, we do not normally recover money for investors."

37 Counsel submits that the receivership proceeding lacks meaningful input from the Retail Investors. Counsel also submits that it is not clear from the materials filed by the Receiver as to what role the Committees will perform, since the Receiver has not described what matters it proposes to consult with the Committees. Further, counsel raises concerns that the Committees will be dominated by investment advisors and institutional or professional investors, and this presents the appearance of conflicts.

38 The gist of the submissions put forward by counsel is that the Retail Investors require representation by counsel whose sole focus and loyalty is to them. The appointment of Representative Counsel will also generally improve the efficiency of the receivership; communication with Retail Investors will be streamlined and a multiplicity of legal retainers avoided.

39 I have concluded that the relief requested by the Receiver for the appointment of the LPACs should be granted — albeit with certain time limitations.

40 As noted above, the Receiver is currently involved in the development and implementation of a strategy to maximize value for all stakeholders. A strategic review of the portfolio is in process and the Receiver is not in a position to confirm valuations for certain funds.

41 It seems to me that the Committees will be in a position to provide the Receiver with meaningful input and feedback on behalf of Unitholders regarding actions or decisions of the Receiver. At this time the focus is on maximizing realizations for the benefit of Unitholders and the Committees may very well be in a position to provide meaningful assistance to the Receiver.

42 I also note that although the OSC may have made a statement to the effect that "as a regulatory body, we do not normally recover money for investors", it is necessary to take into account that the Receiver was appointed pursuant to the provisions of section 129 of the Securities Act in a particular section 129(2) which provides:

> 129 [2] No order shall be made under subsection (1) unless the court is satisfied that,
>
> (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company *is in the best interests of the creditors* of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of our subscribers to the person or company; or
>
> (b) it is appropriate for the due administration of Ontario securities law.
>
> (Emphasis added)

43 I am also satisfied that the Receiver will take into account the best interests of all Unitholders.

44 Counsel to the Ad Hoc Group of Retail Investors also questioned the proposed mandate of the Committees. At this point in time, the focus of the Committees is to provide input to the Receiver in connection with a strategic review of the portfolio in an effort to maximize value for all stakeholders. This review take some time but should not be extended for an unlimited time. For this reason, it seems to me that the appointment of the Committees should be time-limited to 60 days, subject to extension by court order. It is my expectation that at the end of 60 days, the Receiver should be in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of inter-fund accounts.

45 Accordingly, I am satisfied that it is appropriate to approve the Committees as requested by the Receiver, on the terms set out in the proposed order, with the proviso that the appointment of the Committees is time-limited to 60 days, subject to extension by court order.

46 With respect to the appointment of Representative Counsel, I am satisfied that the court has jurisdiction to appoint representative counsel under section 101 of the CJA, together with Rules 10.01 and 12.07 of the Rules of Civil Procedure.

  

47 The issue is whether the appointment of Representative Counsel should be entertained at this time, or whether it is more appropriate to defer consideration of this issue until such time as the Receiver is in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of interfund accounts. I have concluded that it is appropriate to defer consideration of this issue for the following reasons.

48 First, the focus at the present time should be on the portfolio review and developing a strategy to maximize value for all stakeholders.

49 Second, when the Receiver reports on this issue and provides information with respect to the reconciliation of interfund accounts, it may become clearer as to the role that Representative Counsel can play. It could very well be that the entitlement or potential entitlement of Unitholders in the various funds will differ, which could in turn require the appointment of different Representative Counsel for different funds. In my view, the potential role of Representative Counsel should focus on allocation issues as opposed to realization issues.

50 The relief requested by the Ad Hoc Group of Retina Investors is dismissed, with leave to reassess the requested relief in 60 days.

51 The appointment of Representative Counsel can be revisited at the time that the Receiver makes its report in 60 days.

52 An order shall issue to reflect the foregoing.

*Receiver's motion granted; investors' motion dismissed as premature.*

**End of Document**

# TAB 17

Court File No. CV-19-00615270-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE |
| MADAM JUSTICE | ) | 5th DAY OF JULY, |
| KIMMEL | ) | 2022 |

**IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

**B E T W E E N:**

**ROYAL BANK OF CANADA**

Applicant

**- and -**

**DISTINCT INFRASTRUCTURE GROUP INC., DISTINCT INFRASTRUCTURE GROUP WEST INC., DISTINCTTECH INC., IVAC SERVICES INC., IVAC SERVICES WEST INC., and CROWN UTILITIES LTD.**

Respondents

**SETTLEMENTS APPROVAL AND DISTRIBUTION ORDER**

THIS MOTION, made by Deloitte Restructuring Inc., in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertaking, property and assets (collectively, the "**Property**") of each of Distinct Infrastructure Group Inc. (the "**Company**"), Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (collectively, the "**Debtors**"), for an Order, *inter alia,* (i) approving the Settlement Agreements (as defined below); (ii) sealing Confidential Appendices "1", 2", "3" and "4", as described below, (iii) authorizing distributions to Royal Bank of Canada (the "**Bank**"), and (iv) approving the Third Special Report of the Receiver dated June 23, 2022 (the "**Third Special Report**"), and the conduct

and activities of the Receiver set out therein, was heard this day via judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

**ON READING** the Motion Record of the Receiver, including the Third Special Report and the appendices thereto, and on hearing the submissions of counsel for the Receiver and those other counsel listed on the counsel slip, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Maria Magni sworn June 27, 2022 filed:

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

**APPROVAL OF SETTLEMENT AGREEMENTS**

2. **THIS COURT ORDERS** that (i) the Minutes of Settlement dated March 22, 2022 (the "**Settlement Agreement**") entered into by the Company by its Special Receiver Douglas J. Cunningham (the "**Special Receiver**"), along with the other parties thereto, (ii) the Minutes of Settlement dated March 22, 2022 (the "**Side Letter**") entered into by the Company by the Special Receiver, along with the other parties thereto, and (iii) the Minutes of Settlement dated March 22, 2022 (the "**Expenses Settlement Agreement**" and together with the Settlement Agreement and Side Letter, the "**Settlement Agreements**") entered into by the Company by the Special Receiver, along with the other parties thereto, are each hereby authorized and approved.

3. **THIS COURT ORDERS** that the Receiver is authorized and directed to disburse the OSA Holdback (as defined in the Settlement Agreement) in accordance with the terms of the Settlement Agreement.

4. **THIS COURT ORDERS** that approval of the Settlement Agreements does not impair or affect the rights, remedies and defences available to MNP LLP in respect of the action against it by the Special Receiver with Court File Number CV-20-00648746-00CL (the "**MNP Action**"), except that MNP LLP may not crossclaim or make any third party claim against Giuseppe Lanni, Alexander Agius, George M. Newman, Garry Wetsch, Douglas Horner, Robert Normandeau, William Nurnberger, George Parselias, Royston Rachpaul, Jacinto Vieira, Emanuel Bettencourt,

and Michael Mifsud (the "**Settling Defendants**") arising from the issues in the MNP Action for contribution and indemnity, whether under the *Negligence Act*, R.S.O. 1990, c. C.N.1 or otherwise.

5. **THIS COURT ORDERS** that the Settling Defendants will preserve and retain any documents in their possession that are relevant to the MNP Action. To the extent that such documents are not privileged, the Settling Defendants will provide such documents to the Special Receiver on written request after pleadings in the MNP Action are closed. The Special Receiver will subsequently deliver such documents to MNP, in accordance with the discovery plan to be entered into in the MNP Action. The Special Receiver shall reimburse the Settling Defendants for reasonable legal costs incurred by them in responding to a request for production, including the review of documents for privilege.

**SEALING OF CONFIDENTIAL APPENDICES**

6. **THIS COURT ORDERS** that Confidential Appendices "1", "2", "3" and "4" attached to the Third Special Report, which contain (i) a summary of the Settlement Agreement, (ii) the Settlement Agreement, (iii) the Side Letter, and (iv) the Expenses Settlement Agreement, respectively, are hereby sealed pending further order of the Court and shall not form part of the public record.

**DISTRIBUTIONS TO ROYAL BANK OF CANADA**

7. **THIS COURT ORDERS** that the Receiver is authorized and directed to distribute the proceeds received by the Receiver pursuant to the Settlement Agreements to the Bank in partial satisfaction of the Bank's secured claim against the Debtors.

8. **THIS COURT ORDERS** that, in addition to and separate from those distributions provided for in paragraph 5 herein, the Receiver is authorized and directed to make future distributions of the proceeds of the Property to the Bank as the Receiver deems appropriate up to the amount of the Bank's secured claim against the Debtors. For greater certainty, any distribution to the Bank under this paragraph is subject to those amounts payable by DistinctTech Inc. and iVac Services Inc. to the Laborers' International Union of North America, Local 183 ("**LiUNA**") and/or its members and/or related trust funds pursuant to the Settlement Agreement between LiUNA and the Receiver dated August 13, 2020, which agreement was approved by the Court pursuant to an Order dated December 2, 2020.

9. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors and any bankruptcy order issued pursuant to any such applications (including with respect to the ongoing bankruptcy proceedings of DistinctTech Inc.); and

(c) any assignment in bankruptcy made in respect of any of the Debtors;

the distributions set out in paragraphs 5 and 6 of this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Debtors (including Deloitte Restructuring Inc. in its capacity as trustee in bankruptcy of DistinctTech Inc.) and shall not be void or voidable by creditors of the Debtors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

**APPROVAL OF THE THIRD SPECIAL REPORT**

10. **THIS COURT ORDERS** that the Third Special Report and the conduct and activities of the Receiver and the Special Receiver described therein be and are hereby approved; provided, however, that only the Receiver and the Special Receiver, in their personal capacities and only with respect to their own personal liability, shall be entitled to rely upon or utilize in any way such approval.

**GENERAL**

11. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver in carrying out the terms of this Order. All courts, tribunals, regulatory and

administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver as may be necessary or desirable to give effect to this Order or to assist the Receiver in carrying out the terms of this Order.

Digitally signed
by Jessica Kimmel
Date: 2022.07.21
18:56:01 -04'00'

**IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

| | | |
|---|---|---|
| **ROYAL BANK OF CANADA** | and | **DISTINCT INFRASTRUCTURE GROUP INC. et al.** |
| Applicant | | Respondents |

Court File No. CV-19-00615270-00CL

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

Proceedings commenced at Toronto

**SETTLEMENTS APPROVAL AND DISTRIBUTION ORDER**

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Lawyers for the Receiver, Deloitte Restructuring Inc. and Special Receiver, Honourable J. Douglas Cunningham, Q.C.

