Second Report of KSV Restructuring Inc. as Receiver and Manager of Proex Logistics Inc., Guru Logistics Inc., 1542300 Ontario Inc. (operated as ASR Transportation), 2221589 Ontario Inc., 2435963 Ontario Inc., Noor Randhawa Corp., Superstar Transport Ltd., R.S. International Carriers Inc., Subeet Carriers Inc., Superstar Logistics Inc., Continental Truck Services Inc., and ASR Transportation Inc.

July 15, 2021

Contents

COURT FILE NO. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

SWINDERPAL SINGH RANDHAWA

APPLICANT

- AND -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., AND ASR TRANSPORTATION INC.

RESPONDENTS

SECOND REPORT OF
KSV RESTRUCTURING INC.
AS RECEIVER

JULY 14, 2021

1.0 Introduction

1. This report ("Report") is filed by KSV Restructuring Inc. ("KSV") in its capacity as receiver and manager (the "Receiver") of all the assets, undertakings and property (collectively, the "Property") of Proex Logistics Inc., Guru Logistics Inc., 1542300 Ontario Inc. (operated as ASR Transportation), 2221589 Ontario Inc., 2435963 Ontario Inc., Noor Randhawa Corp., Superstar Transport Ltd., R.S. International Carriers Inc., Subeet Carriers Inc., Superstar Logistics Inc., Continental Truck Services Inc., and ASR Transportation Inc. (collectively, "RGC") acquired for, or used in relation to a business carried on by RGC.

2. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") made on May 26, 2021 (the "Receivership Order"), KSV was appointed Receiver of RGC. The Receivership Order was amended on June 4, 2021 (the "Amended Receivership Order"). A copy of the Amended Receivership Order is attached as Appendix "A".

3. Since 2018, Swinderpal Singh Randhawa ("Paul") and Rana Partap Singh Randhawa ("Rana") have been involved in a dispute concerning, *inter alia*, the ownership, operation and sale of RGC.

4. In the context of the dispute between Paul and Rana, on May 19, 2021, the Honourable Justice Koehnen released a decision (the "Decision") which, *inter alia*, contemplated the issuance of the Receivership Order for the purposes of KSV, as Receiver, to carry out a sale mandate and an investigation. A copy of the Decision is attached as Appendix "B".

5. Paragraph three of the Amended Receivership Order authorizes the Receiver to:

   a) operate and manage RGC and sell the trucking, warehousing and logistics business (the "Sale Mandate"); and

   b) conduct an investigation of issues identified by the parties, including those identified by the arbitrator and by the Receiver, to ensure that the trucking business is being sold in a manner that maximizes value (the "Investigation Mandate").

6. The Amended Receivership Order provides for the following charges against the Property (jointly, the "Charges"), namely:

   a) a charge (the "Receiver's Charge") in favour of the Receiver and its legal counsel as security for the Receiver's fees and disbursements, including those of its legal counsel; and

   b) a charge in favour of Paul or Rana as security for any advances made by or on behalf of Paul and/or Rana to fund the Receiver's fees in connection with the Sale Mandate;

   c) a charge (the "Operations Charge") in favour of any lender who advances money to the Receiver to fund the operation of the business up to $250,000.

7. Pursuant to the terms of the Amended Receivership Order:

   a) the Sale Mandate will be funded by RGC, or if RGC does not have sufficient funds, by, or on behalf of, Paul or Rana equally. As disclosed in the First Report of the Receiver dated May 27, 2021 (the "First Report"), Paul and Rana agreed to fund the wind down of the business, including the Sale Mandate, and to secure such funds under the Operations Charge. However, Rana was unable to fund his share of the requested amount on the timeline required by the Receiver. Paul has funded the Receiver $173,000 to perform the Sale Mandate, which amounts advanced are secured under the Operations Charge; and

   b) the Investigation Mandate will initially be funded by Paul. In that respect, Paul advanced $100,000 to the Receiver to fund the initial fees and expenses of the Receiver and its counsel in respect of the Investigation Mandate. To the extent the initial amount ($100,000) is exhausted by the Receiver and its counsel, Paul will continue to advance additional funds, in increments of $25,000, to fund the fees and expenses of the Receiver and its counsel in respect of the Investigation Mandate until such time as the Investigation Mandate is completed or the Court orders otherwise.

1.1 Purposes of this Report

1. The purposes of this Report are to:

    a) provide background information about these proceedings;

    b) summarize the proposed sale process for the trucks and trailers owned by RGC (the "Sale Process");

    c) provide the Court with an update on the Investigation Mandate; and

    d) recommend the Court issue an order approving the Sale Process.

1.2 Currency

1. All amounts in this report are expressed in Canadian Dollars, unless otherwise noted.

1.3 Restrictions

1. In preparing this Report, the Receiver has relied upon RGC's unaudited financial statements, their books and records and discussions with representatives of RGC.

2. The Receiver has not audited, or otherwise attempted to verify, the accuracy or completeness of the financial information relied on to prepare this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.

2.0 Background

1. RGC operated a trucking business with a fleet of approximately 60 tractors and 140 trailers. RGC provided international truckload services between the US and Canada. RGC's largest customer was Ford Motor Company ("Ford").

2. At the commencement of its mandate, the Receiver determined that it needed to immediately discontinue RGC's business and operations because there was no funding available considering the significant costs to continue to operate the business, and the limited potential for a going concern sale. The Receiver has retained two former employees of RGC to assist with the wind-down, the collection of receivables and the Sale Process.

3. Based on searches conducted under the *Personal Property Security Act* (Ontario) ("PPSA"), the Receiver understands that RGC's secured creditors include the Bank of Nova Scotia ("BNS"), parties with an interest in certain equipment, and secured creditors under the Repair and Storage Liens Act (Ontario) ("RSLA".) Additional RSLA filings have been made since the date of the Receivership Order. The Receiver understands that BNS is owed approximately $30,000 and that the other primary secured creditor is VFS Canada Inc., an affiliate of Volvo Canada ("Volvo"), which is owed approximately $485,000 under certain financing leases.

3.0 Sale Process

1. At the commencement of the receivership proceedings, RGC's tractors and trailers were in multiple locations across Canada and the USA. Over 100 trailers were located at third party sites, including over 80 located at the Ford plant in Oakville, Ontario ("Ford Oakville") and Ford suppliers throughout North America. Ford Oakville and some Ford suppliers were closed for most of June 2021, complicating the retrieval of the trailers. In addition, the trailers contained racking, dunnage and parts that needed to be returned to Ford's suppliers. The Receiver has worked cooperatively with Ford to arrange for the return of the equipment to Ford's suppliers and the delivery of the trailers to yards that are currently being leased by the Receiver.

2. As of July 10, 2021, the Receiver has retrieved approximately 90% of the tractors and trailers. The Receiver is considering whether it should recover the balance of the assets as they may require payments to repair shops or former yard landlords to retrieve the assets that exceed the value of the assets.

3. The Receiver has compiled and reviewed the tractors and trailer ownership documentation available in RGC's physical records and identified over 75 assets missing original copies of their ownership records. The tractors and trailers cannot be sold without the ownership records. The Receiver is in the process of having the missing ownerships re-issued by Service Ontario which is a time-consuming process.

4. As RGC is no longer operating, the Sale Process will consist of a liquidation of all tractors, trailers and other equipment.

5. A summary of the proposed Sale Process is as follows:

    a) immediately following the making of the proposed order, the Receiver will distribute an interest solicitation letter detailing this opportunity to prospective purchasers identified by the Receiver, including end-users, liquidators and parties that have already contacted the Receiver expressing interest. The interest solicitation letter will include the make, model and mileage of each piece of equipment;

    b) the Receiver will facilitate due diligence efforts by, *inter alia*, arranging site visits to view the assets;

    c) consistent with the Minutes of Settlement dated October 1, 2018, the Receiver will require each bidder to confirm that it is at arm's length from Rana, Paul, their family members, or any corporation affiliated therewith;

    d) parties will be able to submit *en bloc* offers for the assets, net minimum guarantee auctioneer offers and bids on subsets of the assets ("Partial Offers"). The Receiver will consider aggregating Partial Offers with a view of generating a global greater offer;

e) the offer deadline will be August 11, 2021. The offer deadline provides three weeks for prospective purchasers to view the assets. Given this is a liquidation, a longer diligence period is not required. The Receiver will require that offers allocate a value to each piece of equipment so that it can determine the best overall bids. The Receiver intends to sell the Volvo equipment if the bids are for amounts greater than the amount remaining on the financing leases;

f) the successful transaction will be completed on an "as is, where is" basis with limited representations and warranties;

g) the Receiver will have the right to reject all offers, including the highest and best offer;

h) the Receiver will have the right to extend the Sale Process and any related deadlines in its sole discretion; and

i) any transaction requiring a vesting order will be subject to Court approval, but the Receiver will continue to be authorized to enter into, without Court approval, sales transactions with consideration not exceeding $100,000 per transaction or an aggregate of $500,000, as set out in the Amended Receivership Order.

3.1 Sale Process Recommendation

1. The Receiver recommends that the Court issue an order approving the Sale Process for the following reasons:

   a) the proposed Sale Process is fair, open and transparent and is intended to canvass the market broadly on an orderly basis;

   b) there will be no delay commencing the Sale Process. This should allow the process to be conducted on a timely basis;

   c) the Sale Process will provide sufficient time for all potential purchasers to assess the opportunity. In that respect, there is limited diligence that needs to be completed on the assets other than viewing and assessing the assets. The Sale Process provides flexibility for the Receiver to extend the process; and

   d) the Receiver has discussed the proposed Sale Process with legal counsel to Paul and Rana. On July 13, 2021, the Receiver provided a draft description of the process and a proposed buyers list to counsel to Paul and Rana. Paul's counsel provided comments on the Sale Process which were relayed to Rana's counsel. The Receiver has not received comments from Rana on the proposed Sale Process.. To the extent Paul or Rana have comments, the Receiver remains willing to discuss the proposed Sale Process in advance of the hearing.
   .

4.0 Investigation Mandate

4.1 Overview of the Investigation Mandate

1. On October 1, 2018, Paul and Rana entered into Minutes of Settlement ("Minutes"), which provided, *inter alia*, an orderly process for selling RGC's business. Nearly two years after the Minutes, the parties had still not effected the sale of RGC's business.

2. Since the time of the Minutes, Paul has alleged that, among other things: (i) RGC's business had been diverted to Motion Transport Ltd. ("Motion"), a company alleged to be affiliated with Rana; and (ii) RGC resources had been used to operate Motion; and (iii) certain of RGC's vehicles have been sold to Motion.

3. On October 26, 2020, Larry Banack (the "Arbitrator"), an arbitrator, set out in a decision that Paul's concerns over Rana's conduct in managing RGC and implementing the Minutes justified the appointment of an inspector (the "October Award").

4. A copy of the October Award is attached as Appendix "C". In the October Award, the Arbitrator found, among other things:

    a. Rana "perpetuated a lack of transparency into the operations of ASR, and a lack of good faith in providing financial, operational and other relevant information required to secure the sale of the Trucking Business";[1]

    b. it was "highly suspicious" that ASR was paying Rana's son when he was working for Motion;[2]

    c. it was "highly suspect that 13 pieces of ASR equipment coincidentally ended up with Motion"[3]; and

    d. Rana provided no explanation for "why ASR's decline in revenue not only coincided with the incorporation of Motion, but greatly exceed the decline in revenue experienced by ProEx [the smaller entity in the Trucking Business that is run by Paul]"[4].

5. In part based on these findings, the Honourable Justice Koehnen appointed KSV as the Receiver to investigate the issues in the arbitration and other matters identified in the course of the Receiver's investigation.

6. Rana has denied all of these allegations and any affiliation with Motion, as set out in Rana's various affidavits and cross examinations as part of these proceedings.

---

[1] October Award, paragraph 293

[2] October Award, paragraph 89

[3] October Award, paragraph 339

[4] October Award, paragraph 320

4.2 Steps taken in the Investigation Mandate

1. The Receiver's activities relating to the Investigation Mandate have included the following:

    a) imaging RGC's server and Motion's email database;

    b) negotiating a protocol (the "Protocol") with counsel to Rana regarding the review of records on RGC's server. The Protocol provides that all data is separated into potentially privileged data (the "Potentially Privileged Data") and the remaining data (the "Remaining Data"). The Potentially Privileged Data is based on keywords provided by counsel to Rana and consists of approximately 900,000 records. Rana and his legal counsel have until July 29, 2021 (the "Objections Date") to assert any objections to the disclosure to the Receiver of any Potentially Privileged Data. After the Objections Date, the Receiver will be given access to all the documents except for documents objected to by Rana as being privileged (the "Objection Documents"). Rana is required to provide the Receiver a list for all Objection Documents including, at a minimum, the date sent, author, sender, recipients, title and the subject. The Receiver shall be permitted to challenge any of the Objection Documents and claims of privilege within 45 days of being provided with the list of Objections Documents, provided however, that this deadline may be extended by order of the Court. A copy of the Protocol (without schedules) is attached as Appendix "D";

    c) reviewing the Remaining Data which consists of over 1 million records;

    d) reviewing certain records of Motion and ASR, including banking, customer, Ministry of Transportation, and other records;

    e) preparing for an examination of Mr. Baldev Dhindsa, a principal of Motion;

    f) preparing for an interview with Rana, to be conducted under oath;

    g) interviewing certain former employees of ASR; and

    h) speaking on several occasions with legal counsel to Paul and Rana.

4.3 Motion

1. On May 31, 2021, the Receiver served its Supplement to its First Report (the "Supplemental Report"). The Supplemental Report highlighted certain issues the Receiver had in obtaining information from Motion, despite the Amended Receivership Order which required Motion to provide the information. A copy of the Supplemental Report without appendices is attached as Appendix "E".

2. On June 4, 2021, the Court made an order (the "June 4th Order") that required Motion to provide all electronic records to the Receiver by June 7, 2021 and required that Mr. Dhindsa, among others, attend an examination under oath with the Receiver. A copy of the June 4th Order is attached as Appendix "F".

3. Prior to the June 4th motion, Motion's legal counsel advised that Motion ceased its operations, Motion did not maintain a server, and that its only computer had gone missing and was not replaced in summer or autumn 2020. Since the time of the June 4th Order, the Receiver has obtained an image of Motion's emails and a single banker's box of records. The Receiver has also obtained Motion's bank statements, but the bank statements provided are missing deposit information and Motion has been unable to provide the requested information. Accordingly, on June 17, 2021, the Receiver requested the information from Motion's bank and expects the information to be provided in the near term.

4. The Receiver had scheduled an examination with Mr. Dhindsa for June 21, 2021. On the morning of the proposed examination, counsel for Motion advised that Mr. Dhindsa was hospitalized and unable to attend the examination. On June 22, 2021, Mr. Dhindsa's counsel further advised that Mr. Dhindsa had been discharged but his doctor required him to rest for three days before rescheduling the examination. On June 29, 2021, Mr. Dhindsa's counsel requested to reschedule the examination to the week of July 19, 2021 due to its client's health condition. The examination has been scheduled for July 21, 2021. The Receiver, through Mr. Dhindsa's counsel, has requested a doctor's note confirming Mr. Dhindsa's unavailability, but has not been provided with a note.

4.4 Status of the Investigation

1. The Receiver has not completed the Investigation Mandate. In that respect, the Receiver has not, *inter alia*, had the opportunity to examine Rana[5] or Mr. Dhindsa, review any of the Potentially Privileged Data and consider some of the other issues in the Arbitrator's decision. The Receiver intends to examine Rana and Mr. Dhindsa before the end of July 2021.

2. The Receiver has expended the initial $100,000 advanced by Paul for the Investigation Mandate. Paul has agreed to fund another $50,000 to allow the Receiver to complete the interviews noted above, following which, the Receiver will issue a report to Court on the Investigation Mandate and will seek advice and directions from the Court on the next steps in these proceedings.

5.0 Conclusion and Recommendation

1. Based on the foregoing, the Receiver respectfully recommends that this Honourable Court make an order granting the relief sought in paragraph 1.1(1)(d) of this Report.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF RGC
AND NOT IN ITS PERSONAL OR IN ANY OTHER CAPACITY

[5] The Receiver has scheduled an examination of Rana on July 30, 2021.