# TAB 18

Court File No. CV-19-615560-00CL

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

| | | |
|---|---|---|
| THE HONOURABLE | ) | WEDNESDAY, THE 28TH |
| | ) | |
| JUSTICE MCEWEN | ) | DAY OF JUNE, 2023 |

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BONDFIELD CONSTRUCTION COMPANY LIMITED, 950504 ONTARIO INC., 352021 ONTARIO LIMITED, 2433485 ONTARIO INC. AND 2433486 ONTARIO INC. (each, an "Applicant", and collectively, the "Applicants")

**ORDER**
**(SETTLEMENT APPROVAL)**

**THIS MOTION** made by Ernst & Young Inc., in its capacity as Court-appointed monitor (the "**Monitor**"), for an order approving a settlement (1) between Toronto Transit Commission ("**TTC**"), Bondfield Construction Company Limited ("**BCCL**"), Zurich Insurance Company Ltd. ("**Zurich**"), Travelers Insurance Company of Canada (formerly Travelers Guarantee Company of Canada ("**Travelers**") and IBI Group Architects (Canada) Inc. (formerly known as Stevens Group Architects Inc. and SGA IBI Inc.), WSP Canada Inc. (formerly Halsall Associates Limited and Parsons Brinckeroff Halsall Inc.) and LEA Consulting Ltd., sometimes collectively referred to as "The Spadina Group Associates", and with H.H. Angus Ltd. as their sub-consultant (collectively the "**Designers**") and (2) between BCCL, Zurich, Travelers and certain subcontractors, in each case pursuant to Minutes of Settlement (collectively, the "**Minutes of Settlement**") was heard this day via videoconference.

**ON READING** the Motion Record of the Monitor, the Twenty-Third Report of the Monitor dated June 14, 2023 (the **"Twenty-Third Report**"), and on hearing the submissions of counsel for the Monitor, TTC, Zurich, Travelers and the Designers, no one appearing for any other party

although duly served as appears from the Affidavit of Service of Katie Parent sworn June 14, 2023, filed:

**Sufficiency of Service and Definitions**

1. **THIS COURT ORDERS** that the time for service and manner of service of the Notice of Motion and Motion Record of the Monitor and the Twenty-Third Report, on any Person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this Motion is properly returnable today.

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meaning attributed to those terms in the Minutes of Settlement.

**Approval of Settlement Agreement**

3. **THIS COURT ORDERS** that the Minutes of Settlement, including all Schedules thereto, are hereby approved, and the parties thereto are hereby bound by this Order and by those terms of the Minutes of Settlement that are conditional upon the granting of this Order and are authorized and directed to comply with their obligations thereunder.

4. **THIS COURT ORDERS** that all claims, claims over, cross claims, counterclaims and related claims that could have been asserted by any person against TTC, City of Toronto, BCCL, Zurich, Travelers, or the Designers (collectively, the "**Releasees**") in any way related to the subject matter of the actions attached as Schedule "A" (the "**Actions**") are (upon completion of the steps set out in Section 8 of the Minutes of Settlement between TTC, BCCL, Zurich, Travelers and the Designers) irrevocably, absolutely, and unconditionally fully, finally and forever released, remised and discharged (the "**Released Matters**"). For greater certainty, this paragraph shall not release any claims against any parties other than the foregoing Releasees, whether or not related in any way to the subject matter of the Actions, and shall not release any of the claims made (i) in the action commenced by BCCL, through its litigation trustee Martin Sclisizzi, bearing Court File No. CV-21-00655113-00CL or (ii) by Zurich bearing Court File No. CV-21-00655128-00CL (together, the "**Auditor Claims**"), and shall not impair any of the rights, arguments or defences available to BCCL, Zurich, Deloitte LLP and PricewaterhouseCoopers LLP in the Auditor Claims, or any of the Third, Fourth, or subsequent Parties to the Auditor Claims, whether at law, equity or otherwise. This paragraph shall also not release any claims (other than claims against the City of Toronto and TTC) that John Aquino has asserted in any proceedings commenced to date, and shall not impair any of the rights, arguments or defences

available to John Aquino in those proceedings as well as any proceedings that may be asserted against him in the future.

5. **THIS COURT ORDERS** that no party to the Minutes of Settlement and no subcontractor of BCCL of any tier who provided services or materials to the Toronto York Spadina Subway Extension – Finch West Station Project shall now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any other person, any action, suit, cause of action, claim or demand against TTC, City of Toronto or BCCL (or any other person who may claim contribution or indemnity from any of the foregoing parties) in respect of the Toronto-York Spadina Subway Extension – Finch West Station Project or the Released Matters, and recoveries for any such claims in respect of the Released Matters will be solely limited to a distribution from (i) the Total Settlement Amount, (ii) Security for Costs and (iii) the Finch West Deficiency Funds (as defined in the Twenty-Third Report) in accordance with paragraph 7 below.

6. **THIS COURT ORDERS** that notwithstanding any other provision of this Order, the Outstanding Subcontractor Actions are not barred or released and paragraphs 4 and 5 of this Order do not apply to the Outstanding Subcontractor Actions, other than to the extent of any claims against TTC, the City of Toronto or the Designers.

**Distributions**

7. **THIS COURT ORDERS** that:

a) the Total Settlement Amount (excluding any applicable taxes);

b) the security for costs posted by BCCL in the amount of $1,000,000.00 pursuant to the Order of the Honourable Justice Hainey on October 17, 2019 (the "**Security for Costs**"); and

c) the Finch West Deficiency Funds

are Finch West Litigation Proceeds (as defined in the Amended and Restated Initial Order dated April 3, 2019 in these proceedings (the '**Initial Order**")) and BCCL is authorized to distribute all or any portion of the Total Settlement Amount, the Security for Costs and the Finch West Deficiency Funds, at times determined by the Monitor and subject to such

reserves as the Monitor deems appropriate, in accordance with the priorities set out in paragraph 46(b) of the Initial Order and as set out in greater detail in Confidential Appendices "J" and "K" to the Twenty-Third Report. The Monitor is authorized to deliver distributions of the Total Settlement Amount, the Security for Costs and the Finch West Deficiency Funds on behalf of BCCL.

8. **THIS COURT ORDERS** that, notwithstanding:

a) the pendency of these proceedings;

b) any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act (Canada) in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications; and

c) any assignment in bankruptcy made in respect of any of the Applicants,

the settlement, payments and distributions approved pursuant to this Order and the releases and bar orders shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of any of the Applicants in the CCAA Proceedings, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the Bankruptcy and Insolvency Act (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. **THIS COURT ORDERS** that releases, bar orders and injunctions set out herein shall be conditional upon the completion of the settlement set out in the Minutes of Settlement, and do not limit the releases and protections set out in the Minutes of Settlement.

**Monitor**

10. **THIS COURT ORDERS** that the execution and delivery of the Minutes of Settlement by the Monitor, on behalf of BCCL, is hereby authorized and approved and the performance by BCCL and the Monitor of the respective steps set out in the Minutes of Settlement, including the escrow terms therein, is hereby approved.

11. **THIS COURT ORDERS** that the Monitor, on its own behalf or on behalf of the Applicants, is hereby authorized and directed to take such additional steps and execute such

additional documents (including, without limitation, amendments to the Minutes of Settlement) as may be necessary or desirable for the completion of the settlements and other agreements contemplated under the Minutes of Settlement.

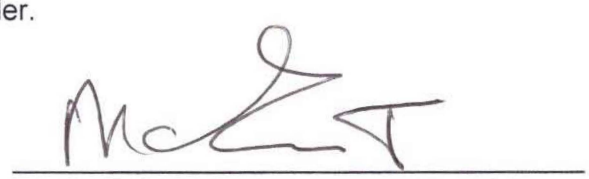
12. **THIS COURT ORDERS** that the Monitor shall not incur any liability or obligation as a result of carrying out the provisions of this Order or the Minutes of Settlement, save and except for any gross negligence or willful misconduct on its part.

**Sealing**

13. **THIS COURT ORDERS** that Confidential Appendices "J" and "K" to the Twenty-Third Report shall be and are hereby sealed, kept confidential and shall not form part of the public record until further Order of the Court. For greater certainty, this paragraph 13 is not a determination that the unredacted Minutes of Settlement are not producible or admissible in any other proceeding, including the Auditor Claims, and does not affect any rights that parties to such other proceedings have to seek production of the unredacted Minutes of Settlement and related documents, if such documents are not voluntarily produced.

**Recognition and Enforcement**

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body (collectively, "**Bodies**") having jurisdiction in Canada or in the United States or in any other jurisdiction to give effect to this order and to assist the Monitor (as an Officer of this Court) and its agents in carrying out the terms of this order. All Bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be necessary or desirable to give effect to this order or to assist the Monitor and its agents in carrying out the terms of this order.



# Schedule "A"

## The Actions

# SCHEDULE "A"

| Style of Cause | Court File No. |
|---|---|
| **Non-Lien Actions** | |
| AGF - Rebar Inc. DMC Division formerly known as DMC Reinforcing Products Ltd. v. Bondfield Construction Company Ltd., Ralph Aquino, John Aquino, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-17-579923<br>CV-17-579223-00A1<br>CV-17-579223-00B1 |
| General Sprinklers Inc. v. Bondfield Construction Company Limited, Zurich Insurance Company Ltd., and Travelers Guarantee Company of Canada | CV-18-00607825-0000<br>CV-18-00607825-00A1<br>CV-18-00607825-00B1<br>CV-18-00607825-00C1<br>CV-18-00607825-00C2 |
| Assa Abloy Entrance Systems Canada aka Besam Canada Inc. v. Bondfield Construction Company Limited, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company of Canada | CV-18-594253 |
| Nelmar Drywall Company Limited v. Bondfield Construction Company Limited, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-18- 607824-0000 |
| Nelmar Drywall Company Limited v. Bondfield Construction Company Limited, Ralph Aquino, John Aquino and Steven Aquino | CV-18-607827 |
| 1086289 Ontario Inc. operating as Urban Electrical Contractors v. Bondfield Construction Company Ltd, Ralph Aquino, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-17-581732 |
| Urban Mechanical Contracting Ltd. v. Bondfield Construction Company Ltd, Ralph Aquino, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-18-590001<br>CV-18-590001-00A1<br>CV-18-590001-00B1<br>CV-18-590001-00B2 |
| Interborough Electric Incorporated v. Bondfield Construction Company Limited and The Toronto Transit Commission and Travelers Insurance Company of Canada, carrying on business as and/or operating as Travelers Guarantee Company of Canada and Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-13-482012 |
| Bondfield Construction Company Limited v. Interborough Electric Incorporated | CV-12-468839 |
| Bondfield Construction Company Limited v. Interborough Electric Incorporated and Travelers Insurance Company of Canada, carrying on business as and/or operating as Travelers Guarantee Company of Canada and Travelers Guarantee Company of Canada | CV-13-479638 |

| Style of Cause | Court File No. |
|---|---|
| Application – Interborough Electric Incorporated v. Bondfield Construction Company Limited and The Toronto Transit Commission | CV-12-458053 |
| 1086289 Ontario Inc., operating as Urban Electrical Contractors v. Toronto Transit Commission, Lea Consulting Ltd., IBI Group Architects (Canada) Inc., WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited), and The Spadina Group Associates | CV-18-594747<br>CV-18-594747-00A1 |
| 1086289 Ontario Inc., operating as Urban Electrical Contractors v. Toronto Transit Commission, Lea Consulting Ltd., IBI Group Architects (Canada) Inc., WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited), H.H. Angus Associates Ltd. and The Spadina Group Associates | CV-19-00624425-0000 |
| 1086289 Ontario Inc., operating as Urban Electrical Contractors v. H.H. Angus Associates Ltd. | CV-19-00624427-0000 |
| Nelmar Drywall Contractors Limited v. Bondfield Construction Company Limited, Ralph Aquino, John Aquino, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-18-00605679<br>CV-18-00605679-00A1<br>CV-18-00605679-00B1<br>CV-18-00605679-00C1<br>CV-18-00605679-00C2 |
| Urban Mechanical Contracting Ltd. v. Toronto Transit Commission, Lea Consulting Ltd., IBI Group Architects (Canada) Inc. WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited) and The Spadina Group Associates | CV-18-594803<br>CV-18-594803-00A1<br>CV-18-594803-00A2 |
| Urban Mechanical Contracting Ltd. v. H.H. Angus Associates Ltd. | CV-19-00624408-0000 |
| Urban Mechanical Contracting Ltd. v. H.H. Angus Associates Ltd. | CV-19-00624409-0000 |
| 1086289 Ontario Inc. operating as Urban Electrical Contractors v. Bondfield Construction Company Limited, Ralph Aquino, John Aquino, Steven Aquino, Travelers Guarantee Company of Canada and Zurich Insurance Company Ltd. | CV-17-281732 |
| General Sprinklers Inc. v. Bondfield Construction Company Limited, Ralph Aquino, John Aquino and Steven Aquino | CV-18-607828<br>CV-18-607828-A1<br>CV-18-607828-B1<br>CV-18-607828-C1<br>CV-18-607828-C2 |
| Bondfield Construction Company Limited v. Interborough Electric Incorporated | CV-12-468839 |
| Pave-Al Limited v. Bondfield Construction Company Limited, Ralph Aquino, John Aquino and Steven Aquino v. Toronto Transit Commission v. Lea Consulting Ltd., IBI Group Architects (Canada) Inc., The Spadina Group Associates, WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited | CV-18-596514<br>CV-18-596514-A1<br>CV-18-596514-B1<br>CV-18-596514-C1<br>CV-18-596514-C2 |

| Style of Cause | Court File No. |
|---|---|
| Aqua-Tech Dewatering Company Inc. v. Bondfield Construction Company Limited | CV-18-134707<br>CV-18-134707-00A1<br>CV-18-134707-00B1<br>CV-18-134707-00C1<br>CV-18-134707-00C2 |
| Schindler Elevator Corporation v. Toronto Transit Commission et al. | CV-18-594197 |
| Assa Abloy Entrance Systems Canada Inc. a.k.a. Besam Canada Inc. v. Bondfield Construction Company Limited et al. | CV-18-594253<br>CV-18-594253-00A1<br>CV-18-594253-00B1<br>CV-18-594253-00C1<br>CV-18-594253-00C2 |
| Exterior Wall Systems Limited cob as Ontario Panelization v. Bondfield Construction Company Limited | CV-496/18<br>CV-496/18-00A1<br>CV-496/18-00B1<br>CV-496/18-00C1<br>CV-496/18-00C2 |
| F&M Caulking Limited v. Bondfield Construction Company Limited et al. | CV-18-65348<br>CV-18-65348-00A1<br>CV-18-65348-00B1<br>CV-18-65348-00C1<br>CV-18-65348-00C2 |
| Gage Metal Cladding Limited v. Bondfield Construction Company Limited et al. | CV-18-597469<br>CV-18-597469-00A1<br>CV-18-597469-00B1<br>CV-18-597469-00C1<br>CV-18-597469-00C2 |
| Gengroup Inc. v. Bondfield Construction Company, Ralph Aquino, Steven Aquino, John Aquino, Zurich Insurance Company Ltd., and Travelers Guarantee Company of Canada | CV-18-597973<br>CV-18-597973-00A1<br>CV-18-597973-00B1<br>CV-18-597973-00C1<br>CV-18-597973-00C2 |
| Pollard Enterprises Ltd. v. Bondfield Construction Company Limited, Ralph Aquino, Steven Aquino, John Aquino, Zurich Insurance Company Ltd., and Travelers Guarantee Company of Canada | CV-18-604153<br>CV-18-604153-00A1<br>CV-18-604153-00B1<br>CV-18-604153-00C1<br>CV-18-604153-00C2 |
| Gregory Signs & Engraving Limited v. Bondfield Construction Company Limited et al. | CV-18-595789<br>CV-18-595789-00A1<br>CV-18-595789-00B1<br>CV-18-595789-00C1<br>CV-18-595789-00C2 |
| Peregrine Protection Inc. v. Bondfield Construction Company Limited | CV-17-582463<br>CV-17-582463-00A1 |

| Style of Cause | Court File No. |
|---|---|
| | CV-17-582463-00B1<br>CV-17-582463-00C1<br>CV-17-582463-00C2 |
| Terrazzo, Mosaic & Tile Co. Ltd. v. Zurich Insurance Company Ltd. et al. | CV-18-00604684<br>CV-18-00604684-00A1<br>CV-18-00604684-00B1<br>CV-18-00604684-00C1<br>CV-18-00604684-00C2 |
| Deep Foundations Contractors Inc. v. Bondfield Construction Company Limited et al. | CV-15-522678 |
| Guild Electric Limited v. Bondfield Construction Company Limited et al. | CV-17-581531 |
| Monir Precision Monitoring Inc. v. Bondfield Construction Company Limited et al. | CV-18-00595354-0000 |
| Gregory Signs & Engraving Limited v. Bondfield Construction Company Limited et al. | CV-18-595789<br>CV-18-595789-00A1<br>CV-18-595789-00B1<br>CV-18-595789-00C1<br>CV-18-595789-00C2 |
| Nexlevel Construction Solutions Inc. v. Zurich Insurance Company Ltd. | SC-20-00001384-0000 |
| Gregory Signs & Engraving Limited v. Bondfield Construction Company Limited et al. | CV-19-0014138 |
| 9357-1578 Quebec Inc. v. Bondfield Construction Company Limited et al. | CV-18-595919<br>CV-18-595919-00A1<br>CV-18-595919-00B1<br>CV-18-595919-00C1<br>CV-18-595919-00C2 |
| 9357-1578 Quebec Inc. v. Bondfield Construction Company Limited et al. | CV-18-594602<br>CV-18-594602-00A1<br>CV-18-594602-00B1<br>CV-18-594602-00C1<br>CV-18-594602-00C2 |
| 9357-1578 Quebec Inc. v. Bondfield Construction Company Limited et al. | CV-18-595430<br>CV-18-595430-00A1<br>CV-18-595430-00A2<br>CV-18-595430-00C1<br>CV-18-595430-00C2 |
| Royal Windsor Mechanical v. Bondfield et al. | CV-14-00499947-00<br>CV-13-492185<br>CV-14-506211 |
| **Lien Actions** | |

| Style of Cause | Court File No. |
|---|---|
| Interborough Electric Incorporated v. Bondfield Construction Company Limited | CV-12-469449 |
| AGF - Rebar Inc. DMC Division formerly known as DMC Reinforcing Products Ltd. v. Her Majesty the Queen in Right of Ontario as Represented by the Minister of Infrastructure, City of Toronto, City of Toronto formerly the Municipality of Metropolitan Toronto, City of Toronto formerly the Corporation of the Township of North York, Toronto Transit Commission and Bondfield Construction Company Limited | CV-17-575533 |
| General Sprinklers Inc. v. Bondfield Construction Company Limited | CV-18-590333<br>CV-18-590333-00A1<br>CV-18-590333-00B1<br>CV-18-590333-00C1<br>CV-18-590333-00C2 |
| Nelmar Drywall Company Limited v. Bondfield Construction Company Limited | CV-18-590691<br>CV-18-590691-00A1<br>CV-18-590691-00B1<br>CV-18-590691-00C1<br>CV-18-590691-00C2 |
| 1086289 Ontario Inc. operating as Urban Electrical Contractors v. Bondfield Construction Company Ltd. | CV-17-576313<br>CV-576313-00A1<br>CV-576313-00B1<br>CV-576313-00C1<br>CV-576313-00C2<br>CV-576313-00C3 |
| Urban Mechanical Contracting Ltd. v. Bondfield Construction Company Ltd. | CV-17-576314 |
| Urban Mechanical Contracting Ltd. v. Bondfield Construction Company Ltd. | CV-17-576324 |
| Tam-Kal Limited v. Urban Mechanical Contracting Ltd. and Bondfield Construction Company Limited | CV-17- 579420 |
| Bondfield Construction Company Limited v. Toronto Transit Commission, Ministry of Infrastructure, City of Toronto, Imperial Oil Limited, Ont GTA Properties Inc., Policy Investments Inc., Jerome Becker, Samuel Brown, Victor Direnfeld, CFG Centennial Plaza Inc. and Canadian Imperial Bank of Commerce | CV-18-594533<br>CV-18-594533-00A1<br>CV-18-594533-00B1<br>CV-18-594533-00B2 |
| Schindler Elevator Corporation v. Bondfield Construction Company Limited et al. | CV-18-596309<br>CV-18-596309-00A1<br>CV-18-596309-00B1<br>CV-18-596309-00C1<br>CV-18-596309-00C2 |