Appendix “A”

Court File No. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MISTER	)	FRIDAY, THE 4th
	)	
JUSTICE KOEHNEN	)	DAY OF JUNE, 2021

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

AMENDED AND RESTATED ORDER
(appointing Receiver)

THIS MOTION made by KSV Restructuring Inc. ("**KSV**"), in its capacity as receiver and manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of Respondent corporate entities (collectively, "**RGC**") acquired for, or used in relation to a business carried on by RGC, was heard by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 crisis;

ON READING the Amended Notice of Motion, the Amended Motion Record containing the affidavit of Swinderpal Singh Randhawa ("**Paul**"), sworn June 26, 2020, the affidavit of Don Colbourn, sworn June 26, 2020, the affidavit of Shimshon Dukesz, sworn July 5, 2020, the affidavit of Monica Palko sworn November 11, 2020 and the

affidavit of Paul sworn January 28, 2021 (the "**Motion Record**"), the affidavits of Rana Partap Singh Randhawa ("**Rana**"), sworn January 18, 2021, and February 22, 2021, the affidavit of Allan Nackan sworn February 22, 2021, the affidavit of Baldev Dhindsa, sworn January 18, 2021, the Awards and Arbitral Order of the Arbitrator dated July 3, 2020 and October 26, 2020 granted pursuant to the arbitration clause set out in the Minutes of Settlement dated October 1, 2018 (the "**Minutes**") between Paul and Rana, the Receiver's Motion Record dated May 27, 2021, including the First Report of the Receiver dated May 27, 2021 (the "**Receiver's Motion Record**"), the Receiver's Supplemental Motion Record dated May 31, 2021 (the "**Receiver's Supplemental Motion Record**"), including the Supplement to the First Report of the Receiver dated May 31, 2021 (the "**Supplement to the First Report**"), and the Affidavits of Service of Benjamin Goodis sworn May 27, 2021 and June 1, 2021, respectively, and on hearing the submissions of counsel for Paul, counsel for KSV, counsel for Rana and counsel for Motion Transport Ltd. ("**Motion**"):

SERVICE

1. THIS COURT ORDERS that the time for service of the Receiver's Motion Record and the Receiver's Supplemental Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended, KSV is hereby appointed as Receiver, without security, over all of the assets, undertakings and properties of RGC acquired for, or used in relation to a business carried on by RGC, including all proceeds thereof (the "**RGC Property**").

RECEIVER'S MANDATE

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized to: (i) operate and manage RGC and sell the trucking, warehousing and logistics

business that is owned and operated through some or all of the Respondent entities (the "**Trucking Business**") (the "**Sale Mandate**"); and (ii) investigate and report on any financial and operational issues identified by the Parties, including those identified in the awards of Larry Banack dated July 3, 2020 and October 26, 2020, and any other matters identified during the course of the Receiver's investigation, in order to ensure that the Trucking Business is being sold in a manner that maximizes the value of that business (the "**Investigation Mandate**").

4. THIS COURT ORDERS that the Receiver will pursue the Sale Mandate as expeditiously as reasonably possible in order to maximize the value of the Trucking Business on sale, as determined by the Receiver in its sole discretion.

5. THIS COURT ORDERS that the Receiver shall report to the Court on an interim and final basis as to the status of the Investigation Mandate (each, a "**Report**"). Both Paul and Rana shall be provided with a copy of any such Reports. The Reports may be filed under seal if requested by the Receiver or any of the Parties (as defined below), on terms that may be agreed among the Parties or ordered by the Court.

RECEIVER'S POWERS

6. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the RGC Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the RGC Property and any and all proceeds, receipts and disbursements arising out of or from the RGC Property;

(b) to receive, preserve, and protect the RGC Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of RGC Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and

the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of RGC, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of RGC;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of RGC or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to RGC and to exercise all remedies of RGC in collecting such monies, including, without limitation, to enforce any security held by RGC;

(g) to settle, extend or compromise any indebtedness owing to RGC;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the RGC Property, whether in the Receiver's name or in the name and on behalf of RGC, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to RGC, the RGC Property or the Receiver, and

to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the RGC Property, including advertising and soliciting offers in respect of the RGC Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the RGC Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(l) to apply for any vesting order or other orders necessary to convey the RGC Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such RGC Property;

(m) to report to, meet with and discuss with such affected Persons (as

defined below) as the Receiver deems appropriate on all matters relating to the RGC Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the RGC Property against title to any of the RGC Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of RGC;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of RGC, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by RGC;

(q) to exercise any shareholder, partnership, joint venture or other rights which RGC may have;

(r) to enter any premises owned or controlled by Motion and to take any steps the Receiver deems necessary to examine and preserve any and all of Motion's information, documents, records and electronic data, including but not limited to information relating to Motion's accounts or finance activities at any financial institution, with any trade creditor or with any other party; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons

(as defined below), including RGC and Motion, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

7. THIS COURT ORDERS that (i) Paul, Rana and Baldev Dhinsda (“**Baldev**”); (ii) Motion and RGC; (iii) all of Motion’s and RGC’s current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and (iv) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any RGC Property or Motion Property in such Person's possession or control, shall grant immediate and continued access to any such RGC Property or Motion Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

8. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of RGC or Motion, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 8 or in paragraph 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to any privilege attaching to the Record or due to statutory provisions prohibiting such disclosure.

9. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall

forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

10. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords of RGC with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

11. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST RGC OR THE RGC PROPERTY

12. THIS COURT ORDERS that no Proceeding against or in respect of RGC or the RGC Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way

against or in respect of RGC or the RGC Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

13. THIS COURT ORDERS that all rights and remedies against RGC, the Receiver, or affecting the RGC Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and further provided that nothing in this paragraph shall (i) empower the Receiver or RGC to carry on any business which RGC is not lawfully entitled to carry on, (ii) exempt the Receiver or RGC from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

14. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by RGC, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

15. THIS COURT ORDERS that all Persons having oral or written agreements with RGC or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to RGC are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of RGC's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by

the Receiver in accordance with normal payment practices of RGC or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

16. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the RGC Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

17. THIS COURT ORDERS that all employees of RGC shall remain the employees of RGC until such time as the Receiver, on RGC's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

18. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the RGC Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the RGC Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is

disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any RGC Property shall be entitled to continue to use the personal information provided to it, and related to the RGC Property purchased, in a manner which is in all material respects identical to the prior use of such information by RGC, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the RGC Property or the Motion Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the RGC Property or the Motion Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

20. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and

except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

21. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the RGC Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the RGC Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

23. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

24. THIS COURT ORDERS that the fees and disbursements of the Receiver and its counsel shall be funded first by RGC, or if RGC does not have sufficient funds, by or on behalf of Paul and Rana equally in respect of the Sale Mandate, which amount will be repaid from the proceeds of the sale of the RGC Property. The whole of the RGC

Property shall be and hereby is charged by way of a fixed and specific charge (the "**Funding Charge**") as security for the payment of any monies advanced by or on behalf of Paul and/or Rana to fund the Sale Mandate, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, save for the Receiver's Charge and subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

25. THIS COURT ORDERS that to the extent that the Receiver concludes that funds are required for the continued operation of the Trucking Business to maximize the value to be realized as part of the Sale Mandate, the Receiver shall offer both Paul and Rana the opportunity to lend funds to the Receiver on equivalent terms, and upon such offer being made and accepted by Paul, Rana, or Paul and Rana jointly, is hereby empowered to borrow from Paul, Rana, or Paul and Rana jointly (or if none of them agree, from a third party) by way of revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $250,000 (or such greater amount as this Court may by further Order authorize on terms, including an appropriate rate or rates of interest, that reflect the full degree of risk to the lender(s) associated with such lending) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Operations Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, save for the Receiver's Charge, the Funding Charge and subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. For greater certainty, nothing in this Order shall require Rana or Paul to advance funds to the Receiver, RGC or any other person to fund the operations of the Trucking Business.

26. THIS COURT ORDERS that neither the Funding Charge, the Operations Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

27. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order, whether pursuant to the Funding Charge described in paragraph 24 above, or under the Operations Charge described in paragraph 25 above.

28. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to the Funding Charge and any and all Receiver's Certificates evidencing the same shall rank in priority to monies from time to time borrowed by the Receiver pursuant to the Operations Charge and any and all Receiver's Certificates evidencing the same, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

29. Paul will post $100,000 with the Receiver, which shall be used to fund the initial fees and expenses of the Receiver and its counsel in respect of the Investigation Mandate. To the extent the $100,000 is exhausted by the Receiver and its counsel, Paul will continue to post additional funds, in increments of $25,000, to fund the fees and expenses of the Receiver and its counsel in respect of the Investigation Mandate until such time as the Investigation Mandate is completed or the Court orders otherwise.

30. Both Paul and Rana reserve their rights to claim at any time for a revised allocation of any past or future fees and disbursements paid to the Receiver or its counsel, or any other amounts ordered to be paid in connection with these proceedings and the proceedings before the Arbitrator, based on the interim and/or final results of the Sale Mandate and the Investigation Mandate. To this end, the Receiver shall hold in escrow all proceeds from the sale of the Trucking Business that are otherwise to be distributed to Paul or Rana pursuant to the October Minutes or otherwise until the issue of the allocation of costs has been resolved or further order of the court. For the avoidance of doubt, subject to further order of the Court, the Receiver may use the

proceeds of the sale of the Trucking Business to fund the costs of the receivership as set out in this order, including the fees and expenses of the Receiver and its counsel.

SERVICE AND NOTICE

31. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://www.ksvadvisory.com/insolvency-cases/case/rgc>'.

32. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to RGC's creditors or other interested parties at their respective addresses as last shown on the records of RGC and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

SEALING

33. THIS COURT ORDERS AND DECLARES that Confidential Appendix "1" to the Supplement to the First Report be and is hereby sealed and shall be treated as confidential until further order of this Court.

GENERAL

34. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of RGC or of Motion.

36. 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 Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

37. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

38. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that KSV Restructuring Inc., the receiver (the "Receiver") of the assets, undertakings and properties of the corporate entities listed on Schedule "A" hereto (collectively, the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 26th day of May, 2021 (the "Order") made in an action having Court file number CV-18-593636-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses. For the avoidance of doubt, the amounts borrowed under this certificate shall have the benefit of the [Funding Charge / Operations Charge] set out in the Order.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Other than as set out in the Order with respect to priority of monies borrowed pursuant to Receiver Certificates, and any other Order of the Court, until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

KSV RESTRUCTURING INC., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

Schedule "A" to Receiver Certificate

Debtors:

1. PROEX LOGISTICS INC.;
2. GURU LOGISTICS INC.;
3. 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION);
4. 2221589 ONTARIO INC.;
5. 2435963 ONTARIO INC.;
6. NOOR RANDHAWA CORP.;
7. SUPERSTAR TRANSPORT LTD.;
8. R.S. INTERNATIONAL CARRIERS INC.;
9. SUBEET CARRIERS INC.;
10. SUPERSTAR LOGISTICS INC.;
11. CONTINENTAL TRUCK SERVICES INC.; and
12. ASR TRANSPORTATION INC.

SWINDERPAL SINGH RANDHAWA
Applicant

and

RANA PARTAP SINGH RANDHAWA, et al.
Respondents

Court File No.: CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

AMENDED AND RESTATED ORDER
(APPOINTING RECEIVER)

CASSELS BROCK & BLACKWELL LLP
Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
Fax: 416.640.3207
nlevine@cassels.com

Ben Goodis LSO #: 70303H
Tel: 416.869.5312
Fax: 416.640.3199
Email: bgoodis@cassels.com

Lawyers for KSV Restructuring Inc. in its capacity as Receiver

Appendix “B”

CITATION: **Randhawa v. Randhawa, 2021 ONSC 3643**

COURT FILE NO.: CV-18-593636-00CL
DATE: 20210519

SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

RE: SWINDERPAL SINGH RANDHAWA

Applicant

AND:

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

BEFORE: Koehnen J.

COUNSEL: *Aaron Kreaden, Sam Dukesz* for the Applicant

Brian Kolenda, Chris Kinnear Hunter for the Respondents

Christina Bowman for Motion Transport Ltd.

HEARD: March 12, 2021

ENDORSEMENT

[1] The applicant Swinderpal Singh Randhawa and the respondent Rana Partap Singh Randhawa are brothers. They have been involved in a long, acrimonious dispute about the separation of their interests in various businesses that they once ran together. The division of their businesses has been adjudicated on several occasions by Mr. Larry Banack acting as arbitrator. The applicant was referred to as Paul and the respondent as Rana in the factums of the parties and during oral argument. I will use the same names in these reasons.

[2] Between the two of them, Paul and Rana raised three issues for determination on this motion:

I. Did the Arbitrator have jurisdiction to appoint an inspector under the *Ontario Business Corporations Act*[1] (the "OBCA")?

II. Should the receiver appointed to sell the remaining business also be empowered to conduct an investigation that the Arbitrator envisaged that the inspector would conduct?

III. Who should be appointed as receiver?

[3] For the reasons set out below, I find that the Arbitrator had jurisdiction to appoint an inspector, the receiver should have investigatory powers and Paul's proposed receiver should be appointed.

I. Arbitrator's Jurisdiction to Appoint an inspector

[4] Rana submits that the Arbitrator had no jurisdiction to appoint an inspector under the OBCA because the statute reserves the power to do so to this court and because the inspector was to have the power to investigate Motion Transport Ltd., a non-party to the arbitration agreement.

[5] I will first address the Arbitrator's power to appoint an inspector under the OBCA and then address the implications of the inspector's power to look into the affairs of Motion.

[6] Paul commenced an oppression application in March 2018. The application was settled on October 1, 2018 by entering into Minutes of Settlement. The Minutes of Settlement called for the dissolution or sale of the businesses the brothers ran including the trucking business that is the subject of this motion.

[7] Rana submits that an arbitrator has no power to appoint an inspector because s. 162 (1) of the OBCA provides that "the court may appoint an inspector" and "court" is defined as the Ontario Superior Court of Justice. Rana relies on several authorities for the proposition that an arbitrator has no power to award a statutory remedy like the appointment of an inspector.

[8] Some confusion has arisen in this area because issues are often conflated and then reduced to a short form statement that an arbitrator has no power to grant a statutory remedy. Rather than resorting to the short form statement that an arbitrator has no power to grant a statutory remedy as Rana submits, I find it more helpful to untangle some of the issues that the cases address. Some of those separate issues include: (i) Whether an arbitrator in principle has

---

[1] *Ontario Business Corporations Act*, R.S.O. 1990. c. B. 16

the power to grant a statutory remedy; (ii) Whether there are reasons in a particular case that might make it inappropriate for an arbitrator to grant a statutory remedy; (iii) The scope of the particular arbitration clause at issue; and (iv) A judicial concern that a party may be deprived of a remedy if they are limited to arbitration.

[9] As a starting point, more recent Ontario cases make it clear that statutory remedies, and in particular OBCA remedies, can be pursued through arbitration.[2]

[10] The only principled reason for preventing an arbitrator from awarding a statutory remedy that Rana advanced before me was the possibility that statutory remedies might affect persons who are not signatories to the arbitration agreement.

[11] In this regard Rana submits that an *OBCA* inspector is a court officer with specific rights and responsibilities set out in the statute. These include powers a private arbitrator could never grant including "requiring any person to produce documents or records to the inspector", "authorizing an inspector to conduct a hearing, administer oaths and examine any person upon oath, and prescribing rules for the conduct of the hearing" and "requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath".[3]

[12] To the extent that the inspector is being asked to exercise its powers vis-à-vis persons who are not party to the arbitration agreement, I agree that an arbitrator has no jurisdiction to empower an inspector to do so. If, however, the powers of the inspector are limited to investigating the signatories to an arbitration agreement, I was given no conceptual reason for which an arbitrator should be precluded from appointing an inspector. Although the OBCA might refer to the court appointing an inspector, the whole principle underlying arbitration is that parties are free to contract out of the court system and submit their disputes to an arbitrator unless precluded by statute or public policy.

[13] In the case at hand, the Arbitrator recognized that his jurisdiction was limited to the signatories of the arbitration agreement and provided that if the inspector extended his activities beyond signatories to the arbitration agreement, the parties would have to obtain the assistance of the court. Paragraph 3 of his initial *ex parte* order provides:

> I HEREBY DECLARE THAT the scope of the investigation requested to be made by the inspector and the appointment and powers of the inspector are to be determined by return motion before me or the Superior Court of Justice (Commercial List) if the inspection could potentially impact the rights of entities who are not parties to the arbitration clause contained in the Minutes and are therefore outside my jurisdiction as Arbitrator.

---

[2] *The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v. Canadian Hearing Society*, 2018 ONSC 5445 at para. 58-59; *Blind Spot Holdings Ltd. v. Decast Holdings Inc.,* 2014 ONSC 1760 at para. 28.
[3] *Business Corporations Act*, RSO 1990, c B.16, s 162.

[14] Seeking the court's assistance in those circumstances is a solution that would naturally impose itself in any event. Enforcement of arbitral award depends initially on the agreement of the parties. An arbitral award has no independent compulsory force. To give it compulsory force, the successful party must in any event go to a court to have the award recognized and enforced.

[15] The arbitration agreement in question is found in paragraph 22 of the Minutes of Settlement between the parties. It provides:

> Paul and Rana each agree that any dispute arising in respect of the completion or implementation of these Minutes of Settlement, then Paul and Rana agree to appoint an arbitrator … and any such determinations shall be made on a summary basis and be final and binding on the Parties and shall not be subject to appeal.

[16] Apart from a minor grammatical error, the arbitration clause is clear. Paul and Rana have agreed to submit to an arbitrator "any dispute arising in respect of the completion or implementation of these Minutes of Settlement." The arbitration is not limited to the interpretation of the agreement. It is broader than that and encompasses "any dispute" that arises "in respect of the completion or implementation" of the Minutes of Settlement. The Minutes of Settlement specifically require Rana to provide Paul with information. The Arbitrator found that Rana had failed to do so.

[17] The Minutes of Settlement impose specific obligations with respect to provision of information. Paragraph three of the Minutes provide:

> Upon the execution of these Minutes of Settlement, the Parties agree to act in good faith to provide each other with financial, operational and any other information that is required to ensure that the events described in these Minutes of Settlement proceed in an open and transparent manner, including, but not limited to, information to allow the Parties to monitor the Trucking Business and Real Estate Business while the steps contemplated by these Minutes of Settlement are being implemented. ….

[18] Paragraphs 4-8 set out a process whereby the parties have time to assess the information they receive to determine whether one of them has directly or indirectly obtained an unequal benefit from the trucking business in the period following January 1, 2011. If one party asserts the other has received an unequal benefit and the parties cannot resolve that dispute, the Minutes call for the appointment of an independent accountant or arbitrator to determine the amount of the unequal benefit. The independent accountant or arbitrator is to work with the parties to determine a fair and efficient process for making that determination. If the parties cannot agree on that process, the independent accountant or arbitrator is empowered to determine the process.

[19] In my view, the Arbitrator's appointment of the inspector was squarely within the powers he was given under the Minutes of Settlement. He was empowered to establish a process to determine any alleged unequal benefit to one of the parties. Doing so was part and parcel of implementing the Minutes of Settlement. He determined that the most efficient way of doing so was to appoint an inspector. He was squarely within his jurisdiction under the Minutes of Settlement to do so.

[20] Rana relies on *Armstrong v. Northern Eyes Inc*.,[4] which he submits stands for the proposition that an arbitrator has no power to award a statutory remedy. *Armstrong*, arose in the context of a shareholders' agreement that provided a specific remedy for a departing shareholder. The arbitration clause was contained in the shareholders agreement. In that context, the case is not so much about a conceptual holding that arbitrators have no power to award statutory remedies but can be more closely read as standing for the proposition that in the circumstances of that case, where the parties had contemplated a specific remedy for a departing shareholder, the arbitration agreement did not give the arbitrator the power to go beyond the contractually agreed to remedy. That is far different from saying that an arbitrator has no power to award a remedy under the OBCA, regardless of the circumstances.

[21] The following extracts from the Divisional Court reasons make this clear:

> [34] It might also be noted that the remedies open to the arbitrator under Article 14 are comparatively close to the remedies available under OBCA s. 248(3)(f). The remedies are operationally identical in the sense that they require the majority to purchase the applicant's shares. What may differ, depending on the view that might be taken by the court in an oppression hearing, is the scope of the methodology used to achieve the valuation. If not completely identical, the remedies are comparatively close.
>
> [35] Where the essential character of the dispute is subject to arbitration, there is no real deprivation of ultimate remedy so long as the applicant is able to pursue an appropriate remedy through the specialized vehicle of arbitration.
>
> [36] Such is the case here. The applicant agreed in Article 14 that on leaving the company, he would tender his shares to be redeemed by the company at fair market value to be determined by the company's accountants. The applicant's problem is not that he lacks an appropriate remedy. His problem is that the method of valuation within the remedy to which he agreed may not be as

[4] *Armstrong v. Northern Eyes Inc*., 2000 CanLII 29047 (ON SCDC)

> potentially advantageous to him as that which might be imposed by a court under the OBCA. There is nothing unequal or unfair, within the meaning of s. 6(3) of the Arbitration Act, in holding the applicant to his agreement. Absent the extraordinary circumstances contemplated by cases such as *Deluce*, the *Weber* principle does not oust the arbitrator simply because the applicant now prefers the potential of a valuation method that might be more advantageous to him than the method to which he agreed.

[22] Put differently, when the arbitrator in *Armstrong* said he had no authority to grant a statutory remedy, he was really saying that the arbitration agreement prescribed the remedies that were available to the parties and, since arbitration is a matter of contract, the arbitrator had no power to go beyond the contractual remedy and provide a statutory remedy.

[23] Next, Rana relies on the decision of Justice Lax in *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd*..[5] Like *Armstrong, Pandora* is not so much about a general proposition to the effect that an arbitrator has no power to award remedies under the OBCA as it is about: (i) concerns that the applicant would be denied access to an OBCA remedy entirely; and (ii) the interpretation of the particular arbitration clause in that case.

[24] In *Pandora,* investors subscribed for shares in shares an OBCA company. The investors later complained that the OBCA company had not produced audited financial statements as they are required to do by the statute. The subscription agreement provided that it was to be construed with and governed by the laws of the State of New York and that:

> Any controversy, claim or dispute arising out of or relating to this Subscription Agreement between the parties hereto, their assignees, their affiliates, their attorneys, or agents, shall be litigated solely in state or Federal Court in New York City….

[25] On the plain wording of the OBCA, a state or federal court in New York is not a "court" for the purposes of the OBCA and may not be entitled to grant OBCA remedies.

[26] At the same time, the subscription agreement contained a conflicting clause which called for any dispute to be resolved "exclusively by arbitration to be conducted in New York, New York in accordance with the rules of the American Arbitration Association."

---

[5] *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd*., 2007 CanLII 8026 (ON SC)

[27] In paragraph 15 of her reasons, Justice Lax drew a distinction between the arbitration clause which governed the subscription agreement and the core obligations of the OBCA corporation. On her interpretation of the arbitration agreement, Justice Lax found that the applicants had not contracted out of the right to apply to an Ontario court for relief about the manner in which the underlying corporation was to be governed. In doing so she explained:

> [15] The right of shareholders to financial reporting is solely a function of the legal relationship between a corporation and its shareholders under the OBCA. By contrast, the arbitration clause is contained in the Subscription Agreements, the purpose of which was to consummate a commercial transaction. The Subscription Agreements do not purport to apply to the core obligations which SREI has to the Applicants under the OBCA. Rather, they are primarily comprised of terms peculiar to the transaction, namely, representations and warranties between the parties that were intended "to induce" one another "to enter into" the Subscription Agreements, together with various covenants by SREI, including ones relating to compliance with U.S. securities legislation, compliance with laws, the keeping of records and books of account and the status of dividends. This would suggest that the arbitration clause is properly interpreted as applying to issues arising in the context of the transaction contemplated by the Subscription Agreements.

[28] Justice Lax continued in paragraph 16 of her reasons to express a concern that

> If the arbitration clause is interpreted as prohibiting the Applicants from seeking judicial enforcement of SREI's core obligations under the OBCA, this would mean that, merely by agreeing to include the arbitration clause in the Subscription Agreements, the Applicants have absolved SREI of its core financial disclosure obligations. In particular, if the arbitration clause prohibits the Applicants from seeking judicial enforcement of SREI's core obligations, it is likely the case that there is no forum to which the Applicants can turn to enforce those core obligations, thereby rendering the obligation nugatory. In turn, the arbitration clause would effectively circumvent the statutory requirement of explicit written consent provided by section 148(b) to exempt SREI from its obligations under Part XII of the OBCA. The deprivation of a statutory right is a matter to be considered in determining the scope of an arbitration clause.

[29] *Pandora* does not express a view that an arbitrator has no power to award OBCA remedies. Rather, it expresses a concern about what might happen in a foreign forum if the arbitral clause were interpreted that way and the concern that a foreign court may not have the power to award OBCA remedies.

[30] Finally, Rana relies on the decision of the Court of Appeal for British Columbia in *ABOP LLC v. Qtrade Canada Inc*.[6] The reasons of the motions court judge and of the Court of Appeal suggested that oppression relief was not available in the arbitration in that case. It is not entirely clear though whether this finding was grounded in a legal rule to the effect that statutory remedies are not available in arbitrations or whether it was grounded in the interpretation of the arbitration clause that applied in that case. The arbitration agreement at issue provided that a portion of the dispute was subject to arbitration but another portion of the dispute was not. The Court of Appeal disposed of the issue by holding that it would be for the arbitrator to make all necessary findings of fact. If those findings supported an oppression claim, then the applicant could continue the oppression claim in court based on the arbitrator's findings of fact.

[31] This is similar to what happened here. The Arbitrator made a finding that the appointment of an inspector was appropriate. He specifically found, however, that Paul would have to go to the courts if the inspector's powers were intended to affect persons that had not signed the arbitration agreement.

[32] In my view, the Arbitrator acted entirely appropriately and within his jurisdiction in authorizing the investigation and in directing the parties to the court if they wanted to expand the powers of the inspector to affect non-signatories to the arbitration agreement.

II. Should the Receiver Conduct an Investigation?

[33] The landscape has changed somewhat since this matter was last before the Arbitrator. Both parties now agree that a receiver should be appointed to sell the trucking business. The issue separating them is whether the receiver should have investigatory powers.

[34] The Arbitrator already determined that an investigation is needed in connection with the sale of the trucking business. Rana submits that I am not entitled to rely on any of the findings the Arbitrator made and must revisit the question of an investigatory receivership from scratch.

[35] I disagree. Rana's position might have more force if the question before me were whether a receiver should be appointed. That, however, is not in issue. Rana agrees that a receiver should be appointed. The only point of difference is whether there should be an

---

[6] *ABOP LLC v. Qtrade Canada Inc*., 2007 BCCA 290.

investigation. It matters little whether the investigation is conducted by an inspector or by a receiver. The point is whether an investigation should occur. That issue has already been fully canvassed by the Arbitrator in a process that took many months.

[36] As noted above, even if I were to adopt Rana's view to the effect that the Arbitrator had no jurisdiction to appoint an inspector, the decision of the British Columbia Court of Appeal in *ABOP* holds that the appropriate course of action is for the Arbitrator to make relevant findings of fact and for the court to consider whether the statutory remedy is appropriate on those facts.

[37] The Arbitrator made ample findings of fact to justify the need for an investigation. The arbitrator has been involved with the parties since 2018. He has issued 12 endorsements or awards relating to the disputes between them. He has in his words "become very familiar with" their business dealings.

[38] The Arbitrator rendered two decisions in respect of the appointment of an inspector. The first was an *ex parte* order dated July 3, 2020. The matter then returned to the Arbitrator for submissions by Rana. That led to a further decision dated October 26, 2020 which runs to 359 paragraphs. It was based on extensive evidence including eight affidavits and *viva voce* cross-examinations before the Arbitrator, albeit conducted virtually.

[39] The Arbitrator provided detailed reasons for appointing an inspector which fall into two general categories.

[40] First, Rana "perpetuated a lack of transparency" in the operation of the trucking business. This included findings of a "lack of good faith in providing financial and operational information required to secure the sale of the Trucking Business." As noted earlier, the Minutes of Settlement required Rana to give Paul information to enable him to monitor the trucking business before the sale. The Arbitrator found that "Rana has failed to comply with his disclosure obligations" under the Minutes of Settlement. Among other things, the Arbitrator noted that it was Rana's obligation to prepare financial statements and that Rana did not do so.

[41] Second, the Arbitrator made several findings that Rana's own proposed receiver acknowledged would constitute red flags for potential fraud.

[42] Far from casting any doubt on the *ex parte* order, Rana's participation in the with notice hearing only strengthened the Arbitrator's view about the need for an inspector.

[43] The Arbitrator made a series of findings surrounding what appeared to be the transfer of at least 12 trucks from the brothers' business to Motion Transport Ltd. It appears that Motion acquired the trucks for the same price at which Rana had sold them, sometimes to third party, a day or two earlier. Motion was run by a good friend of Rana's, Mr. Dhinda. Mr. Dhinda says he was retired. Rana's son worked for Motion. Mr. Dhinda could not explain where Motion got the money to purchase the trucks that formerly belonged to the brothers' business. Moreover, Mr. Dhinda stated that he had no knowledge of Motion's accounting or operational issues because Rana's son "looked after that."

[44] The need for an investigation is well-founded. Whether it is conducted by an inspector or a receiver does not matter.

[45] In the hearing before me, Rana resisted the investigatory aspect of the receivership by: taking issue with some of the facts that the Arbitrator found; pointing to the cost of the investigation and by pointing to the delay an investigation will have on the sale. None of these provides a basis for refusing the investigation.

[46] Rana is entitled to dispute the facts on which the Arbitrator based his order for an investigation. The Arbitrator did not make definitive findings of fact in this regard nor is he entitled to. Indeed, the whole point of appointing an inspector is because facts need to be investigated. The test for the Arbitrator was whether there were sufficient grounds to have concerns about wrongdoing to warrant an investigation. There were more than ample grounds in this regard. Rana also suggested before me that his son was no longer working at Motion. That may or may not be the case but it has nothing to do with the allegations of past misconduct levelled against Rana and his relationship with Motion.

[47] With respect to the costs of the investigation, Paul has agreed to fund the investigation initially. If it finds wrongdoing, Paul will be compensated for the cost of the investigation out of the proceeds of sale. If it finds no wrongdoing, then the cost will remain for Paul's account.

[48] With respect to concerns about the delay that the investigation would have on the sale, Rana's own proposed receiver stated that: the investigation could be done expeditiously;[7] there are synergies to be gained by investigating while advancing the sales process;[8] and if there is a concern that Rana has not acted in good faith in providing information required to sell the business, it would be prudent "investigate those issues as part of any sale."[9] The Arbitrator expressly found that concerns about Rana's lack of good faith were valid.[10]

[49] There are also ample grounds for which the Receiver should be entitled to examine the affairs of Motion. I note here that the Receiver would not be making any findings of liability but would merely be conducting a factual investigation. The Receiver does not need to disrupt Motion's business to do so. It is simply a matter of having access to Motion's records which can be easily facilitated by allowing the Receiver to image Motion's computers or other electronic storage devices.

[50] In *Akagi v. Synergy Group (2000) Inc,*[11] the Ontario Court of Appeal confirmed that the mandate of a receiver appointed under section 101 of the *Courts of Justice Act*[12] can in appropriate cases include an investigation. As Blair J.A. stated:

---

[7] Nackan Cross at q. 166.
[8] Nackan Cross at q. 172.
[9] Nackan Cross at q. 151.
[10] October Award at para. 293.
[11] *Akagi v. Synergy Group (2000) Inc*., 2015 ONCA 368
[12] *Courts of Justice Act,* RSO 1990, c C.43

> Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view – when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions – including even, in proper circumstances, the affairs of and transactions concerning related non-parties – will be a proper exercise of the court's just and convenient authority under section 101 of the Courts of Justice Act.[13]

[51] In paragraph 98 of *Akagi*, Blair J.A. set out four themes or factors that emerged from the case law surrounding investigative receiverships.

[52] The first is whether the appointment is necessary to alleviate a risk to the plaintiff's right to recovery. I am satisfied that this factor has been met. Paul is entitled to 50% of the proceeds of sale. Rana is not entitled to any unequal benefit. The are a series of suspicious circumstances the Arbitrator identified that would, if substantiated, lead to an unequal benefit to Rana.