| Style of Cause | Court File No. |
|---|---|
| Selco Elevators Ltd. v. City of Toronto, Toronto Transit Commission et al. | CV-18-591212<br>CV-18-591212-00A1<br>CV-18-591212-00B1<br>CV-18-591212-00C1<br>CV-18-591212-00C2 |
| Ginkgo Sustainability Inc. v. Pollard Enterprises Ltd. et al. | C-289-18 |
| Wintech Air Systems Inc. v. Corporation of the City of Toronto, et al. | CV-18-589639 |
| Johnson Controls Canada LP by its general partner Johnson Controls Ltd. v. Urban Mechanical Contracting Ltd. et al. | CV-18-596648 |
| Inter-Co Inc. v. Bondfield Construction Company Limited et al. | CV-18-00593174-0000 |
| Pollard Enterprises Ltd. v. Bondfield Construction Company Limited et al. | CV-18-593810-0000 |
| **Designer Actions** | |
| Bondfield Construction Company Limited v. Toronto Transit Commission et al. | CV-18-594533<br>CV-18-594533-00A1<br>CV-18-594533-00B1<br>CV-18-594533-00B2 |
| Toronto Transit Commission v. Lea Consulting Ltd., SGA-IBI Inc., (formerly Stevens Group Architects Inc.), Parsons Brinckerhoff Halsall Inc. (formerly Halsall Associates Limited), IBI Group Architects and The Spadina Group Associates | CV-13-489730<br>CV-13-489730-00A1<br>CV-13-489730-00A2<br>CV-13-489730-00A3 |
| Toronto Transit Commission v. Lea Consulting Ltd., SGA-IBI Inc., (formerly Stevens Group Architects Inc.), WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited), IBI Group Architects and The Spadina Group Associates | CV-15-543342<br>CV-15-543342-00A1<br>CV-15-543342-00A2<br>CV-15-543342-00A3 |
| Toronto Transit Commission v. Lea Consulting Ltd., IBI Group Architects (Canada) Inc., WSP Canada Inc. (formerly Parsons Brinckerhoff Halsall Inc. and Halsall Associates Limited), and The Spadina Group Associates | CV-17-588597<br>CV-17-588597-00A1<br>CV-17-588597-00A2<br>CV-17-588597-00A3 |

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, RSC 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BONDFIELD CONSTRUCTION COMPANY LIMITED, 950504 ONTARIO INC., 352021 ONTARIO LIMITED, 2433485 ONTARIO INC. AND 2433486 ONTARIO INC.

Court File No. CV-19-615560-00CL



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

Proceeding commenced at Toronto

**ORDER**
**(Settlement Approval)**

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Click or tap here to enter text.

# TAB 19

SUPERIOR COURT OF JUSTICE

# COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-19-615270-00CL

HEARING DATE: July 5, 2022

TITLE OF PROCEEDING: ROYAL BANK OF CANADA V. DISTINCT INFRASTRUCTURE GROUP INC ET AL

BEFORE MADAM JUSTICE KIMMEL

NAMES OF COUNSEL AND PARTY:

☒ APPLICANT(S):
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☒ DOUG WORNDI FOR SEAFORT CAPITAL INC
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**ENDORSEMENT OF JUSTICE KIMMEL:**

The Receivership

[1] On March 11, 2019, Deloitte Restructuring Inc. ("Deloitte") was appointed by the Court as Receiver (the "Receiver"), without security, of all of the assets, undertakings and properties of Distinct Infrastructure Group Inc. (the "Company") and its subsidiaries, DistinctTech Inc., Distinct Infrastructure Group West Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (collectively with the Company, "DIG") pursuant to an order (the "Appointment Order") of the Ontario Superior Court of Justice (Commercial List) (the "Court").

This Approval Motion

[2] The Receiver brings this motion for Court approval of the settlement of multiple actions/legal proceedings commenced after DIG's insolvency. The Receiver is also seeking Court approval for the distribution of the settlement proceeds in accordance with the agreement of the parties to the settlements and Court approval of the Receiver's Third Special Report dated June 23, 2022 and the activities described therein. The Receiver is further seeking a sealing order in respect of the settlements.

The Settlements

[3] The settlements were reached following a lengthy and complex mediation before the Honourable Justice Dennis O'Connor. The mediation was conducted over five days in 2021 and resulted in three distinct but related settlements that finally dispose of seven out of nine proceedings arising out of this receivership (collectively, the "settlements").

[4] Two of the seven proceedings were settled separately. The other settled proceedings are covered by the proposed approval order (supplemented by a separate consent dismissal order in the proceedings commenced by Seafort Capital Inc.).

[5] Of the two remaining proceedings that have not been finally settled, the proposed approval order contains some provisions that deal with one of them, namely the action against the former auditors of DIG, MNP LLP ("MNP"), that is continuing. It is expected that there will be a separate order or agreement to be finalized in the action commenced by Rogers Financial Management Inc. ("Rogers") and others that has been settled with seven of the eight originally named defendants, but is continuing against the one remaining defendant, AltaCorp Capital Inc. ("AltaCorp"). AltaCorp and MNP may collectively be referred to as the "non-settling defendants."

[6] Douglas Cunningham, Q.C. was appointed as Special Receiver to pursue certain claims of DIG, including against certain former directors and officers and the former auditor, MNP.

[7] The three settlement agreements (collectively, the "Settlement Agreements") are comprised of:

a. A main settlement contained in Minutes of Settlement dated March 22, 2022 (the "Settlement Agreement");

b. A side-letter agreement that deals with the manner in which any proceeds from the MNP action will be distributed (the "MNP side-letter settlement"); and

c. An agreement also dated March 22, 2022 that settled claims for recovery of expenses from two former CEO's of the Company (the "personal expense settlement agreement").

[8] The Receiver recommends that the Court approve the Settlement Agreements. The Receiver has advised the court that the compromises reflected in the settlements reflect a commercially reasonable resolution of a myriad of litigation claims that were settled through complex and arduous negotiations in the Mediation. The Receiver is further of the view that the Settlement Agreements reflect the best commercial resolution in the circumstances. The settlements are supported by the Special Receiver. The applicant Royal Bank of Canada was consulted throughout the mediation and also supports the settlements.

[9] The Receiver's Motion and its Special Third Report were served on the Service List and there has been no opposition to the relief sought. At the initial return of this approval motion on July 5, 2022, the non-settling defendants asked for some additional language to be included in the approval order to protect their discovery and other rights in the continuing litigation against them. The parties with an interest in those continuing proceedings have had an opportunity to comment upon and further negotiate those revised terms, resulting in some amendments to the proposed form of order as it relates to the continuing action against MNP (received by the court on July 21, 2022) and to the removal of corresponding provisions from the proposed form of order as it relates to the continuing action against AltaCorp, with a view to those arrangements being worked out separately.

Analysis and Decision on Approval Motion

[10] The Court accepts the recommendation of the Receiver, supported by the Special Receiver. I find that the Settlement Agreements represent a fair and reasonable commercial resolution of the settled claims in the circumstances. The Court also takes comfort in the fact that there is no opposition to the approval of the Settlement Agreements or the distributions contemplated thereby. The Settlement Agreements and the distributions provided for are approved.

[11] The activities undertaken by the Receiver in the pursuit of these settlements are reflected in the Receiver's Third Special Report. The Court's approval of that report and the activities reflected therein flows from the Court's approval of the Settlement Agreements and distributions contemplated thereby.

The Confidentiality and Sealing Order

[12] The Settlement Agreement contains the following provisions dealing with confidentiality:

> 25. These Minutes of Settlement shall be kept confidential. They may only be disclosed by the parties to their respective immediate family (in the case of parties who are individuals), lawyers, financial advisors, auditors, accountants and then only upon a promise to keep them confidential. These Minutes of Settlement may also be disclosed as necessary to enforce their terms, to comply with law (including an order of a court of competent jurisdiction) or a bona fide requirement of CRA, or as permitted by paragraph 28. In the event of such disclosure, the fact that these Minutes of Settlement were made without admission of liability shall receive the same publication at the same time, and the parties shall use their best efforts to ensure that confidential treatment will be accorded such information.
>
> 26. If court approval of these Minutes of Settlement is required then the motion for approval will be brought after June 1, 2022, and the party seeking such approval shall seek a sealing order from the court

> order that these Minutes of Settlement be received by the court under seal.

[13] The MNP side-letter agreement and personal expense settlement agreement also both contain provisions requiring the parties to keep the settlement terms confidential and not to disclose them. All of these Settlement Agreements contain confidential financial settlement terms and commercially sensitive information and are the product of, and reflect, hard fought private negotiations as between different plaintiff groups competing for their share of the settlement proceeds, and eventually the compromises made to reach a deal in this case. These are, for the most part, sophisticated commercial parties with other business interests and dealings. The personal expense settlement agreement also contains personal information specific to the settling former CEO's and their spouses.

[14] The parties negotiated and entered into these Settlement Agreements upon the understanding and expectation that their terms would remain confidential and the contents of those agreements were thus not curtailed with a view to the possibility of their public disclosure.

[15] There are further confidentiality considerations that come into play because not all of the outstanding proceedings are being settled at this time. While the non-settling defendants are entitled to certain limited information, they are not, at this time, entitled to know the financial terms of the settlements.

[16] The Receiver seeks an Order sealing the Confidential appendices to its Special Third Report that summarize and attach the Settlement Agreements, pending further order of this Court.

[17] Subsection 137(2) of *the Courts of Justice Act* provides that the Court may order that any document filed in the civil proceeding be treated as confidential, sealed, and not form part of the public record.