[53] The second factor is to determine whether the objective is to gather information and "ascertain the true state of affairs" of the debtor, or a related network of entities. This is the very purpose of an investigatory receiver. The appointment order can define the Receiver's powers to ensure that they are limited to this purpose. There is also a need to gather information because, as the Arbitrator noted, there is an informational imbalance between the parties. Correcting an informational imbalance is one key reason for appointing an investigative receiver.[14]

[54] The third factor is that the Receiver does not control the debtor's assets or operate its business, leaving the debtor to carry on its business in a manner consistent with the preservation of its business and property. This factor is of lesser importance here because the Receiver will also be empowered to sell the trucking business. As it relates to Motion, however, it is clear that the Receiver will not be operating Motion's business but will merely be investigating certain transactions between Motion and the brothers' trucking business or entities related to them.

[55] Finally, the receivership should be carefully tailored to what is required to assist in the recovery while protecting the defendant's interests, and go no further than necessary to achieve these ends. This too can be easily achieved by tailoring the order appropriately.

[56] There is ample authority to permit an inspector to extend its investigation to non-parties. In connection with the appointment of an inspector, s. 162(1) of the OBCA allows the

---

[13] *Akagi* at para. 66
[14] *Akagi* at para 90.

court to make any order it thinks fit including, without limiting the generality of the foregoing:

> (d) an order authorizing an inspector to enter any premises in which the court is satisfied there might be relevant information, and to examine anything and make copies of any document or record found on the premises;
>
> (e) an order requiring any person to produce documents or records to the inspector;
>
> (f) an order authorizing an inspector to conduct a hearing, administer oaths and examine any person upon oath, and prescribing rules for the conduct of the hearing;
>
> (g) an order requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath;
>
> (h) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

[57] The wording of these provisions makes it clear that an inspector's powers are not restricted merely to the parties to the litigation but extend to all who have relevant information.

[58] Similarly, investigatory receivers have been given powers to include non-parties within the ambit of their investigation,[15] especially where the non-parties were involved in the movement of funds or assets at issue.[16]

[59] On the basis of the foregoing, I am satisfied that the receiver should have the investigatory powers Paul seeks.

[60] I am equally satisfied that the investigation should extend to Motion. Motion had the ability to make submissions before the Arbitrator and made submissions before me on this motion. Its submissions on the motion before me consisted of contesting some of the factual findings of the Arbitrator and of general allegations of inconvenience. As noted, however, the fact remained to be determined and all that would be required of Motion is to provide an image of its records to the investigatory receiver. If Motion does not cooperate in that regard, the steps required may be more intrusive. Whether more intrusive steps are required will initially be up to Motion to determine.

---

[15] *Akagi* at para 90.
[16] *DeGroote v. DC Entertainment Corp*., 2013 ONSC 7101 at paras. 58 and 60.

III. Who should be appointed as receiver?

[61] Paul proposes that the court appoint KSV as Receiver. Rana proposes that A. Farber and Partners Inc. be appointed. I am concerned that Farber may be conflicted based on a prior retainer by Rana. Rana had retained Farber to assist him in the litigation between the parties. Farber's representative acknowledged that this created a potential conflict.

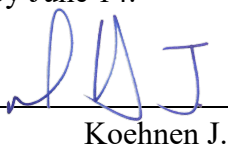
[62] Given past acrimony I think it is preferable to appoint KSV.

Disposition and Costs

[63] For the reasons set out above, Paul's motion is granted and KSV will be appointed Receiver over the trucking businesses of the parties.

[64] A draft order was included with the Caselines materials. If the respondents have any objections to that order they should notify the applicants and me by email within 48 hours. I will then set up a case conference to finalize the form of order.

[65] Any party seeking costs of the motion may make written submissions by June 1, 2021. Responding submissions should follow by June 8, 2021 with reply due by June 14.



Koehnen J.

Date: May 19, 2021

Appendix “C”

IN THE MATTER OF AN ARBITRATION under the *Arbitration Act 1991*, SO 1991, C 1:

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

AWARD
(Hearing by Zoom Video Conference August 25 and 27, 2020)

Arbitrator: Larry Banack

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto Ontario M5L 1B9

Aaron Kreaden
akreaden@stikeman.com
Tel: 416-869-5565

Lawyers for the Applicant

LENCZNER SLAIGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600, 130 Adelaide Street West
Toronto, ON M5H 3P5

Brian Kolenda
bkolenda@litigate.com
Tel: 416-865-2897

Chris Trivisonno
ctrivisonno@litigate.com
Tel: 416-865-3059

Lawyers for the Respondents

INDEX

I. OVERVIEW

1. By Notice of Motion dated July 31, 2020, the Respondents, whom I will collectively refer to as "Rana", seek the following relief:

    a. An Order setting aside my Award and corresponding Order dated July 3, 2020 (the "*ex parte* Award and *ex parte* Order");

    b. The costs of this motion on a full indemnity basis, plus all applicable taxes; and

    c. Such further and other relief as may be just.

2. This current motion is brought in response to the *ex parte* Order granting the Applicant, who I will refer to as "Paul," *inter alia*:

    a. A declaration that the criteria for the appointment of an inspector pursuant to sections 161-163 of the *Ontario Business Corporations Act*, RSO 1990, c B 16 ("OBCA") have been met;

    b. A declaration that the scope of the investigation requested to be made by the inspector and powers of the inspector be determined by return before me or the Superior Court of Justice; and

    c. An order that Rana is restrained from directly or indirectly removing or making changes to the books and records of the Corporate Respondents (collectively known as "RGC Group") or Motion Transport Ltd. ("Motion"), until such time as determined by the Superior Court of Justice or further order from me.

3. A copy of the *ex parte* Award and Order are attached to these reasons as Schedule "1".

4. To understand the parties' current circumstances, attention must be paid to their acrimonious history, much of which is contained in my Award dealing with the parties' 'Unequal Benefits,' dated March 13, 2020 (the "March Award") which is attached as Schedule "A" to the *ex parte* Award dated July 3, 2020.

II. BACKGROUND

5. The individual parties, Rana and Paul, are brothers, who have been in the process of divorcing their shared business interests since early 2018.

6. In March 2018, Paul commenced a Superior Court Application, wherein he sought, among other things, declarations that he and Rana owned and operated the RGC Group together as partners and/or 50-50 shareholders.

7. Justice Wilton-Siegel issued an Order on consent dated April 27, 2018, pursuant to which, among other things:

    a. Rana is restrained from interfering with Paul's ability to access staff employed by or associated with RGC Group for the purpose of carrying out the business of ProEx Logistics Inc ("ProEx"), among other companies;

    b. Paul is restrained from entering or being present at the RGC Group Office;

    c. Paul is restrained from interfering with the operations, business, and economic relations of 1542300 Ontario Inc. (operated as ASR Transportation) ("ASR"); and

    d. Both Paul and Rana are restrained from, directly or indirectly, selling, transferring or otherwise disposing of any of the assets owned by the RGC Group, including transferring money out of any RGC Group bank account, outside the ordinary course of business without express written consent of the other party.

    The April 27, 2018 Consent Order of Justice Wilton-Siegel is attached to these reasons as Schedule 2.

8. Following Justice Wilton-Siegel's Order, the parties entered into Minutes of Settlement dated October 1, 2018 (the "October Minutes") to settle Paul's Superior Court Application.

9. According to the recitals, which paragraph 1 of the October Minutes confirms "are true and form part of these Minutes of Settlement":

> … the principle underlying [the October Minutes] is the recognition of the settlement agreement reached by Paul and Rana providing that they each own a 50% interest in each of: i) the trucking warehousing and logistics business that is owned and operated by Paul and Rana through some or all of ProEx, Guru, ASR, STL, Subeet, R.S., SLI, Continental, ASR Inc. (the "Trucking Business") and any other entities that Paul and Rana used to carry out the Trucking Business, including but not limited to ASR Warehousing and Logistics Inc.; and ii) the real estate business in respect of the Properties (as defined below) that is owned and operated by Paul and Rana through some or all of 222, Noor and 243 (the "Real Estate Business"), and any other entities that Paul and Rana used to carry out the Real Estate Business…
>
> [and]
>
> … Paul and Rana agree that [the October Minutes] shall be interpreted in accordance with this underlying principle that they each own a 50% interest in the Trucking Business and the Real Estate Business and each share equally in all of the liabilities incurred in the ordinary course of the operation of the Trucking Business and the Real Estate Business as owners, directors or directing minds, as the case may be.
>
> ….
>
> (My emphasis.)

10. The purpose of the October Minutes is described as follows:

> …these Minutes of Settlement are designed to achieve an orderly sale of the Real Estate Business and Trucking Business…

11. The October Minutes also provide for the equal split of any sale proceeds from the Real Estate and Trucking Businesses, once sold, subject to an equalization of what the parties defined as any Aggregate Unequal Benefit.

12. In implementing the settlement, namely in effecting an orderly sale of the Real Estate and Trucking Businesses, the parties agreed to act in good faith in the exchange of information. Specifically, paragraph 3 of the October Minutes provides as follows:

> Upon the execution of these Minutes of Settlement, the Parties agree to act in good faith to provide each other with financial, operational and any other information that is required to ensure that the events described in these Minutes of Settlement proceed in an open and transparent manner, including, but not limited to, information to allow the Parties to monitor the Trucking Business and Real Estate Business while the steps contemplated by these Minutes of Settlement are being implemented. Any information to be exchanged pursuant to this paragraph shall be directed through written requests to be made by and to (as the case may be) the Parties' respective counsel. If the Parties dispute the relevance of the information requested in this section, they will work together in good faith, through counsel, to resolve the disagreement in a mutually agreeable manner. All information to be provided pursuant to this paragraph shall be provided forthwith unless the information is not readily available, in which case the Party to provide the information will advise in writing that the information is not readily available and will use best efforts to provide it as expeditiously as possible.
>
> (My emphasis.)

13. Shortly after execution of the October Minutes, I was jointly appointed as arbitrator in accordance with paragraph 22, which provides as follows:

> 22. Paul and Rana each agree that any dispute arising in respect of the completion or implementation of these Minutes of Settlement, then Paul and Rana agree to appoint an arbitrator from among the resident or member arbitrators associated with Arbitration Place in Toronto or alternatively any other person who is a retired judge of the Ontario Superior Court of Justice or Ontario Court of Appeal (the **"Arbitrator")** to determine any such dispute acting as arbitrator pursuant to the provisions of the *Arbitration Act, 1991,* S.O. 1991, c. 17 and any such determinations shall be made on a summary basis and be final and binding on the Parties and shall not be subject to appeal.

14. There is no dispute that the parties have sold the Real Estate Business.

15. The issue of any Aggregate Unequal Benefit between the parties was not resolved until my Award dated March 13, 2020, nearly a year and a half after the execution of the October Minutes.

16. Now, two years after the October Minutes, the parties still have not effected the orderly sale of the Trucking Business.

17. Immediately following the execution of the October Minutes disputes arose concerning the disclosure of information.

18. Unfortunately, disclosure issues have resurfaced continually for the past two years.

19. Notwithstanding the explicitly agreed upon obligations of good faith, the parties have proven themselves to be incapable of working cooperatively with each other, through counsel or otherwise.

20. The parties have appeared before me in person, over teleconference, and video conference on numerous occasions. I have issued approximately a dozen Endorsements and Awards, some details of which are set out at paragraphs 17-51 of the March Award.

21. Given the relief sought on this motion by Rana, it is necessary to review the subject matter of this procedural history. In particular, the following is a brief summary of the parties' disputes to date, which have necessitated my intervention:

    a. **Endorsement dated November 27, 2018 -** In anticipation of a motion delivered by Paul arising out of the parties' inability to agree on how to finance the cash flow shortage facing ProEx, one of the trucking companies operated by Paul, and in consideration of the parties' obligations to exchange information in good faith, I asked the parties agree to a direction to be provided to RGC Group staff regarding documents and records to be provided to Paul in order to address the cash flow issue.

    b. **Endorsement dated November 29, 2018 -** Following the parties inability to agree to a consent direction, I issued an Endorsement for documentary disclosure, including, *inter alia*, disclosure from Rana to Paul of online banking records for ASR, 2221589 Ontario Inc. and Subeet Carriers Inc. as well as accounts receivable records, invoices transferred from the Transplus dispatch system, and records for the amounts of available lines of credits for all RGC Group entities.

    c. **Consent Award dated December 5, 2018 -** A Consent Award was issued resolving Paul's disclosure motion and providing, *inter alia*, that ongoing financial disclosure was to be provided by the RGC Group to Paul on the 15th day of each month. The parties also agreed that if there remained a cash flow shortage they could either (1) agree to fund the cash flow shortage from personal funds or (2) make submissions to the arbitrator for an appropriate remedy "including but not limited to the liquidation of any of the entities in RGC and the appointment of a receiver/manager to deal with the cash flow

shortage issue and to run RGC until the completion of the steps contemplated by the [October Minutes]."

d. **Inspection and Costs Award dated December 12, 2018 -** In response to Paul's motion regarding the cash flow shortage of ProEx and related disclosure, Rana delivered a motion for unfettered and unconditional access to certain documents at Paul's lawyers' offices. Access to the records at Paul's lawyers' office was awarded, along with a reciprocal direction providing Paul with access to records being stored at the RGC Group office.

e. **Endorsement dated April 23, 2019 -** A timetable was set for the Unequal Benefits Arbitration. The parties agreed that Rana had received all of the documents requested from Paul, and dates were set by which Paul would request documents to inspect and Rana would make those documents available.

f. **Endorsement dated July 23, 2019 -** The parties were unable to move the matter forward as anticipated and agreed upon in April 2019, and Rana, who had appointed new counsel, raised a new request for documents from Paul, notwithstanding the representation by prior counsel that all requested documents had been received in April 2019. A revised timetable was set working toward a hearing for the Unequal Benefits Arbitration in September 2019.

g. **Endorsement dated September 3, 2019 -** A further scheduling conference call was held to move the matter forward toward the anticipated September hearing dates. Further hearing dates were added, and various evidentiary issues addressed.

h. **Endorsement dated September 6, 2019 -** A further conference call was held to address a motion delivered by Paul concerning the identification and production of documents after the delivery of Rana's expert report. Following the conference call wherein much of the relief sought was agreed upon between counsel, the balance of Paul's motion was dismissed due to it being

disproportionate and not in the interests of the parties nor necessary to achieve a fair and equitable outcome.

i. **Unequal Benefits Minutes of Settlement dated September 13, 2019 -** Following a last-minute mediation, the parties entered into the Unequal Benefits Minutes of Settlement dated September 13, 2019 ("UB Minutes"). In respect of the parties' disclosure obligations, and the sale of the Trucking Business, the UB Minutes provide as follows:

5. Within 14 days of the execution of these Unequal Benefits Minutes of Settlement, Rana shall cause RGC to provide Paul with access to:

a. the fuel portals identified as "TCH/Pilot/Flying J" and "Petro-Pass";

b. "Trans Plus Fleet Manager Dispatch System";

c. "Border Connect";

d. "Shaw Tracking GPS Communication".

6. The Parties shall continue to exchange information on the 15th day of every month, as previously ordered by the Arbitrator, with the exception that going forward this information shall include reports/documentation that is sufficient to enable Paul to monitor the petty cash that is used for RGC;

7. Three months from the date of these Unequal Benefits Minutes of Settlement, Rana shall cause RGC to provide Paul with a USB key that contains a complete copy of the RGC QuickBooks account, and shall continue to provide an updated USB key with this information every three months thereafter;

….

14. The Parties agree that they will act in good faith to facilitate the sale of the Trucking Business as effectively and cost-efficiently as possible.

…

j. Amended Endorsement dated January 19, 2019 - An Endorsement was issued to deal with Rana's access to a property in India that was dealt with in the UB Minutes. I note that prior to issuing my endorsement, the parties were requested to exchange proposed protocols to address the issue of Rana's access and despite the caution to avoid extreme positions, both parties delivered unduly aggressive positions.

k. Award dated March 13, 2020 - This March Award is attached as Schedule "A" to the *ex parte* Award. The narrow issue in the award was how to effect an unequal benefit payment from Rana to Paul. In the course of determining this issue, I describe the parties' procedural history and comment on the parties' ongoing inability to comply, in good faith, with their documentary disclosure obligations.

22. The parties defined their process and disclosure obligations in respect of their common business interests in both the October Minutes and the UB Minutes. The above noted Endorsements enforced the agreed upon obligations to implement the brothers' goal of achieving an orderly sale of the remaining Trucking Business all in the context of the constraints set out in the Consent Order of Justice Wilton-Siegel dated April 27, 2018.

23. The issue of the parties' inability to provide open and transparent disclosure and access to information is a long-standing theme between the parties. It is against this backdrop that the *ex parte* Order was issued.

24. On June 30, 2020, Paul delivered an extensive *ex parte* motion record, in excess of 1200 pages, which upon review I found justified the appointment of an inspector pursuant to section 161 of the OBCA. In the *ex parte* Award I concluded:

> 26. In particular, I find that there is evidence of a lack of transparency and disclosure from Rana to Paul in respect of the operations and financial standing of ASR.
>
> 27. Moreover, there is some evidence that Rana has been involved with a new entity, Motion Transport Ltd ("Motion") which was incorporated by a third party in 2018 and to which he has apparently caused ASR to sell vehicles, either directly or indirectly through intermediaries since September 2018.
>
> 28. The corporate profile report for Motion suggests that its sole officer and director is a person purportedly known to Rana, but according to Mr. Colbourn's investigation report, this individual has never been observed at the Motion offices or observed to be engaged in any activity related to Motion. It seems Motion may be operated by Rana's son and operated out of locations leased by ASR.
>
> 29. There is further evidence that Motion has been servicing ASR clients, and using ASR drivers, vehicles and fuel for Motion's benefit.
>
> 30. Coupled with the evidence of a lack of transparency through the denial of records to Paul, I am satisfied that there is an appearance of oppressive conduct that warrants the appointment of an inspector.

25. On July 6, 2020 Paul delivered the *ex parte* Award and Order to Rana, along with the motion record filed in support. The parties appeared before Justice Dietriech on July 7 and 9, 2020. By Endorsement dated July 17, 2020, Justice Dietrich adjourned Paul's motion to allow Rana to bring the present motion to vary or set aside the *ex parte* Order.

26. The evidence is described in detail below. Suffice it to say that the parties exchanged contradictory affidavits in the present motion.

27. By consent of the parties, a hearing was held on August 25 and 27, 2020 via Zoom video conference. On August 25, 2020 each of the affiants were cross-examined in real time. On August 27, 2020, the parties delivered closing submissions.

28. I have carefully considered the very comprehensive evidentiary record and fulsome submissions. I find that Rana, as outlined below, does not satisfactorily respond in his filed material to the very clear disclosure issues that are characteristic of the parties' acrimonious history as evidenced by the above-mentioned Endorsements.

29. All of the parties' disputes, including the present motion, are in some way borne out of an unwillingness to provide sufficient information necessary to implement the sale of the Trucking Business in an open and transparent way, contrary to the parties' good faith obligations under the October Minutes and the UB Minutes.

30. Prior to considering the substance of the parties' dispute, two preliminary issues were raised by counsel that need to be addressed.

III. PRELIMINARY ISSUES

A. JURISDICTION ON THE PRESENT MOTION

31. At the outset of the hearing on August 25, 2020, I requested the parties to pointedly address my jurisdiction to review the *ex parte* Award and Order dated July 3, 2020 and to make submissions on the nature of that jurisdiction, if any.

1. ***Rana***

32. Rana asserts, that the *ex parte* Order must be treated as interim, and his current motion is in essence a hearing *de novo*. To treat it otherwise, Rana argues, would be a breach of the principles of natural justice, as he was not provided notice of, and therefore was not

present at, Paul's *ex parte* motion. Rana relies on section 19 of the *Arbitration Act 1991*, SO 1991, c 17 ("Arbitration Act"), which the parties cannot contract out of.

33. Section 19 of the Arbitration Act provides as follows:

> **19** (1) In an arbitration, the parties shall be treated equally and fairly.
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

34. According to Rana, not allowing him the opportunity to return before me to make submissions on the validity of the *ex parte* Order would violate section 19 of the Arbitration Act.

35. Rana also submits that I have the authority to review the *ex parte* Order pursuant to section 44(1)(b) of the Arbitration Act which provides:

> **44** (1) An arbitral tribunal may, on its own initiative within thirty days after making an award or at a party's request made within thirty days after receiving the award,
>
> …
>
> (b) amend the award so as to correct an injustice caused by an oversight on the part of the arbitral tribunal.

36. Relying on the decision of Justice Wilton-Siegel in *1210558 Ontario Inc v 1464255 Ontario Limited,* 2011 ONSC 5810 at paragraph 41, Rana asserts that it is for me, having inadvertently not included a come-back date in the *ex parte* Order, to now allow the parties to return before me to address the issue of the appointment of an inspector.

37. According to Rana, the language of the OBCA allowing for the appointment of an inspector *ex parte*, is insufficient to satisfy the principles of procedural fairness entitling him to respond to the evidence against him.

38. I deal with Rana's position that I lack jurisdiction to appoint an inspector pursuant to the OBCA and to grant Paul's injunctive relief, below.

2. Paul

39. According to Paul, there is no basis upon which I can review the *ex parte* Order on the grounds set out by Rana. Specifically, Paul notes that section 37 of the Arbitration Act provides that any Award binds the parties unless it is set aside under sections 45 or 46, neither of which are applicable.

40. Paul submits that pursuant to the October Minutes the parties contracted out of any rights of appeal provided by section 45 of the Arbitration Act. He further contends that the challenges available under section 46 must be brought before the Superior Court. Paul relies upon the language of the grounds for review in section 46, which in his submission make it clear that the arbitrator does not have jurisdiction under that provision. For example, section 46(1)(8) allows a court to set aside an award. where "an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.",

41. Paul further argues that it would be inconsistent for Rana, on the one hand, to suggest that I have no jurisdiction to appoint an inspector because of the reference to "the court" in section 161 of the OBCA, but on the other hand contend that I have jurisdiction to set aside an *ex parte* Award or Order under section 46 of the Arbitration Act, which also refers to "the court".

42. According to Paul, nothing in the *ex parte* Order permits Rana to come back and now challenge the appointment of an inspector. Paul submits that to allow Rana the opportunity to argue the motion *de novo* essentially guts section 161 of the OBCA, and a party's ability to appoint an inspector *ex parte*, of any meaning.

43. Paul concedes that principles of natural justice and the language of the *ex parte* Order provide Rana with standing to request to set aside the injunction, because the injunctive relief restrains Rana's conduct. He denies there was any inadvertence in excluding a come-back date in the *ex parte* Order since it was only to remain in force "until such

time as is determined by the Superior Court of Justice or further order from me." Paul maintains that this is equivalent to a come back date.

44. Unlike an injunction, the appointment of an inspector does not restrain Rana in any way and all the submissions Rana is currently making, according to Paul, could be made when the parties deal with costs following the inspector's report.

45. In respect of Rana's argument that section 44 of the Arbitration Act applies, Paul submits that Rana ought to be restricted to the relief sought in his Notice of Motion, which as drafted uses the language of setting aside the *ex parte* Award and Order, consistent with section 46 of the Arbitration Act (see *Apotex v Abbott Laboratories*, 2017 ONSC 1348 at paragraph 45).

46. Ultimately, however, Paul agrees to have this matter heard by me, but states that this is not a hearing *de novo*, but rather a review of the *ex parte* Order and Award on a reasonableness standard (see *Freedman v Freedman Holdings Inc*, 2020 ONSC 2692 at paragraphs 127-128).

3. Determination – Jurisdiction to review ex parte Award

47. Having considered the parties' fulsome submissions and authorities in respect of my jurisdiction to hear Rana's present motion, I conclude that I have the authority to receive evidence from Rana in respect of the propriety of the *ex parte* Award and Order.

48. First and foremost, while the *ex parte* Order does not contain a specific return date in respect of the appointment of an inspector, it clearly specifies at paragraph 3 that "the scope of the investigation requested to be made by the Inspector and the appointment and powers of the Inspector are to be determined by return motion before me or the Superior Court of Justice (Commercial List) if the inspection could potentially impact the rights of entities who are not parties to the arbitration clause…"

49. By return motion before me, therefore, it is available to Rana to assert, as he has done, that no inspector can, or ought to, be appointed.

50. To conclude otherwise would violate the principles of procedural fairness.

51. I also agree that section 44(1)(b) provides me with the authority to hear the present motion. This provision allows me, on my own initiative or at the request of a party within 30 days of the *ex parte* Award, to amend the Award to correct an injustice caused by an oversight. In this case, I have concluded that Rana ought to have the ability to challenge the evidence led against him in support of the *ex parte* Award.

52. I conclude that this opportunity is provided to him on the plain language of the *ex parte* Order and in particular paragraphs 3 and 4 (the latter of which concerns the injunctive relief). To the extent that I am mistaken, and paragraph 3 is insufficient, section 44(1)(b) allows me to correct an oversight to include a specific return date and consider the issues raised in the present motion.

53. In respect of whether Rana's present motion is a hearing *de novo* or a review of the *ex parte* Award on a reasonableness standard, I conclude that it does not matter, as applying either standard it is clear that Rana's motion must fail. I have accepted the extensive records delivered by Rana, and after a comprehensive review in light of the whole record, maintain my conclusion that, among other things, on either a *de novo* or reasonableness review basis that there exist grounds for the appointment of an inspector under the OBCA. As is set out below, I also find sufficient grounds for the injunction granted.

B. ADMISSBILITY OF NEW EVIDENCE

54. The second preliminary issue concerns the admissibility of an affidavit sworn by Amar Randhawa on August 26, 2020, after the first day of the hearing. The affidavit attached a voice recording made after the hearing began, between Amar (Paul's son) and Harpreet Kaur, an attendant at the Petro Canada on Trafalgar Road in Hornby, Ontario ("Petro Station").

55. This evidence purportedly addresses a dispute between the parties as to whether ASR resources were used to purchase fuel for a Motion truck at the Petro Station on June 6,

2020. This substantive issue is more fully dealt with below, and for reasons that follow, I conclude that it is unnecessary to admit Amar's affidavit.

1. ***Paul***

56. Counsel for Paul relies on Rule 39.02 of the *Rules of Civil Procedure* as well as the test set out in *DK Manufacturing Group Ltd v Co-Operators General Insurance Company*, 2020 ONSC 1259 at paragraph 11.[1]

57. According to Paul, this is evidence that directly relates to a matter raised on cross-examination of Karanvir Singh, a truck driver who works with ASR. Specifically, Paul notes that despite delivering multiple affidavits, it was only on cross-examination that Mr. Singh said that he used a fuel card provided by the Petro Station to assist Subeet Randhawa, Rana's son, with refueling a Motion truck.

2. Rana

58. Rana objects to the introduction of this evidence on the basis that it is hearsay evidence and Paul could have but did not summons Ms. Kaur to be examined. He notes that what

---

[1] In that decision Master Muir provides as follows:
[11] The courts have developed a four-part test when deciding whether leave should be granted under Rule 39.02(2). The law is well summarized in Master Jolley's decision in *Nexim Healthcare Consultants Inc. v. Yacoob*, 2018 ONSC 91 (Master), a decision relied upon by Co-Operators. At paragraph 9 of that decision Master Jolley states as follows:

> **9.** The four-part test for granting leave is set out in *First Capital Realty Inc. v. Centrecorp Management Services Ltd*., 2009 CarswellOnt 6914 (Div. Ct.): (1) is the evidence relevant; (2) does the evidence respond to a matter raised on the cross examination, not necessarily raised for the first time; (3) would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment; and (4) did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset. A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2) having regard to the overriding principle outlined in Rule 1.04 that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. As stated by Master Muir in *Mars Canada Inc. v. Bemco Cash and Carry Inc.* 2015 ONSC 8078 at paragraph 10, "In my respectful view, the court should avoid a rigid interpretation of Rule 39.02. The flexible, contextual approach is to be preferred." As noted in P.M. Perell & J.W. Morden, *The Law of Civil Procedure in Ontario*, commenting on *First Capital Realty* and quoted in *Shah v. LG Chem, Ltd.* 2015 ONSC 776, "the Divisional Court held that all the criteria should be weighed and no one criterion was determinative."

happened at the Petro Station, how fuel was paid for, and by whom, has been in issue since the outset. Rana asks that the evidence not be admitted, or that if admitted, be given no weight.

3. Determination – Admissibility of Amar's Affidavit

59. I advised the parties that I would take under advisement the acceptance of Amar's affidavit and the attached recording. Having considered the disputed evidence and reviewed the comprehensive record delivered in respect of this motion, I find that it is not necessary to resolve this issue of admissibility as the impugned affidavit is not determinative of the issues before me. I have therefore not considered Amar's affidavit or the attached audio recording in determining the present motion.

IV. ISSUES FOR DETERMINATION

60. The remaining issues to be determined in respect of Rana's motion are:

a. Whether I have the jurisdiction to appoint an inspector pursuant to sections 161-163 of the OBCA or sections 121 of the *Courts of Justice Act*;

b. If yes, whether Paul made full and frank disclosure in his *ex parte* motion record;

c. If yes, whether the test for the appointment of an inspector is met on the current evidentiary record; and

d. Whether a strong *prima facie* case and irreparable harm have been established, justifying injunctive relief.

61. Prior to turning to the parties' submissions in respect of the substantive issues in dispute, I review some of the relevant evidence delivered.

V. EVIDENCE

62. On behalf of the Respondents, the following witnesses swore affidavits:

a. Rana Randhawa swore two affidavits dated July 31, 2020, and August 14, 2020;

b. Subeet Randhawa – Rana's son – swore an affidavit dated July 31, 2020;

c. Baldev Dhindsa, the sole shareholder, officer, and director of Motion swore an affidavit dated July 31, 2020; as well as

d. The following three ASR truck divers: Karanvir Singh swore two affidavits dated July 31, 2020 and August 16, 2020 respectively; Narinder Singh swore an affidavit dated August 1, 2020; and Nicholas Peet swore an affidavit dated August 5, 2020.

63. The Applicant, Paul, relies on his initial affidavit sworn June 26, 2020, as well as his responding affidavit sworn August 10, 2020. He also relies on the affidavit of his private investigator, Don Colbourn, sworn June 26, 2020, which attaches a private investigation report (the "Colbourn Report") and an affidavit sworn by a member of Paul's legal team dated August 10, 2020.

64. All of the affiants, with the exception of Paul's counsel, were cross-examined in real-time at the hearing.

65. The issue in dispute raised by Paul in his Notice of Motion dated June 30, 2020 is the lack of transparency with which Rana has been operating ASR. Of particular concern are the details of its financial operations and the details of the relationship between ASR and Motion, if any.

66. The practical significance of the lack of transparency is that the parties have yet to sell the Trucking Business pursuant to the October Minutes. ASR is a part of the parties' Trucking Business and, in a manner consistent with the requirements of the 2018 Consent Order of Justice Wilton-Siegel and the October Minutes, the parties are to effect its orderly sale and share the sale proceeds equally. Without insight into its operations, Paul is concerned that Rana is transferring ASR business and assets to a third party,

Motion, which will decrease the value of the Trucking Business, and therefore Paul's equal share in it.

67. As an indication of how far behind in the sale process they are, some two years after the execution of the October Minutes, the parties have yet to even complete financial statements for the last three years in respect of the Trucking Business.

68. I note that Rana did not dispute Paul's evidence that the parties had agreed to prepare financial statements in respect of the RGC Group as a preliminary step toward selling the Trucking Business. In addition, Rana did not provide any rebuttal evidence in response to Paul's allegation that Rana has not complied with the parties' agreement to complete the financial statements or their agreement to exchange draft statements prior to their final completion.

69. Below I set out the evidence most relevant to the factual issues in dispute. In numerous instances, as in the past, the testimony of Paul and Rana is simply at odds. Accordingly, I am obliged to make determinations of the matters in issue on a balance of probabilities considering the evidence presented and documents tendered as a whole, having regard for the circumstances and, importantly, the evidence that ought to have been reasonably available to the parties but was not tendered.

A. RELATIONSHIP BETWEEN ASR AND MOTION

70. Paul asserts on the basis of the Colbourn Report, that Rana and his son are working for the benefit of Motion, and not ASR, in violation of the parties' obligations to act in good faith in the operation of the Trucking Business in anticipation of its sale, pursuant to the terms of the October Minutes.

71. Subeet is not a party to the October Minutes, and therefore not bound by the obligations set out therein. However, where Subeet is engaging in conduct for the benefit of Rana, and such conduct would violate the terms of the October Minutes, I am satisfied that the evidence relating to Subeet is relevant to the present motion.

72. Motion is a company incorporated in May 2018 by Mr. Baldev Dhindsa, its sole shareholder and director, who Paul identified as a friend of Rana's from when they were both in India.