[18] In *Sherman Estate v. Donovan*, 2021 SCC 25, the Court, at para 38, reaffirmed and reformulated the test applicable to a determination whether a sealing order should be granted, as set out in its 2002 decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle.
>
> In order to succeed, the person asking a court to exercise discretion in way that limits the open court presumption must establish that:
> (1) court openness poses a serious risk to an important public interest;
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a

> publication ban, an order excluding the public from a hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[19] The Receiver argues that all three prerequisites have been met and that an order is justified in the circumstances of this case:

a. Disclosure of the Confidential Appendices to the Receiver's Special Third Report containing the terms of the Settlement Agreements poses a serious risk to two important public interests recognized by the courts, namely:

   i. The overriding public interest in favour of the settlement of disputes and the avoidance of litigation, which is the rationale for litigation settlement privilege that the Supreme Court of Canada has repeatedly recognized the importance of in the effective administration of justice. See *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37. Settlement communications are presumptively privileged. Settlement privilege is a class privilege and a "social value of superordinate importance capable of justifying a sealing order". See *Sable*, at paras. 2, and 11-13; *Hollinger Inc., Re,* 2011 ONCA 579, at paras. 16 and 20.

   ii. The general commercial interest in preserving private confidential financial information, which includes settlements and other agreements bound by confidentiality terms, such as has been recognized in recent cases, such as *Shell Canada Limited v. The Queen*, 2022 TCC 39 at para. 18: "if the exposure of confidential information would cause a breach of a confidentiality agreement, there is a general commercial interest of preserving confidential information".

b. There are no reasonable alternatives to sealing in the circumstances. The entirety of these settlements is commercially sensitive because of the complexity of the interrelated business and financial interests. They contain payment terms. They are subject to confidentiality terms that have been agreed to by multiple parties as part of a complex multi-party mediation. Redaction is therefore unfeasible.

c. The benefits of a sealing order outweigh its negative effects. A sealing order would protect two important public interests as described above, and this is not outweighed by the public's interest in accessing the details of the settlement that involve multiple parties (including third parties that are not subject to these receivership proceedings).

[20] The public interest in promoting settlements and preserving commercially sensitive confidential information is clear and unassailable.

[21] The parties all agreed to keep the Settlement Agreements confidential. But for the requirement of the Receiver to seek Court approval of the settlements and its activities, the need for public access would not have arisen. In *Bombardier*, the Supreme Court of Canada acknowledged (for example, circa para. 66) that even if the terms of a settlement agreement may be disclosed to the court for the purposes of enforcement, they may also still be confidential as between the parties and the public. The court noted that there may be a need for a sealing order where a settlement agreement is to be enforced, and held that "potentially sensitive information" tendered in support of an application to enforce a settlement agreement can be sealed so long

as the *Sierra Club* test [now, as reformulated in *Sherman Estate*] is met. In my view, the same logic can be applied to a situation where the need for disclosure of confidential settlements to the court arises in the context of a receivership proceeding such as this.

[22] No party will be prejudiced by the sealing order (to the contrary, all have either requested the confidentiality by signing the Settlement Agreements, or do not oppose the sealing order). I find the proposed sealing order to be proportionate. While there may be situations in which redactions could be applied to avoid the need to seal the entirety of a settlement agreement and all of its terms, the court has been advised that would not be practical in this case given how these Settlement Agreements were structured and the nature of the proceedings and the parties involved. There is also the added layer of complication in this case because of the continuing claims against the non-settling defendants AltaCorp and MNP.

[23] Further, the proposed sealing order is not absolute. It remains subject to further order of the court. It may be that some or all of the confidential Settlement Agreements, and the summary of their terms, can be unsealed at some future point in time.

[24] In the circumstances of this case, the important public interest in promoting settlements, especially complex multi-party and multi-proceeding settlements involving commercial parties who seek to protect their private and commercially sensitive information (and the personal private information of some of the individuals as well) by the confidentiality provisions they incorporated into their Settlement Agreements, outweighs any negative effects on the open court principle.

[25] I am satisfied that the prerequisites outlined by the Supreme Court in *Sherman Estate* for a sealing order over the Confidential Appendices to the Receiver's Special Third Report have been met in this case. The requested sealing order is granted.

A Word of Caution

[26] Parties should not assume that, just because they include a confidentiality clause or agreement to seek a sealing order in their agreements (whether they be settlement or other agreements), the Court will automatically grant a sealing order in any circumstance in which the agreements need to be referred to in legal proceedings. The chances of the court granting a sealing order may be enhanced where the agreement is the product of a settlement, but even so, there is no guarantee that the court will rubber stamp sealing orders just because of a confidentiality or sealing order clause. Settlement negotiations and agreements entered into in circumstances where it is known or expected that court approval is required can and should, where possible, be tailored so as to avoid the necessity of the entire agreements being sealed and to allow for limited redactions where needed.

[27] The sealing order must be based on a principled analysis and a record that supports concerns about disclosure. In this case, the sealing order was justified by virtue of the lengthy history of negotiations that were a product of, the nature and complexity of the issues, the nature and numerosity of the parties, the multitude of proceedings, including some that have not yet settled, and the identified commercial sensitivities that were not restricted to discrete parts of the Settlement Agreements and could not be easily redacted.

[28] Each case must be justified on its own merits.

Final Disposition and Orders

[29] There was a discussion at the hearing about some changes to the proposed form of order relating to the ongoing preservation and production obligations that had been requested by the non-settling defendants. A revised form of approval order was provided to the court today incorporating changes to the provisions

relating to the ongoing preservation and production obligations and ancillary relief that has been approved by all of the parties to the MNP Action. The provisions relating to the ongoing preservation and production obligations and any ancillary relief in the continuing action against AltaCorp have been removed from the approval order and will be addressed separately by the parties to that action.

[30] The Approval Order to go in the revised form signed by me today, with immediate effect.

[31] The supplemental consent order for the dismissal of the actions commenced by Seafort Capital Inc. against certain named individuals under court file numbers CV-19-627225-0000 and CV-21-0065966-00CL to go in the form signed by me today, with immediate effect and without the necessity of formal issuance and entry.

[32] These signed orders may be issued and entered, but they are not required to be.

[33] Counsel for the Receiver is responsible for ensuring that a physical hard copy of the motion records containing the sealed confidential exhibits to the Receiver's Special Third Report is filed with the court, together with a copy of the order by which they are sealed.

KIMMEL J.

July 21, 2022

# TAB 20

SUPERIOR COURT OF JUSTICE

# COUNSEL SLIP

**COURT FILE NO.:** CV-19-00615560-00CL **DATE:** 28 June 2023

**NO. ON LIST:** 4

**TITLE OF PROCEEDING:** **Bondfield Construction Company Limited, et al. v. The International Union of Operating Engineers, Local 793 et al.**

**BEFORE:** . **JUSTICE MCEWEN**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party, Crown:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

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| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
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**ENDORSEMENT OF JUSTICE MCEWEN:**

The settlement approval order and the related ancillary orders shall go as per the drafts filed & signed. With one exception, which I will outline below, the orders are unopposed and supported by the Monitor.

Insofar as the settlement is concerned, it relates to the significant litigation amongst Bondfield, the TTC and others. It is the result of extensive steps in the litigation, negotiation and mediation.

I have reviewed the settlement with counsel and read the motion materials. I am satisfied that the CCAA factors in approving a settlement have been met. The settlement is fair and reasonable; beneficial to the Applicants and the stakeholders; and, consistent with the purpose and spirit of the CCAA: see Sino-Forest Corp 2013 ONSC 1078 at para 49.

Among other things, the settlement, which resulted from arm's-length negotiation, frees up substantial cash for distribution to stakeholders, resolves ongoing, complex litigation and constitutes

a fair and reasonable compromise of Bondfield claims.

The proceeds of the settlement will be distributed in accordance with the priorities established in the Initial Order.

The releases sought are also acceptable and in keeping with CCAA jurisprudence: see Nortel 2018 ONSC 6257 at para 31.

I am also satisfied that the narrow sealing order ought to be granted. It is restricted to the amounts being paid. Otherwise there are no redactions. In the circumstances, I am of the view that the test in Sherman Estate 2021 SCC 25 at para 38 has been met. Confidentiality has been a key requirement of the settlement, including the Court ordered mediation. The TTC is also involved in other similar litigation and could be prejudiced by disclosure of the settlement figures. There is also public interest in significant litigation such as this being resolved and the very limited redactions are the only reasonable means to protect this important public interest.

The only objections raised were by 9357-1578 Quebec Inc ("9357"). First, it wishes to have disclosed to it, subject to the implied U/T rule, the redacted information concerning

the settlements and particulars of amounts paid to the parties and Bankfield AS I indicated at the motion, I am not prepared to make such an order. 9357's Responding motion Record was served late yesterday and I do not give the other stakeholders, parties or Applicants suitable time to respond. Further, the Settlement Approval Order states that the sealing order does not prevent 9357 from obtaining the unredacted document in the litigation to which it is a party or related documents (as per para 13). I agree with the Monitor that this adequately addresses the issue, and I pause to note that para 13 does not provide an automatic right, but allows 9357 to seek production.

Second, 9357 without the benefit of any supporting evidence, also seeks to have this Court make an order protecting its interests as a non-settling party. In my view no such order is required. The lien of 9357 is fully secured, plus costs, & no trust claim has been asserted. The Settlement Approval Order also deals with how funds are to be distributed as per para 7 and ∴ 9357's interests are protected. The proposal of the Monitor in this regard is

consistent with the usual CCAA practice concerning distributions.

Last, the ancillary orders are consistent with the Minutes of Settlement and consented to by all of the affected parties.

Insofar as this endorsement is concerned the parties at the motion also agreed to additional language which is attached as Schedule A and approved by this Court.

Schedule A

This Order is without prejudice to, and does not impair, any of the rights, arguments or defences (collectively, the "Defences"), counterclaims, crossclaims, third party claims, or other claims (collectively, the "Claims") available to Deloitte LLP ("Deloitte"), PricewaterhouseCoopers LLP ("PwC"), or any of the Third, Fourth, or subsequent Parties to the Auditor Claims (as defined below) ("Third Parties"), whether at law, equity or otherwise, and Deloitte, PwC and the Third Parties will be able to assert any and all Defences and Claims in: (i) the action commenced by Bondfield Construction Company Limited ("Bondfield"), through its litigation trustee Martin Sclisizzi bearing Court File No. CV-21-00655113-00CL or (ii) the action commenced by Zurich Insurance Company Ltd. ("Zurich") bearing Court File No. CV-21-00655128-00CL (collectively, the "Auditor Claims").

For greater certainty, and by way of example only, Deloitte, PwC and the Third Parties will not be precluded from asserting that the fact or the amounts of the anticipated payments to be received and/or made by Bondfield and Zurich in connection with the Finch West Litigation were not commercially reasonable, inadequate and/or excessive, constituted a failure by Bondfield and/or Zurich to properly mitigate its damages, and should not be recoverable by Zurich or the Litigation Trustee in the Auditor Claims.