73. The Colbourn Report also identifies Motion as being the ultimate owner of a number of ASR vehicles.

74. According to Mr. Dhindsa, while Motion was incorporated in May 2018, it did not commence business operations until December 2019. Curiously, it was also Mr. Dhindsa's evidence that he has been retired since August 2017.

75. Rana categorically denies any personal involvement with Motion but admits that he knows Mr. Dhindsa who has been a long-time friend and who in the past has lent Rana money. According to Rana, Motion is owned and operated for the exclusive benefit of his friend, Mr. Dhindsa.

76. Rana denies knowing that Motion was incorporated in May 2018, or that it came to own equipment that ASR used to own. Rana says he only learned those facts in the course of this motion, despite his son, who lives with him, working for Motion since November 2019.

77. According to Rana, Motion is not a competitor, as it carries different types of loads than ASR. While Rana acknowledged that ASR and Motion get some of their work from the same customers, he denies that ASR has lost any work to Motion. No documentary evidence from ASR or Motion was tendered in this respect.

78. Rana denies having any interest in Motion or receiving any income or benefits from it. He admitted being aware that Subeet started working part-time for Motion in November 2019, a month before Mr. Dhindsa testified that Motion commenced operations.

79. Subeet is Rana's 20-year old son. He lives with Rana, has never worked full-time in the trucking industry, and allegedly only started working when Mr. Dhindsa is said to have approached him in November 2019 to work for Motion on a part-time basis.

80. Contrary to Rana, Subeet candidly acknowledged that ASR and Motion are competitors, in that they are both transport companies that service some of the same clients.

81. Both Subeet and Mr. Dhindsa testified that Rana had no advance knowledge of or hand in arranging their working relationship.

82. I find it difficult to believe that Rana was not involved in connecting his young son and long-time friend to work in the same industry, including from the same trucking yards, as ASR – the company operated exclusively by Rana.

83. It remains unclear exactly what Subeet's role at Motion was (assuming his employment has now come to an end).

84. According to Subeet, he coordinated loads and prepared invoices until February 2019, at which time he got his commercial truck driving license and thereafter added to his Motion responsibilities, driving trucks for repairs, maintenance, and refuelling. Subeet did not drive any load contracts.

85. According to the drivers that gave evidence, Subeet acted as dispatcher for the drivers.

86. Based on Mr. Dhindsa's retirement and limited knowledge of the operational details of Motion, detailed below, it seems as though Subeet has been the only person meaningfully operating the company. It is unclear how he was doing so on a part-time basis.

87. The evidence is that in exchange for his services to Motion, Subeet did not receive any salary from Motion. Rather, Subeet testified that he was banking hours until August 2020, the anticipated termination date of his employment. At the end of his employment, Subeet expected to be paid a lump sum from Motion for all of his time since November 2019.

88. Until at least April 1, 2020, however, Subeet and Rana confirmed that ASR continued to pay Subeet, which it had been doing for a number of years. The evidence is that these payments stopped at some point after the COVID-19 pandemic in the Spring of 2020, but again, no helpful evidence was put forward in this regard.

89. I find it highly suspicious that Rana's son would be working for Rana's friend, in the same industry as Rana's own company, and that ASR, not Motion, would be providing Subeet with regular monthly compensation, even if that had been an agreed upon practice prior to Subeet working for Motion. The evidence is unclear whether ASR was really compensating Subeet for the work performed by Motion, which could have easily been dispelled with documentary records pertaining to Subeet's pay from ASR, hours worked for Motion, or compensation arrangement with Motion.

90. Mr. Dhindsa's evidence did not assist in dispelling any suspicions regarding the relationship between Motion and ASR. He had what can only be described as insufficient information in respect of the business operations of Motion.

91. In particular, according to Mr. Dhindsa, though Motion was not operating for nearly a year and a half after its incorporation, it was purchasing equipment, the bulk of which coincidentally came from ASR, his long time friend's company, unbeknownst to him.

92. Similarly, Mr. Dhindsa had no explanation for Motion's financial ability to purchase equipment in 2020 when, at the same time, Mr. Dhindsa advised that business was so slow that he was negotiating the deferral of rental payments to Border Bound for use of its yard.

93. Neither Mr. Dhindsa nor Subeet tendered any documentary record for Motion, including financial records relating to the equipment purchased by Motion, and when asked about the funds used to purchase this equipment, Mr. Dhindsa advised, again without corroborating evidence, that he used personal funds.

94. In addition, when asked about the current operations of Motion, Mr. Dhindsa stated that he had no knowledge of any of the accounting or other operational processes, as Subeet looked after that. Mr. Dhindsa's evidence concerning the sharing of equipment and drivers between Motion and ASR is that all of those dealings were handled by Subeet.

95. Notwithstanding that Mr. Dhindsa was cross-examined on August 25, 2020, there is no evidence that Mr. Dhindsa had any knowledge of who would run the company after Subeet left, which according to the evidence he was scheduled to do at the end of August.

96. According to Mr. Dhindsa, the only person with knowledge of the company's operations was leaving imminently, and there was no evidence of who, if anyone, would take over. I find that evidence concerning.

B. ASR'S DECLINING REVENUE

97. Paul's concern is that during the period ASR should be prepared for sale, it is diverting business to Motion. He states that based on the QuickBooks data he has access to, ASR's steep revenue decline coincides with the period just after Justice Wilton-Siegel's April 2018 Order, restricting his access to ASR operations, which also just happens to coincide with Motion's incorporation in May 2018.

98. According to Paul, most of this decline is not due to changes in work from Ford Motor Company ("Ford"), despite Rana's statement to the contrary. He highlights that the decline in revenue occurs at the same time that ASR recorded an increase in expenses for repairs and maintenance, which does not make sense if, as suggested by Rana, ASR vehicles are operating less frequently because the work was diminishing.

99. Paul asserts that ASR's revenue decline is also much steeper than that of ProEx or what was experienced in the industry more generally, contrary to Rana's evidence.

100. Paul specifically notes that a comparison between ASR and ProEx revenues over the last few years supports his position. From 2018-2019, for example, ASR's revenues declined by nearly 20% while ProEx revenues declined 4%. The reason for the steeper decline in ProEx revenues between 2017-2018, according to Paul, is due to a joint decision of Paul and Rana to transfer the ProEx account with its customer, TST Overland Express ("TST"), to ASR. While Paul acknowledges that TST cancelled its business around the same time, the driver that previously generated the work with TST continued working with ASR, generating it revenue.

101. Rana relies on a comparison of the companies over the full period between 2017-2019, which is said to be misleading because he fails to properly account for the transfer of TST.

102. Rana did not respond to the evidence concerning TST or to Paul's concern regarding ASR's increasing repair and maintenance costs at a time that Rana asserts that business was slowing down. He denies diverting any business to Motion and highlights that ASR has completed work for approximately 188 new customers since January 1, 2018 and that it has since been awarded new lanes from the Ford.

103. In respect of ASR's declining revenue, Rana provides no expert evidence in respect of industry trends, but relies on articles and e-mails from customers which he admitted on cross-examination were solicited by an employee of ASR, who did not testify, to rebut Paul's evidence.

104. Rana points to the loss of numerous trucking lanes from Ford's Oakville Assembly Line as a specific cause of ASR's declining revenue since November 2019.

105. Rana also asserts, without documentary support other than a spreadsheet presumably prepared by ASR, that fourteen other customers, in addition to Ford, dropped freight volumes, resulting in nearly $2 million in lost revenue.

106. According to Rana revenues only further declined in 2020 due to the impact of the COVID-19 pandemic. ASR thus had reduced work for drivers and reduced need for equipment, which Rana offers as an explanation for why he was selling equipment during this period.

107. As the sole operator of ASR, Rana has access to the full scope of ASR books and records, virtually none of which were provided to support the assertion that ASR's declining revenue is nothing more than what the industry at large has purportedly faced, including ProEx.

C. SALE OF ASR EQUIPMENT

108. Paul asserts that until he hired a private investigator, he was unaware, contrary to the Order of Justice Wilton-Siegal dated April 27, 2018, that ASR was transferring assets outside the ordinary course of business. Paul says that he knows of no legitimate business purpose for ASR to transfer over a dozen vehicles to Motion.

109. Rana states that ASR and Subeet Carriers, another RGC Group company, regularly buy and sell trucks and other equipment. He asserts that ProEx and Guru Logistics Inc, the companies operated by Paul, do the same, as it is a regular feature of the trucking industry.

110. In response to Paul's assertion that in the ordinary course of business ASR always sold vehicles at auction, not resellers, Rana only accepts that he often sold equipment by auction, but states that he has also sold many ASR trucks directly to resellers.

111. In respect of the trucks set out in the Colbourn Report as having been transferred from ASR to Motion, Rana asserts that each of these were in fact sold through resellers. Rana states that he did not discuss with any of the resellers to whom they intended to sell the trucks, and he was unaware of any intention to re-sell these trucks to Motion.

112. As noted above, Mr. Dhindsa also states that he had no knowledge that the equipment purchased by Motion used to be owned by ASR.

113. Where there was an issue of the timing of the sale to the reseller versus the registration with the Ontario Ministry of Transportation by Motion, Rana suggests that the reason the resellers were not listed as registered owners of these trucks may be because where a purchaser is also a reseller, they do not necessarily register the equipment to themselves. Instead, only the ultimate owner becomes the registered purchaser of the re-sale transaction.

114. According to Rana, each of the sales were properly recorded in QuickBooks, and provided to Paul as part of the monthly financial disclosure package.

115. The records appended to Rana's current affidavit are different from the records provided to Paul, and in particular, Rana's exhibit contains more details concerning the sale of the trucks in question, such as VIN numbers.

116. According to Rana these changes are because ASR's accountant, on her own initiative in response to some of the questions raised by Paul in his *ex parte* motion record, updated the entries in question with more detail, but did not change any of the data already contained therein. He adamantly denies requesting her to amend the entries in any way.

117. He also admits, however, that he did not provide ASR's accountant with a copy of the *ex parte* Order or advise her not to amend any of ASR's books and records in accordance with the injunctive relief set out therein. The bookkeeper was not called as a witness.

118. Finally, Rana asserts that it is wrong to suggest that these trucks were part of an attempt to sell-off ASR's equipment as ASR has bought and/or leased equipment as well. He notes four examples, which I observe are dated between December 2017 and May 2018, prior to Motion's incorporation and the most recent events upon which Paul's *ex parte* motion was based.

119. Having considered the evidence as a whole, I find it extremely implausible that there was not some communication between ASR and Motion in respect of the equipment transferred between the companies.

120. Not only do the persons in charge of day-to-day operations of each of those companies live together, they are father and son. I find it unlikely that Rana would have made the decision to sell more than a dozen assets, approach a re-seller, and sold the equipment without notifying Subeet or Mr. Dhindsa, who then just happened to approach the same resellers around the same time period, and purchase the same equipment. The fact that no documents were tendered by Subeet or Mr. Dhindsa in respect of Motion's asset purchases since 2018 only heightens my concerns.

D. THE JUNE 6, 2020 REFUELLING INCIDENT

121. According to Paul, relying on the Colbourn Report, Subeet was observed refuelling a Motion vehicle at the same time and place that an ASR fuel card was used at the Petro Station. Rana, along with his son, Subeet, and an ASR driver, Karanvir Singh, were all present.

122. Paul did not initially highlight that Mr. Singh was also at the Petro Station that day refuelling an ASR truck and reefer van.

123. According to Rana, he was only there to bring his son house keys, which Subeet had forgotten. Rana purportedly had no idea that Subeet also forgot his Motion fuel card.

124. Subeet was driving a Motion truck as part of his duties with Motion. In his affidavit he states that he paid $150 in cash to refuel the Motion truck he was driving. Subeet attached a receipt for $150 in fuel paid in cash at 9:40am on June 6, 2020. There is no mention of Mr. Singh in Subeet's affidavit sworn July 31, 2020.

125. Mr. Singh's initial affidavit sworn July 31, 2020 also did not mention Subeet or Rana. According to Mr. Singh, he attended at the Petro Station on June 6, 2020 to refuel an ASR truck and reefer van. Mr. Singh produced two receipts showing use of a Petro Pass at the Petro Station on June 6, 2020 at 9:11am and 9:26am respectively.

126. Following delivery of Paul's responding affidavit sworn August 10, 2020, all of the related evidence tendered on behalf of Rana changed. Paul's responding affidavit contained video footage of the incident showing Rana, Subeet, and Mr. Singh together at the Petro Station, and Mr. Singh, an ASR driver, refuelling Subeet's Motion truck.

127. Mr. Singh delivered a second affidavit sworn August 16, 2020, in which he mentions for the first time that Rana and Subeet just happened to be at the same Petro Station as him on June 6, 2020. According to Mr. Singh's revised evidence, he saw Rana at the Petro Station and went over to speak with him. That is when Subeet asked Mr. Singh to refuel his truck, because Subeet did not have his gloves. Mr. Singh also said that Subeet had

forgotten his fuel card, so he gave Mr. Singh $150 in cash, which was then used to pay for Subeet's fuel inside the station.

128. In the video of the Petro Station incident on June 6, 2020 taken by Mr. Colbourn's associates and tendered with Paul's responding affidavit sworn August 10, 2020, Mr. Singh is seen swiping a fuel card into the pump used to refuel Subeet's Motion truck. Mr. Singh made no reference of a fuel card in either of his affidavits.

129. Under cross-examination, in response to the video, Mr. Singh's evidence changed yet again. Mr. Singh then testified for the first time that after refueling Subeet's Motion truck, he used a fuel card loaned to him by the Petro Station at the pump, following which he went into the station and used the cash given to him by Subeet to pay the charge.

130. Subeet had a similarly confusing and unsatisfactory explanation for the video of Mr. Singh swiping a fuel card at the pump. In addition to having no knowledge of the fuel card used by Mr. Singh, Subeet did not remember whether Mr. Singh later gave him a receipt for the fuel, but said that he provided a picture of a receipt to Mr. Dhindsa a few days later. No documentary evidence was tendered demonstrating that Motion funds were used to pay for the fuel purchased for its vehicle by Subeet on June 6.

131. According to Rana, the fuel card and receipts provided by Mr. Singh as part of the standard practice for drivers' costs, corroborates that Mr. Singh used the ASR card to refuel an ASR truck and reefer van around the same time that Subeet refuelled his Motion truck. Rana asserts that no ASR funds were used to refuel a Motion truck. Rana gave no evidence in respect of the $150 cash said to have been given by Subeet to Mr. Singh.

132. I note that the timing on the video footage presented in Paul's responding affidavit does not align perfectly with the timestamps on the receipts from the Petro Station on June 6, 2020.

133. The private investigator has footage of Subeet driving his Motion truck prior to arriving at the Petro Station on a video time stamped as 9:15am, therefore after the 9:11am transaction at the Petro Station.

134. There is also footage of Subeet, Rana, and Mr. Singh standing between a fuel pump and the Motion Truck, time stamped at around 9:26am. Mr. Singh is then shown swiping a Petro Pass, sometime shortly after 9:26am.

135. In response to Rana's argument that Mr. Colbourn improperly included in his report both the 9:11am and 9:26am transactions at the Petro Station despite the fact that his investigators observed Subeet on his way to the Petro Station at 9:15am, after the first receipt for fuel purchased at the Petro Station at 9:11am, Mr. Colbourn testified that he chose to identify in his report both the 9:11am and 9:26am transactions at the Petro Station because he thought both to be important, and turned his mind to the possibility that there may be some discrepancy between the clocks of the two investigators who recorded video footage that morning and the Petro Station pump.

136. I pause here to note that I generally found Mr. Colbourn to be a helpful witness. In response to a request from Rana before the hearing, he made fulsome disclosure of the contents of his investigative file, and in my view, testified honestly and clearly as to the scope and conduct of his investigation.

137. While there is no evidence of any discrepancy between the clocks on the video cameras and the gas pump at the Petro Station, I do not find it implausible for the recording time on three different devices to be inconsistent with each other, even if only by a small margin. That said, even without the precise timing of the transactions, there remain serious concerns as to the events at the Petro Station on June 6, certainly with respect to what was caught on video.

138. What is clear is that Subeet testified that he forgot his Motion Fuel Card and Mr. Singh is seen pumping fuel into a Motion truck and then swiping a fuel card.

139. All of the evidence presented on behalf of Rana in respect of this issue is problematic, not least of which is because it has evolved in significant ways, numerous times following delivery of other evidence. While I can make no determination on the record before me in respect of the Petro Station events, there remain serious concerns as to whether ASR funds were used to purchase fuel for a Motion truck on June 6, 2020.