By way of further example only, this Order will also not operate, or be relied upon by Zurich or the Litigation Trustee, to advance arguments in the Auditor Claims based on issue estoppel or *res judicata* in respect of the commercial reasonableness, adequacy, and/or proper mitigation of damages related to the anticipated payments to be received and/or made by Bondfield and Zurich, and which Zurich or the Litigation Trustee may subsequently seek to recover as damages from Deloitte, PwC and the Third Parties in the Auditor Claims.

# TAB 21

# SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-057679-199

DATE: April 27, 2023

---

**BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.**

---

In the Matter of *The Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 of Fortress Global Enterprises et al.:

**INVESTISSEMENT QUÉBEC**
**FIERA PRIVATE DEBT INC.**
Applicant / Secured Creditors

and
**FORTRESS GLOBAL ENTERPRISES INC.**
**FORTRESS SPECIALTY CELLULOSE INC.**
**FORTRESS BIOENERGY LTD.**
**FORTRESS XYLITOL INC.**
**9217-6536 QUÉBEC INC.**
Debtors

and
**DELOITTE RESTRUCTURING INC.**
Applicant/Monitor

---

**JUDGMENT ON APPLICATION TO EXTEND A STAY OF PROCEEDINGS AND AN APPLICATION TO APPROVE A SETTLEMENT AGREEMENT WITH A FORMER EMPLOYEE**
**(Sections 11 and 11.02(2) of the *Companies' Creditors Arrangement Act*)**

---

JS 1699

## OVERVIEW

[1] The Court is seized with two motions:

[2] In the first motion (the "**Stay Application**"), the Applicant, Investissement Québec ("**IQ**") in its capacity as interim lender and secured creditor of the Debtors, seeks the issuance of an order:

2.1. to extend the Stay Period (as defined below) until June 23, 2023;

2.2. to confirm that the Stay (as defined below) applies to the SAP Proceedings (as defined below); and

2.3. to approve the activities of Deloitte Restructuring Inc., in its capacity as court-appointed monitor of Fortress (as defined hereinafter) ("**Deloitte**" or the "**Monitor**") as described in its Nineteenth report to this Court dated April 25, 2023 (the "**Nineteenth Report**");

2.4. to allow Appendixes A and B of the Nineteenth Report to be filed under seal.

[3] In the second motion (the "**Settlement Approval Application**"), the Monitor seeks the issuance of an order:

3.1. to approve the terms and conditions of the Settlement Agreement (as defined below) between Fortress and a Former Employee (as defined hereinafter);

3.2. to authorize the Monitor to enter into and execute the Settlement Agreement for and on behalf of Fortress; and

3.3. to allow the Settlement Agreement as well as the exchange of documents which led it to be filed under seal.

## CONTEXT

[4] On December 16, 2019, Justice Marie-Anne Paquette, j.s.c. (as she then was) issued a first-day initial order (the "**First Day Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of Fortress Global Enterprises Inc., Fortress Specialty Cellulose Inc., Fortress Bioenergy Ltd., Fortress Xylitol Inc. and 9217-6536 Québec Inc. (collectively, "**Fortress**" or the "**Debtors**"), pursuant to which:

4.1. Deloitte was appointed as monitor of the Debtors;

4.2. all claims against the Debtors, their properties and their directors and officers were stayed (the "**Stay**") until December 26, 2019 (the "**Stay Period**"); and

4.3. the Debtors were authorized to borrow from IQ an amount of up to $1,000,000 on the terms and conditions of the Interim Financing Term Sheet (the "**Interim Financing Term Sheet**"), which was to be secured by a super-priority charge and security over all of the assets of each of the Debtors in the aggregate amount of $1,200,000 (the "**Interim Lender Charge**").

[5] On the same day, the Court appointed Deloitte as receiver to the Debtors for the sole purpose of allowing their respective employees to recover amounts which may be owing to them pursuant to the *Wage Earner Protection Program Act*.[1]

[6] On December 26, 2019, the Court issued an Amended First Day Order which:

6.1. Extended the Stay Period until January 10, 2020;

6.2. Authorized the Debtors to borrow from IQ an amount of up to $1,500,000 under the terms and conditions set forth in the Interim Financing Agreement, to be secured by an Interim Lender Charge of $1,800,000; and

6.3. Authorized the Debtors (with the prior approval of the Monitor), or the Monitor (on behalf of the Debtors), to pay amounts owing for goods or services actually supplied to the Debtors either prior to or after the date of this Order up to a maximum of $250,000, to the extent that, in the opinion of the Monitor, the supplier was essential to the business and ongoing operations of the Debtors.

[7] On January 10, 2020, the Court issued an Amended and Restated Initial Order which provided:

7.1. an extension of the Stay Period until May 2, 2020;

7.2. the authorization for the Debtors to borrow from IQ an amount of up to $6,000,000 under the terms and conditions set forth in the Interim Financing Agreement, to be secured by an Interim Lender Charge of $7,200,000;

7.3. the creation of a key employee retention plan (the "**KERP**") and a charge in the amount of $610,000 to secure the payment of Fortress' obligations under the KERP (the "**KERP Charge**"); and

7.4. an increase in the Monitor's powers, including the powers to conduct and control the financial affairs and operations of the Debtors, and carry on the business of the Debtors.

[8] The Court also issued a Claims Procedure Order which established a "Claims Bar Date" of March 16, 2020 (except for restructuring claims).

---

[1] *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1.

[9] Since then, the Court has rendered further orders, including:

9.1. an order dated March 23, 2020 clarifying that the Stay applied to proceedings commenced before the *Tribunal Administratif du Québec* (the "**TAQ**") and suspending penal proceedings before the Court of Quebec, criminal division;

9.2. orders extending the Stay Period (which is currently set to expire on April 28, 2023);

9.3. orders to approve a First Amending Agreement, a Second Amending Agreement, a Third Amending Agreement, a Fourth Amending Agreement, a Fifth Amending Agreement and a Sixth Amending Agreement to the Interim Financing Term Sheet, providing for an increase to the Facility Amount (as defined in the Interim Financing Agreement) to a total amount of $33,800,000, and a corresponding increase to the Interim Lender Charge to a total amount of $40,460,000; and

9.4. an order dated February 11, 2022 approving a litigation funding agreement with Omni Bridgeway (Fund 5) Canada Investments Limited to allow Fortress to pursue proceedings against Les Pompes Gould Inc.

[10] On April 20, 2023, the undersigned was appointed to case manage the present proceedings.

## ANALYSIS

### 1. The Stay of Proceedings

[11] The Debtors' restructuring efforts have proven challenging.

#### 1.1 Pre-Filing Solicitation Efforts

[12] Prior to the issuance of the First Day Order, a sale and investment solicitation process ("**SISP**") was conducted by the Debtors with the assistance of its financial advisors (and in consultation with IQ and Deloitte).

[13] Despite these efforts, no offer, indication of interest or other proposal were submitted to the Debtors prior to the filing of the proceedings.

#### 1.2 The 2021 SISP

[14] Further to the commencement of the CCAA proceedings, the Debtors and the Monitor, in consultation with IQ and Fiera, held discussions with various parties on an informal basis regarding a potential transaction which would allow the continuation of the Debtors' operations.

[15] On September 3, 2020, the Monitor received an offer from one of these parties for the acquisition of Fortress Bioenergy Ltd.'s ("**Fortress Bioenergy**") cogeneration facility (the "**Cogeneration Facility**"). The offer was shared with IQ and Fiera and was subsequently refused. The Monitor also received a draft letter of intention for the same facility, which was also shared with IQ and Fiera, and was subsequently refused.

[16] In 2021, the Debtors and the Monitor continued to have active discussions with various interested parties with a view of securing a binding offer with a party willing to continue the operations of the Debtors as a going concern.

[17] Despite these continued efforts, no agreement was reached.

[18] In late July 2021, the Monitor met with respective representatives and counsel of IQ and Fiera to discuss the status of this file as well as the next steps.

[19] The parties agreed to establish a formal deadline for the submission of letters of intent as well as the terms and conditions in connection with the acquisition of the Debtors' business and assets (the "**2021 SISP**").

[20] The Monitor communicated with (22) potentially interested parties, including parties that had previously manifested some interest in acquiring the Debtors' business and assets (parties potentially interested in a going concern transaction and parties potentially interested in submitting liquidation offers whereby the Debtors' assets would be decommissioned and dismantled).

[21] On August 4, 2021, the Monitor sent these parties solicitation materials and advised them that offers should be submitted to the Monitor by no later than September 15, 2021.

[22] The Monitor received several offers (the "**2021 Offers**") from various parties including going concern offers from strategic parties as well as liquidation bids.

[23] On September 17, 2021, the Monitor presented a summary of the 2021 Offers to IQ and Fiera.

[24] Since several of the 2021 Offers contained conditions relating to IQ and the Québec government (including requests for financial support), IQ, together with the Monitor, proceeded with a detailed review of each and every one of the 2021 Offers in order to assess their respective viability.

[25] In late 2021, IQ and the Monitor decided to focus their discussions on one of the bidders (the "**Original Potential Purchaser**") and to evaluate its ability to implement a project involving the restart of Fortress' Pulp Mill and Cogeneration Facility (the "**Original Proposed Project**").

[26] Discussions and meetings were held between this Original Potential Purchaser, the Monitor, IQ as well as other governmental entities to clarify its offer, negotiate certain improvements to same and ultimately discuss the path going forward in order to properly assess the Original Potential Purchaser's Original Proposed Project and determine how this project could be implemented.

[27] Unfortunately, it became clear that certain conditions relating to the Original Proposed Project and the required participation from the Quebec government in the project could not be met.

[28] In March 2022, the Quebec government notified the Original Potential Purchaser that no agreement could be reached in connection with the Original Proposed Project.

### 1.3 Subsequent Discussions with Other Potential Purchasers

[29] Fortress, the Quebec government and the Monitor continued discussions with other parties and considered other potential transactions and projects involving the acquisition of Fortress' assets.

[30] In late September 2022, Fortress and the Monitor received a non-binding letter of intent, together with a business plan, from a party potentially interested in acquiring the business and assets of Fortress.

[31] Again, the offer did not result in a transaction.