140. The timing and amount of ASR payments would also be readily apparent by inspection of the ASR records, which were not produced by Rana.

E. BORDER BOUND AND OTHER TRUCKING YARDS

141. Paul's concern is that prior to May 2018, ASR paid very little to Border Bound. The record shows that payments prior to May 2018 from ASR to Border Bound were less than $250 a month. There was a sudden increase in fees, up to $2,260 per month, coinciding with the incorporation of Motion, which raises the concern that ASR is making payments on Motion's behalf. In addition, Mr. Colbourn photographed Rana with Subeet at Border Bound on or around June 8, 2020, purportedly test driving a tractor unit owned by another company. The concern is whether Rana and Subeet were acting for the benefit of Motion or ASR.

142. Rana denies attending at the office of Motion, which he says is in fact coincidentally located at the same trucking yard, Border Bound, that ASR uses. Rana states that Border Bound is a freight broker that provides transportation services itself, arranges for transportation through a number of other trucking companies, such as ASR, and leases the use of its storage yard to a number of companies, including ASR and Motion.

143. According to Rana, ASR has paid rent to Border Bound since 2018, without a written contract. Rana states that this is not unusual and is reflected in the financial records regularly provided to Paul.

144. In response to Paul's concerns that the amounts paid by ASR to Bonder Bound increased inexplicably around May/June 2018, when Motion was incorporated, Rana did not provide any satisfactory response. He referred to payments being recorded under different names (Border Bound Inc versus Border Bound Warehousing), but did not explain or provide corroborating documents explaining how or why that related to the sudden increase in monthly payments.

145. Mr. Dhindsa's evidence concerning Motion's use of Border Bound was that Motion negotiated rent at Border Bound commencing around the onset of the COVID-19

pandemic in March 2020 for approximately $1,000 per month. It is unclear from Mr. Dhindsa if Motion was using Border Bound, or any other trucking yard, prior to March 2020.

146. Mr. Dhindsa explained that Motion has been unable to pay invoices for use of Border Bound due to cash flow issues as a result of the pandemic. Mr. Dhindsa's affidavit included no documents, and it is reasonable to expect that he would have some record of communication with Border Bound, if not at least some record of fees charged, or payments made.

147. Rana states that Mr. Colbourn's observation of him, Subeet and various drivers at Border Bound does not indicate any link between ASR and Motion, both of which use the yard. According to Rana, Paul knows that multiple trucking companies pay for the use of storage yards, and he should have disclosed as much.

148. In respect of the incident on June 8, 2020, where Rana and Subeet were observed together at Border Bound, Rana and Subeet's evidence is consistent. They acknowledge that they were at Border Bound together and state that Rana on behalf of ASR was test-driving a truck owned by another tenant of Border Bound, and Subeet was only there as his son, not in his capacity as representative of Motion.

149. The coincidences between ASR and Motion are numerous. Again, I find it suspicious that ASR and Motion, which are run by father and son respectively, just happened to rent from the same trucking yard. This suspicion is compounded by the uncontroverted fact that at the time Motion is incorporated, ASR starts paying significantly more in fees to Border Bound, and despite their evidence, neither Subeet nor Mr. Dhindsa delivered any documents demonstrating any commercial relationship between Border Bound and Motion.

150. The evidence of Rana and Subeet is all the more implausible in the context of a father and son who seem to attend to various business-related tasks together, including the coincidental refueling of Subeet's Motion truck and Rana's test-driving new equipment at Border Bound.

F. LENDING/BORROWING EQUIPMENT

151. The Colbourn Report shows that ASR truck #191 was used by Narinder Singh for the benefit of Motion, between April 15 and June 12, 2020 as its trips were not reported as ASR revenue. During this same period, however, the report indicates that ASR was regularly paying Narinder. More is said about this below.

152. According to Rana and Subeet, notwithstanding the latter's limited experience, it is commonplace in the trucking industry for companies to lend trucks to other companies, like Motion, without fees, as this engenders good will that can be relied upon when ASR, for example, needs to borrow equipment from those companies.

153. Rana claims that ASR has lent equipment to Motion on this very basis. Neither Rana nor Subeet presented any detailed account of this aspect of their relationship, nor is there any documentation to corroborate this.

154. Rana's support for his position is merely that this is common practice. He states that the ASR system tracks borrowed equipment as "temporary", and since October 2018 ASR has borrowed and/or lent equipment to Coastal Pacific Express (CPX), and on occasion to Border Bound.

155. Paul's evidence in response is that it is, to the contrary, not common practice for any company to loan assets to competitors without documentation and without charging a fee. The only exception, according to Paul is where assets are exchanged with other trucking companies who are customers of ASR, in the process of completing a route as part of its service in exchange for a fee.

156. To the extent that Rana presented evidence of this practice with companies other than Motion, Paul contends that these examples fit squarely within his understanding as he described.

157. In respect of the specific assets in question, Rana states that he has not been able to verify the two trucks and/or four trailers that the Colbourn Report asserts were seen attached to

Motion trucks or trailers, but he submits that this would not be out of the ordinary, especially given the downturn in work experienced by ASR. Moreover, he acknowledges that ASR truck #191 was used by an ASR driver, Narinder Singh, while he was temporarily working for Motion. More is said about this, below.

158. Rana denies that ASR truck #224 was ever lent to Motion, and according to Rana another trailer, R53001, identified in the Colbourn Report as being having been repainted and labelled by Motion in June, had been sold to a reseller, Next Truck, in March 2020.

159. Mr. Dhindsa's only evidence was that in May 2020, at the time of Motion's purported cash-flow shortage, Motion purchased an ASR trailer for an undisclosed amount from a re-seller, Next Truck. That it had been an ASR trailer was said to be unknown to Mr. Dhindsa. The evidence from Rana demonstrates that the trailer was sold to Next Truck for $15,500. There is no evidence documenting the transaction, let alone any evidence demonstrating from where Motion would have had the funds to purchase such expensive equipment.

G. ASR TRUCK 214 AND MOTION TRUCK 1007

160. According to the Colbourn Report, the license plate for ASR truck #214 was photographed on Motion truck 1007. This would indicate yet another inappropriate connection between Motion and ASR. Rana cannot explain how this came to be, but states that the license plate expired in February 2020 and has not been renewed because ASR truck #214 is not in working condition. The truck was towed on April 3, 2020 to a yard in Brampton and has not left the yard since.

161. Employees of the yard in Brampton sent pictures of ASR truck #214 to Rana on July 30, 2020, which show the truck with the correct front licence plate, but no rear licence plate.

162. Rana does not know how a Motion truck was photographed with the same licence plate.

163. I can make no determination in respect of the import, if any, of the misplaced license plate, and therefore I exclude this from my determination herein.

H. DRIVERS AS INDEPENDENT CONTRACTORS

164. Paul relies on Mr. Colbourn's report for his evidence that the following drivers who historically worked for ASR, have done work for Motion:

    a. Brandon Goncalvez;

    b. Nicolas Peet, and

    c. Narinder Singh.

165. Paul also states that Mr. Singh was seen with a Motion truck at Border Bound.

166. According to Rana, drivers regularly work for multiple companies in the trucking industry. He states that Paul knows drivers are usually independent contractors. There is therefore nothing unusual about drivers working both for ASR and Motion.

167. Rana relies on the evidence of Mr. Peet and Mr. Singh as two drivers who worked for both ASR and Motion.

168. According to Mr. Peet, he used to do long-haul drives to the United States on behalf of ASR, but following a health problem in 2018, was unable to continue that route. ASR tried to accommodate him by offering him work between Toronto and Montreal, but he preferred long-haul routes. Mr. Peet's evidence is that he started working for Motion in January 2020, prior to the Covid-19 pandemic, after what he considered to be a decline in work at ASR in the last half of 2019. Mr. Peet states that he heard of Motion through the grapevine but concedes that he was aware that Subeet is Rana's son, and also the dispatcher at Motion.

169. Mr. Peet testified that as a driver for Motion he used an ASR truck for a few weeks in March 2020 after his Motion truck broke down. Mr. Peet is unaware who made the arrangements to borrow the ASR truck, or what were the terms of that arrangement. No details or documentation related to the terms of any arrangement between Motion and ASR were provided by Rana, Subeet, or Mr. Dhindsa.

170. Due to his visa conditions, Mr. Narinder Singh is purportedly an exception to the standard of drivers being independent contractors; he was hired by ASR as an employee. After the pandemic took effect, and the Ford lanes were shut down, ASR had little work for its drivers, and according to Rana, Narinder, among others, sought out temporary work.

171. There is no dispute that Narinder worked for Motion, like Mr. Peet. It is unclear if there were any others.

172. According to Narinder, he started working for Motion in 2020 after he was told by Rana that ASR had no work for him due to the impacts of the COVID-19 pandemic. His evidence is that he went to work for Motion after he had a conversation with Subeet who advised him that Motion had work for him to do.

173. Narinder allegedly worked for Motion starting April 1, 2020 and returned to full-time work with ASR by June 22, 2020.

174. Rana stated in cross-examination that he learned of Narinder working with Motion through Subeet, but he does not remember when. According to Rana, Narinder never spoke to him about the decision to seek out a job with Motion.

175. Inconsistent with Rana's evidence, Subeet testified that he did not speak to Rana about Narinder working for Motion.

176. Again, I find it implausible that Subeet, who had only worked in the trucking industry for less than six months at that point in time, and is by all accounts running the operations of Motion, would not speak to his father when one of his father's employees sought Subeet out for additional work.

177. Rana and Subeet agree that Narinder continued to be paid by ASR while working for Motion. According to Narinder, he requested to stay on ASR's payroll while working for Motion because he believed that if removed, it would create concerns for his work visa. Rana agreed and ASR paid Narinder what Rana describes as salary advances.

178. These purported advances to Narinder were not classified in ASR's QuickBooks as advances. Moreover, aside from Narinder and Subeet's oral evidence that Narinder also received payment from Motion during this period, there was no corroborating documentary evidence, from Narinder, Subeet or Mr. Dhindsa, that Motion, in fact, paid Narinder for his work.

179. Similarly, neither Rana nor Narinder were able to provide evidence of the terms of the agreement to advance payment to Narinder from ASR when it was purportedly made in April 2020.

180. Rana relies on a loan agreement said to be entered into with Narinder and dated months later on June 20, 2020.

181. Notwithstanding the fact that it was signed after Narinder purportedly received the advances, around the same time Narinder returned to work full-time for ASR, the loan agreement refers to amounts "*to be* loaned," and requires Narinder to repay the loaned amounts.

182. There was no documentary evidence of Narinder having repaid any money to ASR.

183. Due to the immigration concerns, Narinder states that he also requested to continue to use ASR trucks and trailers while working for Motion, which ASR agreed to. According to Narinder, both companies spoke with each other and arranged for Narinder to continue using ASR trucks.

184. Again, it is unclear who from each company came to this arrangement and there was no documentary evidence corroborating this arrangement or setting out its terms delivered by Rana, Subeet, Mr. Dhindsa, or Narinder.

185. In addition to the concerns raised by ASR lending its equipment to Motion without compensation and the suspicion that ASR drivers were providing service to Motion while being compensated by ASR, Paul states that ASR drivers being diverted to Motion is at odds with Rana's refusals, since 2019, to allow ASR drivers to assist ProEx. For

example, Paul notes that in the Spring of 2020 when Paul was concerned about having a driver shortage in anticipation of the Ford lanes reopening. Rana repeatedly advised that ASR did not have the drivers to spare, despite Narinder and Mr. Peet, both ASR drivers, doing work for Motion around the same period.

186. Without derogating from the very real concerns I have about the relationship between ASR and Motion, particularly the use of ASR drivers and equipment by Motion, in exchange for questionable, if any, compensation, I accept Rana's evidence that in anticipation of a return to work after the initial shut-down following the COVID-19 pandemic he was not able to ensure that ASR could provide drivers to ProEx, as he had no idea how many drivers would return to work and how much work ASR would have.

187. Having considered the most relevant portions of the extensive evidence, I turn to the position of the parties.

VI. POSITION OF THE PARTIES

A. RANA

1. *Jurisdiction to issue the ex parte Award and Order and appoint an Inspector*

188. According to Rana, I had no jurisdiction to grant any relief *ex parte* because the arbitration agreement between the parties, as set out in the October Minutes, does not expressly provide for *ex parte* jurisdiction (see *Farah v Sauvageau Holdings Inc*, 2011 ONSC 1819 at paragraph 76).

189. Without such express authority, Rana asserts that *ex parte* proceedings violate sections 19, 26(2), 26(3), and 26(4) of the Arbitration Act.

190. In addition, Rana contends that there is no jurisdiction for an arbitrator to grant relief pursuant to section 161 of the OBCA. Rana refers to the language in section 161, and specifically the reference to "the court," which he notes is defined in section 1(1) of the OBCA to mean the Superior Court of Justice.

191. The court must have exclusive jurisdiction to appoint inspectors under the OBCA, according to Rana, because an inspector is a court officer exercising statutory powers, has authority to impact third parties, and is subject to the supervisory jurisdiction of the court. It is nonsensical that the legislature would have created a type of statutory remedy such that a private arbitrator with limited jurisdiction could appoint an inspector with broader jurisdiction.

192. Rana refers me to the following jurisprudence he says supports his position and which he contends ought to have been put forward by Paul when seeking the *ex parte* Order in accordance with the latter's obligation of full and frank disclosure:

    a. *Pandora Select Partners, LP v Strategy Real Estate Investments Ltd*, 2007 CanLII 8026 ("*Pandora*"), wherein Justice Lax refused to stay an application in the Superior Court seeking appointment of an inspector under the OBCA on the basis that the Superior Court was the forum of choice in the legislation.

    b. *Armstrong v Northern Eyes Inc*, 2000 CanLII 29047 ("*Armstrong*"), wherein the Divisional Court upheld the decision of an arbitrator that he did not have jurisdiction to grant an oppression remedy pursuant to section 248 of the OBCA because it is a statutory, not equitable remedy.

    c. *ABOP LLC v Qtrade Canada Inc*, 2007 BCCA 290 ("*ABOP*") and *Elton v 10 Start Events Inc*, 2018 BCSC 1974 ("*Elton*"), in which, according to Rana, the British Columbia courts specifically held that arbitrators did not have jurisdiction to issue relief in the nature of a statutorily provided oppression remedy and the appointment of an inspector.

193. Rana further disagrees that the power to order the inspection of property and documents in section 18 of the Arbitration Act is applicable. Rana submits that this power can only be exercised where the property or documents in question are the subject of an arbitration, and here Paul has not commenced any proceeding for an oppression remedy, breach of the October Minutes, or anything else.

194. Finally, Rana does not concede that Paul is in fact a 50% owner of the RGC Group, but only that the October Minutes provide him with a right to a 50% share of the proceeds of the sale of the relevant businesses.

2. Paul's failure to make Full and Frank Disclosure

195. According to Rana, even if there is jurisdiction for an arbitrator to make an *ex parte* award pursuant to section 161 of the OBCA, there is sufficient ground to set aside the *ex parte* Order on the basis that Paul failed to meet the high obligations of candour and disclosure of relevant legal and factual issues known to him that favour Rana (see *Boal v International Capital Management Inc*, 2018 ONSC 2275 a paragraph 59).

196. Given the injustice of granting an *ex parte* order on the basis of deficient or misleading information, Rana argues that the following material misrepresentation and material non-disclosure is sufficient to set aside an order made without notice, even if the non-disclosure was unintentional (see *United States of America v Friedland*, [1996] OJ No 4399 at paragraph 28 and *Mosregion Investments Corp v Ukraine International Airlines*, 2009 CarswellOnt 1899 at paragraph 14, aff'd 2010 ONCA 715).

197. First, as indicated above, Rana asserts that Paul failed to present the clear binding precedent that arbitrators do not have the jurisdiction to grant OBCA remedies (see *Natale v Testa*, 2018 ONSC 4541 at paragraph 16).