[32] Fortress and the Monitor continued their discussions with several other parties which remained interested in a potential transaction involving the assets of Fortress.

### 1.4 The 2023 SISP

[33] On March 16, 2023, the Monitor communicated new terms and conditions to potential bidders which had shown renewed interest in Fortress' assets.

[34] By the deadline of April 14, 2023, Fortress and the Monitor had received six offers from different interested parties (the "**2023 Offers**"), including parties which had previously demonstrated an interest in a potential transaction, as well as other parties which had, until then, demonstrated no such interest.

[35] The Monitor confirms that some of the 2023 Offers were submitted by serious parties and it believes that some of these offers could be beneficial for Fortress as well as for the region of Thurso.

[36] The 2023 Offers were shared with IQ which will be proceeding with an analysis of these offers, together with the Monitor and various branches of the Quebec government.

1.5 Implementation of the "Cold Idle Plus Scenario"

[37] In parallel with the above discussions, the Monitor continued to maintain Fortress' activities to a minimum, in order to reduce operating costs, while maintaining the value of Fortress' assets for a potential purchaser in the hope that the demand for pulp and related products would increase.

[38] In accordance with the powers granted to it by the Court, the Monitor, in consultation with IQ, decided that:

38.1. Fortress Specialty Cellulose Inc.'s ("**Fortress Specialty**") specialty cellulose mill located in Thurso, Québec (the "**Pulp Mill**") would be idled indefinitely so as to minimize operating costs while market conditions improved; and

38.2. Fortress Bioenergy's Cogeneration Facility would continue to operate, but at a substantially reduced production rate.

[39] On March 24, 2020, the Quebec Government ordered the closure of all Quebec non-essential businesses due to the COVID-19 pandemic. This prompted the temporary shutdown of the Cogeneration Facility, which was intended to take place, in any event, a few weeks later given low demand for electricity and the fact that the Pulp Mill would not require to be heated during the spring and summer months.

[40] As non-essential businesses gradually reopened and the market price for dissolving pulp increased, Fortress, under the supervision and oversight of the Monitor, proceeded to restart its Cogeneration Facility between the fall of 2020 until the spring of 2021, with a view to preserve the value of Fortress' assets and maximize its revenues.

[41] As the market price for dissolving pulp remained strong,[2] Fortress, under the supervision and oversight of the Monitor, restarted the Cogeneration Facility during the fall of 2021 until the spring of 2022.

[42] However, further to the unsuccessful 2021 SISP, a decision was taken to gradually implement a "Cold Idle Plus Scenario", as described in the Monitor's Sixteenth, Seventeenth and Eighteenth Report.

[43] The scenario's goal was to allow Fortress to significantly reduce its operating expenses while it continued to work with the Quebec government to determine the eventual path forward, and, at the same time, allow it to protect and preserve any remaining value of its assets for any future transaction or project, as the case may be.

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[2] In December 2019, dissolving pulp was sold at market price of US$640 per metric ton, whereas in the first half of 2021, the market price for dissolving pulp went up to US$1,100 per metric ton. Today, the market price for dissolving pulp now ranges between US$900 to $US925 per metric ton.

[44] The Cold Idle Plus Scenario also allowed Fortress to assist the City of Thurso for the treatment of its wastewater and plan for environmental remediation of the site, which has remained ongoing over the course of the past few months.

### 1.6 Extension of the Stay Period

[45] The Stay Period is currently set to expire on April 28, 2023.

[46] IQ asks that the Stay Period be extended to June 23, 2023.

[47] IQ submits that this two-month extension of the Stay Period will allow IQ, together with the Quebec government and the Monitor, to assess the 2023 Offers received as part of the 2023 SISP, as well as other remaining available options.

[48] The Monitor believes that there is a strong possibility that a viable project will be selected from the recent offers, and that the Quebec government will be able to provide an indication about its interest by the end of June 2023.

[49] The main conditions of the 2023 SISP are attached to the Nineteenth Report as Appendix A. A table summarizing the main terms of the 2023 Offers is attached to the Nineteenth Report as Appendix B.

[50] Absent an order from this court ordering the extension of the Stay Period, the parties would be forced to initiate receivership or bankruptcy proceedings under the *Bankruptcy and Insolvency Act*[3] (the "**BIA**"). IQ submits that such proceedings would not significantly alter the current situation or the challenges which Fortress and its stakeholders are currently facing.

[51] However, such proceedings would require additional filing of court materials and reports which would distract funds and efforts from the primary goal of finding a viable solution.

[52] IQ, Fortress and the Monitor all believe that the maintenance of the CCAA proceedings and the Stay remain appropriate in the circumstances, especially given the 2023 Offers recently received.

[53] As indicated in the Monitor's Nineteenth Report, an updated operation budget has been prepared to continue implementing the Cold Idle Plus Scenario while Fortress and the Monitor attempt to finalize a transaction with a potential purchaser.

[54] The Cash Flow Statement contained in the Nineteenth Report indicates that Fortress should have sufficient liquidity to continue to meet its obligations in the ordinary course of business within the Interim Financing Facility that was granted to Fortress through the Sixth Amending Agreement.

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[3] *Bankruptcy and Insolvency Act*, L.R.C. 1985, c. B-3.

1.7 Filing of Appendixes A and B of the Nineteenth Report under Seal

[55] Fortress, IQ and the Monitor ask that Appendixes A and B of the Nineteenth Report be filed under seal.

[56] In *Sherman Estate v Donovan*,[4] the Supreme Court of Canada confirmed that a sealing order can only be granted in the following circumstances:

56.1. court openness poses a serious risk to an important public interest;

56.2. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

56.3. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[57] These conditions are met here.

[58] Canadian courts, as a general practice, consider that all aspects of a bidding or sales process should be kept confidential. The sealing of this information protects the integrity of the process and ensures that, while the process is running its course, all potential bidders are treated equitably, and no one obtains an unfair advantage. Courts have considered that publicly divulging such information would negatively impact on future realizations on the assets and the parties' efforts to maximize value for stakeholders. The commercial interests of the monitor, bidders, creditors and other stakeholders to promote a fair sales and solicitation process in restructuring, insolvency or liquidation matters constitutes an important public interest.[5]

[59] A sealing order is required to protect this interest. There are no reasonable alternatives to the sealing order. No stakeholders will be materially prejudiced by sealing the information. The requested order is limited to Appendixes A and B of the Nineteenth Report which contains the information about the process and the bids received in the context of the 2023 SISP.

[60] As a matter of proportionality, the benefits of the limited order outweigh its negative effects.

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4 *Sherman Estate* v. *Donovan*, 2021 SCC 25, para. 38.

5 *Ontario Securities Commission* v. *Bridging Finance Inc.*, 2022 ONSC 1857, para. 53; *Yukon (Government of)* v. 2022 YKSC 2, paras. 39 to 43; *Danier Leather Inc. (Re)*, 2016 ONSC 1044, paras. 82 to 86; *GE Canada Real Estate Financing Business Property Co* v. *1262354 Ontario Inc.*, 2014 ONSC 1173, paras. 33 and 34; *Look Communications Inc* v. *Look Mobile Corp* (2009), 183 ACWS (3d) 736 (Ont Sup Ct); *887574 Ontario Inc.* v. *Pizza Pizza Ltd.*, (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div.).

1.8 Application of the Stay to the SAP Proceedings

[61] Prior to the initiation of the CCAA proceedings, Fortress Specialty operated the Pulp Mill under an authorization certificate (the "**Authorization Certificate**") issued by the *Ministère de l'Environnement, de la Lutte contre les changements climatiques, de la Faune et des Parcs* (the "**MELCC**") in accordance with the *Loi sur la qualité de l'environnement*,[6] (the "**LQE**") and the *Règlement sur les fabriques de pâtes et papier*.[7]

[62] As a result of the Debtors' financial situation, the Pulp Mill's operations have been suspended since on or about October 8, 2019.

[63] On July 7, 2021, the *Bureau de réexamen* of the MELCC imposed a monetary administrative penalty in the amount of 10,000$ (the "**SAP**") against Fortress Specialty (the "**SAP Decision**").

[64] On August 6, 2021, Fortress Specialty contested the SAP Decision before the TAQ in file number STE-Q-257041-2108 (the "**SAP Proceedings**").[8]

[65] IQ seeks a declaration from the Court specifying that the Stay applies to the SAP Proceedings.

[66] The MELCC is a "regulatory body" under section 11.1 of the CCAA.

[67] As such, a stay order under section 11.02 of the CCAA generally does not affect an investigation, suit, proceeding or action by the MELCC in respect of the debtor company unless the Court is of the opinion that:

67.1. a viable compromise or arrangement could not be made in respect of the company if the regulatory proceeding is not stayed; and

67.2. it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[68] IQ submits that the SAP could prevent the closing of a transaction in respect of the Debtors. It points out that certain of the letters of intention received by the Debtors include the Debtors' permits and licences as part of the purchased assets.

[69] The Monitor was informed that if the SAP is confirmed, the MELCC could, without any other motive, refuse to amend or renew Fortress Specialty's Authorization Certificate in accordance with section 115.5 of the LQE.

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6 *Loi sur la qualité de l'environnement*, RLRQ, c. Q-2.
7 *Règlement sur les fabriques de pâtes et papiers*, RLRQ, c. Q-2, r. 27.
8 Exhibit R-2 to the Stay Application.

[70] The loss of the Authorization Certificate would have a significant impact on the Debtor's perspective of closing a transaction and would considerably diminish the value of Fortress Specialty's assets.

[71] Furthermore, for the purpose of the Cold Idle Plus Scenario, the Debtors proceeded to lay-offs and they submit that they do not have the resources to adequately prepare for the SAP Proceedings.

[72] Because the Pulp Mill is in Cold Idle Plus mode, there is no risk that the alleged violations of the LQE and its regulation will continue.

[73] As such, the order sought would have a minimal impact on the public interest.

[74] IQ, the Monitor and the Debtors support the Stay Application.

[75] The MELCC does not oppose it.

[76] No creditor of the Debtors will be materially prejudiced by the extension of the Stay.

[77] The Court is also mindful of the fact that a similar request in connection with proceedings before the TAQ was previously granted by this court on March 23, 2020.[9]

## 2. The Approval of a Settlement with a Former Employee

[78] In its Seventeenth and Eighteenth Reports to this court, the Monitor advised the Court that a former employee of Fortress (the "**Former Employee**") had sent a demand letter (the "**Demand Letter**") to Fortress and IQ seeking damages for constructive dismissal.[10]

[79] The Former Employee sought payment of amounts allegedly owed for the period of the CCAA proceedings as well as under the KERP.

[80] The Monitor contested the allegations of the Demand Letter and took the position that no amounts were owed by Fortress to the Former Employee.[11]

[81] Nonetheless the Monitor informed the Former Employee that it would be willing to consider a private dispute resolution process to avoid potential litigation.

[82] Further to several discussions and exchanges between the Monitor, IQ, the Former Employee and their respective legal counsel, the parties have agreed on the terms and conditions of a settlement agreement (the "**Settlement Agreement**"), which

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9 Exhibits R-4 and R-5 to the Stay Application.
10 Exhibit A-2 to the Settlement Approval Application (filed under seal).
11 Exhibit A-3 to the Settlement Approval Application (filed under seal).

remains conditional upon the approval of the Court given that Fortress remains subject to the CCAA Proceedings.[12]

[83] The Settlement Agreement provides for:

83.1. the payment of compensation to the Former Employee in exchange for a full and final release in favour of Fortress and IQ with respect to the allegations contained in the Demand Letter; and

83.2. the confidentiality of the terms and conditions of the Settlement Agreement in order to preserve the confidentiality of the identity of the Former Employee.

[84] The Monitor asks that the Court approve the Settlement Agreement. The Court agrees.

[85] The terms and conditions of the Settlement Agreement are reasonable in the circumstance, namely because they allow the parties to avoid the costs and inconvenience associated with a potential litigation with the Former Employee, which would, in all likelihood, exceed the amount of consideration provided for under the Settlement Agreement given the numerous parties involved.

[86] IQ, in its capacity as the interim lender, is supportive of the Settlement Agreement.

[87] No party will be materially prejudiced as a result of the Settlement Agreement.

[88] The Settlement Agreement allows Fortress to operate within its budget without harming its restructuring initiatives.

[89] The Monitor also asks that the Court order that the Demand Letter (Exhibit A-2), the Monitor's Response (Exhibit A-3) and the Settlement Agreement (Exhibit A-4) be filed under seal until further order of the Court, given that the disclosure of these documents would necessarily result in the identification of the Former Employee.

[90] This request is also appropriate in the circumstances.

[91] No public proceedings have been filed by the Former Employee relating to the facts alleged in the Demand Letter.

[92] In accordance with the guidance provided in article 1 of the *Quebec Civil Code of Procedure*, the parties considered private prevention and resolution processes before referring their dispute to the courts.

[93] Discussions which take place in this context are protected by settlement privilege. Settlement privilege "wraps a protective veil around the efforts parties make to settle their

[12] Exhibit A-4 to the Settlement Approval Application (filed under seal).

disputes by ensuring that communications made in the course of these negotiations are inadmissible". The privilege protects the discussions that have led to a settlement as well as the contents of the settlement itself.[13]

[94] Thus, the request to seal the documents is granted.

## 3. Provisional Execution Notwithstanding Appeal

[95] Article 661 of the *Civil Code of Procedure* allows the court, upon application, to order provisional execution for the whole or a part only of the judgment, "if bringing an appeal is likely to cause serious or irreparable prejudice to one of the parties".

[96] Both applicants have asked for provisional execution.

[97] With regard to the Stay Application, the serious prejudice is clear. The Stay expires tomorrow and without it, the important restructuring efforts to date would be put in jeopardy.

[98] With regard to the Settlement Approval Application, the prejudice is less evident.

[99] The parties submit that the Settlement Agreement was reached in December 2022 and that delays ensued in the appointment of a supervision judge to replace Chief Justice Paquette.

[100] Indeed, the parties cannot be faulted for this delay.

[101] This being said, this fact alone does not imply a serious prejudice. The Settlement Agreement gives Fortress ten days to pay. An additional eleven days will not make much of a difference.

[102] Moreover, the fact that a party as been waiting a long time for a judgment, even when it alleges being in urgent need of money (which is not the case here), is generally not considered a sufficient reason to obtain provisional execution of a judgment.[14]

[103] Thus, the criteria for provisional execution of the judgment related to the Settlement Agreement Application are not met.

**FOR THESE REASONS, THE COURT:**

[104] **GRANTS** the Application for the Issuance of an Order Extending the Stay Period and Extending the Stay to the SAP Proceedings (the "**Stay Application**");

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13 *Sable Offshore Energy Inc.* v. *Ameron International Corp.*, 2013 SCC 37, paras. 2 and 18.
14 *141517 Canada ltée (Clermont ltée)* c. *Godin*, 2020 QCCS 1778, para. 35.

[105] **DECLARES** that all capitalized terms used but not otherwise defined in the present Order shall have the meanings ascribed to them in the First Day Order or in the Stay Application or the Settlement Approval Application;

[106] **ORDERS** that the Stay Period (as defined in the First Day Order) shall be extended to and including June 23, 2023, and specifies that such Stay Period shall apply to the Proceedings (as defined in the First Day Order) commenced before the *Tribunal administratif du Québec* under the file number STE-Q-257041-2108;

[107] **APPROVES** the activities of the Monitor, up to the date of this Order as described in the Nineteenth Report of the Monitor and in his testimony at the hearing;

[108] **ORDERS** that Appendixes A and B to the Nineteenth report of the Monitor filed in connection with the Stay Application are confidential and are filed under seal and **PRAYS ACT** of the Monitor's undertaking to communicate such exhibit to certain creditors following an undertaking of confidentiality and subject to such redactions as the Monitor deems appropriate;

[109] **GRANTS** the Application for the Issuance of an Order Approving the Settlement of the Claim of a Former Employee and the Execution of a Settlement Agreement (the "**Settlement Approval Application**");

[110] **ORDERS** that any prior delay for the presentation of the Settlement Approval Application is hereby abridged and validated so that the Settlement Approval Application is properly returnable today and hereby dispenses with any further notification thereof;

[111] **PERMITS** notification of this Order at any time and place and by any means whatsoever, including by email;

[112] **APPROVES** the terms and conditions of the Settlement Agreement between Fortress and the Former Employee (Exhibit A-4 (under seal) to the Settlement Approval Application);

[113] **AUTHORIZES** the Monitor, for and on behalf of Fortress Global Enterprises Inc. as well as in its capacity as Monitor, to enter into and execute the Settlement Agreement.

[114] **ORDERS** that Exhibits A-2 and A-3 filed in support of the Settlement Agreement Application are confidential and are filed under seal until further order from this court;

[115] **ORDERS** that Exhibit A-4 filed in support of the Settlement Agreement Application is confidential and is filed under seal and **PRAYS ACT** of the Monitor's undertaking to communicate such exhibit to certain creditors following an undertaking of confidentiality and subject to such redactions as the Monitor deems appropriate;

[116] **ORDERS** the provisional execution of the conclusions in paragraphs [104] to[108] and [114] to [115] of this Order notwithstanding appeal, and without the requirement to provide any security or provision for costs whatsoever.

[117] **THE WHOLE** without costs.

Signature numérique de Martin Sheehan

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Hearing date: April 27, 2023

# TAB 22

2013 SCC 37
Supreme Court of Canada

Sable Offshore Energy Inc. v. Ameron International Corp.

2013 CarswellNS 428, 2013 CarswellNS 429, 2013 SCC 37, [2013] 2 S.C.R. 623,
[2013] S.C.J. No. 37, 1052 A.P.R. 1, 228 A.C.W.S. (3d) 78, 22 C.L.R. (4th) 1, 332
N.B.R. (2d) 1, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 446 N.R. 35, J.E. 2013-1134

# Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation, ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project, Appellants and Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc., Respondents

McLachlin C.J.C., LeBel, Abella, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 25, 2013
Judgment: June 21, 2013
Docket: 34678

Proceedings: reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.); reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2010), 299 N.S.R. (2d) 216, 947 A.P.R. 216, 2010 CarswellNS 907, 2010 NSSC 473 (N.S. S.C.)

Counsel: Robert Belliveau, Q.C., Kevin Gibson, for Appellants
John P. Merrick, Q.C., Darlene Jamieson, Q.C., for Respondents, Ameron International Corporation and Ameron B.V.
Terrence L.S. Teed, Q.C., Ronald J. Savoy, for Respondents, Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

Subject: Civil Practice and Procedure; Evidence

APPEAL by plaintiffs from decision reported at *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), which granted non-settling defendants' appeal of timing of disclosure of settlement amount.

POURVOI formé par les demandeurs à l'encontre d'une décision publiée à *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), ayant accueilli l'appel des défenderesses non parties à une transaction à l'encontre du moment choisi pour la divulgation du montant de la transaction.

***Abella J.*:**

1 The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

 

2 The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

3 Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

**Background**

4 Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.

5 In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.

6 Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

7 As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.

8 Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.

9 These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.

10 Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

**Analysis**

11 Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.):

> [T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [p. 230]

  

This observation was cited with approval in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (U.K. H.L.), at p. 740).

13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597 (Eng. C.A.), at p. 605:

> [P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

14 *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

15 Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

> In such circumstances it would, I think, place a serious fetter on negotiations ... if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

16 *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (B.C. C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

  

> ... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

17 As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84 (N.S. C.A.), is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

> Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself.... *The distinction ... is arbitrary*. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it*.
>
> [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

> ... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable.
>
> [Emphasis added; para. 14. 341.]

18 Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185 (Alta. C.A.), at para. 40, citing *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1997), 120 Man. R. (2d) 214 (Man. Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54 (B.C. C.A.), at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever Plc v. Procter & Gamble Co.* (1999), [2001] 1 All E.R. 783 (Eng. C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Ont. Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

  

20 The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

21 The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value — and complexity — of trying to settle multi-party litigation as follows:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.
>
> "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1, at p. 5.

22 Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

> On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

23 In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

24 Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

25 The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

26 As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

27 It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to

  

revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.

28 The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

29 Someone has to go first, and encouraging that first settlement in multiparty litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in *Bioriginal Food & Science Corp. v. Gerspacher*, 2012 SKQB 469 (Sask. Q.B.):

> ... imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns ... [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in *Brown* as follows:

> Some courts have argued that it is necessary to go further and disclose the settlement amount itself.... They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. ... If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

30 A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure *outweighs* the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.

31 I would therefore allow the appeal with costs throughout.

*Appeal allowed.*

*Pourvoi accueilli.*

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