198. Second, Rana highlights the following non-disclosure within the motion record delivered in support of Paul's *ex parte* motion:

a. Non-disclosure of well-known practices and trends in the trucking industry, including that:

A. Storage yards are used by a number of trucking companies, and specifically that the Border Bound yard identified in Paul's motion record, are used by numerous companies, not just ASR and Motion suggesting some inappropriate link;

B. The buying and selling of equipment is in the ordinary course of business, even through resellers, such that the fact that Motion purchased equipment through resellers that happened to come from ASR does not imply a link between the companies;

C. Drivers are generally independent contractors who work for multiple companies, so it is not unusual for ASR drivers, when its workload reduced, to supplement their work by driving for Motion;

D. It is common for companies to borrow and lend trucks to another to generate goodwill between companies, which explains why Motion used ASR equipment; and

E. The trucking industry more broadly has experienced declining revenue in recent years due to reduced freight volume and load prices, which explains why ASR, like other companies including Paul's ProEx experienced comparable declines in revenue.

199. According to Rana, Paul also failed to make the following disclosure:

a. Paul failed to disclose ASR records that provide an explanation for his allegation that there is some inappropriate link between ASR and Motion. For example, Paul failed to disclose QuickBooks entries that demonstrate that ASR received value for the sale of equipment to third parties, which Paul suggested in his *ex parte* motion record were surreptitiously transferred to Motion.

b. Paul failed to disclose the ASR driver, Mr. Singh, who was at the Petro Station refueling ASR equipment on June 6, 2020 when the ASR fuel card was used.

c. Similarly, the private investigator failed to identify that the timing of the transactions at the Petro Station as reflected on the receipts were inconsistent with the video footage presented.

d. Paul failed to disclose his unlawful authorization of the private investigator to enter ASR trucks, constituting trespass contrary to the Code of Conduct established under the *Private Security and Investigative Services Act, 2005*, SO 2005, c 34. According to Rana, Paul is not an owner with authority to enter or authorize entry into ASR vehicles. The brothers do not operate the businesses together, and Rana notes that Paul is subject to an injunction issued by Justice Wilton-Siegel preventing him from attending at the business of ASR. Rana further notes that the private investigator himself was alive to these concerns, and refers me to an internal e-mail with the private investigator and his staff. According to Rana, it was incumbent on Paul to disclose this impropriety, absent which he has unclean hands.

200. In addition to the above non-disclosure, Rana asserts that where material facts were included in the Colbourn Report, they were not properly explained in Paul's affidavit, but rather buried as exhibits in the motion record inconsistent with the obligation of full and frank disclosure (see *830356 Ontario Inc v 156170 Canada Ltd*, 1995 CarswellOnt 4360 at paragraph 23).

201. For example, Rana asserts that:

a. Paul fails to identify that the vehicles acquired from ASR by Motion were acquired through third party resellers as noted by the private investigator;

b. Paul does not disclose that an ASR employee was at the Petro Station refueling ASR equipment at the time he alleges an ASR fuel card was improperly used to refuel a Motion truck;

c. Paul's affidavit fails to acknowledge that there is no evidence of Rana operating Motion or receiving any benefit therefrom; and

d. Paul's affidavit does not identify that the ASR trailer repainted and labelled by Motion was purchased by Motion through a reseller a month prior.

202. Rana acknowledges that there is discretion to maintain an *ex parte* order even where non-disclosure exists, but states that such an exercise of discretion is not warranted here.

203. Moreover, according to Rana, he does not bear the burden in the present motion, rather, the burden is on Paul to establish that there are grounds to permanently continue the *ex parte* Order.

204. Rana argues that Paul has not met his burden and that there are grounds to set aside the *ex parte* Order, given that Paul swore evidence highlighting an interpretation of the evidence that supports his case, but omitted to disclose in his affidavit the evidence unhelpful to his case that was either buried in the record, or in some cases not included at all.

3. There are no grounds for an Inspector

205. Rana asserts that Paul has not satisfied the test for the appointment of an inspector.

206. First, he is not a shareholder or security holder of ASR, and Rana highlights that, to date, Paul has refused to reclassify the share structure to reflect his interest.

207. Most importantly, however, Rana argues that he has provided a full explanation for the allegations of oppression raised by Paul in his motion. In particular Rana submits that:

a. There is no evidence that the sales of equipment that ended up with Motion did not benefit ASR. In fact, these were transactions in the ordinary course of business and recorded in the ASR books;

b. Paul admitted in response to Rana's evidence that ProEx also loaned trucks and trailers to other companies;

c. The evidence is that Rana's son, Subeet was not operating Motion on behalf of ASR but in fact was hired by Motion on a part-time basis;

d. In respect of Paul's complaint concerning Rana's unwillingness to share ASR drivers, the evidence is that Rana simply cannot compel drivers to work for

ProEx which does city work, if those drivers would prefer or otherwise be given long haul routes. Rana refers to the evidence of Mr. Peet, who confirmed that he worked with Motion because Motion had long haul routes to the Maritimes that ASR could not compete with; and

e. Paul had regularly received significant disclosure and instead of responding to counsel's request for details about any concerns, Paul sought *ex parte* relief pursuant to the OBCA.

208. Rana relies on the decision in *Khavari v Mizrahi*, 2016 ONSC 4934, for the proposition that at the very least there are credibility issues between the parties such that no inspector ought to be appointed.

4. There is no Basis for Injunctive Relief

209. Rana relies on the same arguments articulated above in respect of my jurisdiction to grant relief *ex parte* to argue that the injunctive relief should not be continued. He also asserts that Paul's failure to provide full and frank disclosure is equally fatal to his request for injunctive relief.

210. Additionally, Rana submits that Paul's request for ongoing injunctive relief should be denied, or not continued as there is no claim being advanced, and Rana argues that an injunction is meant to preserve records, but there is no evidence of any records being at risk of destruction. Rana testified that he does not personally maintain the books and records of ASR, and highlights that the accountant responsible also works with Paul.

211. In respect of the allegation that the books were altered after the injunction was issued in the *ex parte* Order, and in violation of its terms, Rana says that he did not direct anyone to make changes to the books, but rather that in response to some of Paul's concerns, the accountant added additional detail, but did not change any existing information, in respect of the sale of assets.

B. PAUL

212. Paul highlights the long history of a lack of cooperation between the brothers, and notes that despite all of the submissions made, Rana has not been able to advance any evidence of prejudice should an inspector be appointed to provide Paul with the information he is entitled to receive under the October Minutes.

213. In respect of the particular issues outlined above, Paul makes the following submissions.

1. ***Jurisdiction to issue the ex parte Award and Order***

214. According to Paul, I have the jurisdiction to issue an *ex parte* Order and Award because, among other things, I have all the powers of equity pursuant to section 31 of the Arbitration Act. Paul asserts that Rana has not provided any authority where circumstances support an injunction on an *ex parte* basis, but the arbitrator was somehow limited in awarding such an injunction.

215. The fact that the OBCA provides a statutory remedy before the courts is also not determinative of an arbitrator's jurisdiction, according to Paul.

216. Paul submits that the same arguments advanced by Rana were rejected by the court in *The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v Canada Hearing Society*, 2018 ONSC 5445 ("*The Campaign*") at paragraph 58-59.

217. Paul argues that even the authorities put forward by Rana support a finding of jurisdiction for an arbitrator to award remedies under the OBCA (see *Armstrong v Northern Eyes Inc*, 2000 CarswellOnt 1513 (On Div Ct) ("*Armstrong*"); *Butt v Express Plus Inc*, 2004 CarswellOnt 471 at paragraph 33(ONSC); and *Blind Spot Holdings Ltd v Decast Holdings Inc*, 2014 ONSC 1760 ("*Blind Spot*") at paragraph 28 .

218. Similarly, Paul submits that Rana's reliance on *Pandora* is misplaced. Rana asserts that this case supports his position that the Superior Court is the proper forum for the appointment of an inspector pursuant to the OBCA. Paul, however, highlights that Justice Lax acknowledges that an arbitration clause can be drafted to confer jurisdiction

under the OBCA, but that the clause at issue in her decision "captures disputes about the investment transaction [in that case] and not about statutory remedies."[2]

219. Paul asserts, therefore, that he did not fail to put forward binding precedent, and where Rana has found cases from British Columbia to support his position concerning jurisdiction, these are not representative of the law in Ontario.

220. Paul disputes that an underlying claim is necessary for any of the relief sought in his *ex parte* motion. He highlights the number of times the parties have appeared before me for urgent relief to resolve disputes arising out of the implementation of the October Minutes or the UB Minutes. This includes when the parties sought injunction-like relief in respect of their India Property in January 2020.

221. While the inspector may be a court officer, Paul notes that this does not derogate from my jurisdiction, as the same could be said about a manager/receiver, which the parties clearly agree I have the jurisdiction to appoint as set out in the Consent Award dated December 5, 2018.

222. Finally, Paul asserts that:

    a. I have the equitable jurisdiction to appoint a receiver with broad investigatory powers under section 101 of the *Courts of Justice Act;*

    b. The power to appoint an inspector is consistent with the powers afforded to me under section 18 of the Arbitration Act; and

    c. Any concerns that the inspector is not a party to the arbitration are inconsequential because the inspector would have to agree to the appointment, making him a party to the process.

[2] See paragraph 17.

2. Paul met his Obligations of Full and Frank Disclosure

223. Paul acknowledges that he had an obligation to make full and frank disclosure on the *ex parte* motion but disagrees with Rana's articulation of that obligation.

224. Paul relies on *Two-Tyme Recycling Inc v Woods*, 2009 CarswellOnt 7181, and asserts that the standard for disclosure is not one of perfection. Non-disclosure may result in a dissolution of the Order, but only where it would have had an impact on the original order being made. Moreover, even on a finding of material non-disclosure, there is residual discretion to maintain the *ex parte* Order. Paul notes that the purpose of the rule is to deprive the plaintiff of an advantage improperly obtained and where this principle does not apply, the rule ought not to be strictly enforced.

225. Paul asserts that none of the following evidence has been challenged, and therefore on its own justifies the *ex parte* Order:

a. Rana's failure to provide him with drafts of ASR's financial statements prior to filing;

b. Rana's failure to provide Paul with access to the information portals described at paragraph 5 of the UB Minutes;

c. Rana's failure, in accordance with paragraph 6 of the UB Minutes, to provide Paul together with the financial disclosure set out in the October Minutes, reports/documentation sufficient to enable Paul to monitor the petty cash;

d. Rana's provision of monthly bank statements that are missing pages;

e. Paul's evidence that ASR's decline in revenue exceeds that of ProEx and the general industry decline; and

f. Rana's failure to explain increased fees to Border Bound following the incorporation of Motion.

226. Even if Rana's concerns regarding non-disclosure are legitimate, Paul asserts that they would not impact the result.

227. Moreover, Paul notes that there is an informational imbalance between him and Rana such that Paul cannot be expected to have had the evidence Rana is now presenting for the first time (see *East Guardian SPC v Mazur*, 2014 ONSC 6403).

228. Paul further requests that an adverse inference be drawn against Rana, as much of the evidence he has advanced is unsupported by corroborating documents that should be available to him (see *1413910 Ontario Inc v Select Restaurant Plaza Corp*, 2006 CarswellOnt 8579 at paragraph 59).

229. In response to the specific allegations of non-disclosure, Paul submits as follows:

    a. In respect of the binding legal authorities, as articulated above, the relevant authorities were disclosed and the law in Ontario is such that I do have jurisdiction to award statutory remedies pursuant to the OBCA;

    b. In respect of well-known practices and trends in the trucking industry:

        A. Paul does not dispute that multiple trucking companies may rent space from the same yards, but states that the concern is that suddenly in May 2018, at the same time that Motion was incorporated, ASR started paying more in monthly fees to Border Bound leading to suspicion that ASR was paying Motion's fees for use of the yard. Paul asserts that Rana has still not addressed this concern.

        B. In respect of the sale of assets, Paul underscores that he advised the arbitrator that some assets were sold "indirectly" and therefore did not fail to disclose the role of resellers. On the other hand, Paul submits that Rana's evidence that he was unaware that the assets were sold to Motion is not believable. This is particularly so given that Rana's son is managing the operations of Motion, two assets were transferred

directly from ASR to Motion, and six of the assets were transferred to Motion on the same day that they were sold by ASR.

C. In respect of ASR drivers working for Motion, Paul notes that he cannot be faulted for not-disclosing ASR's reduced needs for drivers because Rana had consistently represented to him that ASR had a driver shortage.

D. Moreover, Paul submits that expecting him to disclose that drivers are typically independent contractors is inconsistent with Rana refusing to allow him to contact "ASR drivers."

E. Paul denies that it is a well-known practice to lend assets to competitors (particularly where the competitor is not also a customer of ASR) without documentation and without charging a fee.

F. In respect of the declining revenue, Paul asserts that ASR's financials reveal declines in excess of the general trends in the industry. Rana has not provided any credible explanation for this. Nor does Rana, according to Paul, answer how ASR was spending more on maintenance and repairs at a time when operational revenues were declining. In response to Rana's suggestion that Paul failed to disclose ProEx's own revenue decline, Paul submits that ProEx's revenue decline is largely due to the decision in 2017 to move its business to ASR, and in any event, ProEx experienced a much less significant decline in its revenues than ASR has since 2018. According to Paul, Rana had no response to this evidence.

c. In response to the allegation that Paul failed to disclose accounting records evidencing the sale of equipment by ASR, Paul notes that the records now relied upon by Rana are different than those provided to Paul, and more importantly, these entries according to Paul are buried in thousands of line entries, often misclassified or incomplete.

d. In response to the concern that Paul failed to disclose Mr. Singh's presence at the Petro Station, Paul submits that the full evidence concerning this incident only amplifies his concern. Mr. Singh's evidence morphed from having no involvement in refueling the Motion truck to, once the video of the transaction was disclosed, having some involvement that remains unclear in the evidence.

e. Paul disagrees that he is not an equal owner with equal authority to authorize entry into ASR trucks and therefore disagrees that he failed to disclose material facts in not revealing that he authorized the private investigator to enter ASR trucks.

f. In response to the critique that Paul failed to explain why Mr. Dhindsa did not attend at Motion's office, Paul asserts that he could not be expected to have knowledge of the reasons Mr. Dhindsa was not ever seen at Border Bound. Most importantly, however, Paul notes that Mr. Dhindsa's evidence is that he retired in August 2017 and he could not explain the company's financial situation, including why it purportedly could not pay fees to Border Bound at a time when it was paying for ASR equipment. Paul also notes that Mr. Dhindsa had no documents to corroborate his evidence.

230. In response to the allegation that Paul purposely left the arbitrator with an impression of the evidence that favoured Paul while failing to disclose evidence hidden in the Colbourn Report, Paul argues:

a. He clearly asserts in his affidavit that ASR transferred equipment both directly and indirectly, but the problem remains that somehow Motion ended up with 13 pieces of ASR equipment without notice to Paul or without any clearly identifiable notes in the books and records;

b. He did not fail to disclose that his suspicion that Rana and/or his son were operating Motion was based solely on photographs of the two of them in the presence of Motion vehicles, because the private investigator confirmed that

Rana's son is operating Motion, and Rana's connections, according to Paul remain inherently suspect; and

c. It was not misleading for Paul to give evidence concerning the ASR trailer that was re-painted and labelled to become a Motion trailer. If Rana is suggesting that Paul's lack of explanation for this is misleading, it was open to him to lead evidence that the trailer always had a Motion logo, but he did not.

231. In respect of the evidence related to the movement of a single license plate from a non-operational ASR truck in Brampton onto an un-plated Motion truck in Milton, Paul asserts that he has no explanation, as he has been shut out of ASR's operations, and that the lack of explanation raises the index of suspicion necessary to justify the appointment of an inspector. In any event, Paul submits that the Order appointing an inspector is justified on the balance of the evidence.

3. There are Sufficient Grounds for the Appointment of an Inspector

232. Paul submits that, notwithstanding the evidence led by Rana, there are sufficient grounds for the appointment of the inspector. Specifically, he relies on the following in the evidentiary record:

a. Rana does not dispute that Paul does not have direct access to ASR's books and records and is unable to oversee the preparation of its financial information;

b. Rana does not dispute that in almost two years, he has not prepared the requisite financial statements to advance the sale of the Trucking Business;

c. Rana does not dispute that the parties agreed to exchange draft financial statements prior to their finalization, and that Rana did not provide Paul with any drafts for ASR's 2017 or 2018 financial statements, while Paul provided Rana with drafts for ProEx's 2017 financial statements;

d. Rana does not dispute that Paul still does not have access to the information portals set out at paragraph 5 of the UB Minutes which would enable him to

monitor ASR, contrary to the parties' good faith obligations under the October Minutes;

e. Rana does not deny that he has failed to provide Paul with sufficient information to monitor the petty cash, contrary to the UB Minutes;

f. Rana does not deny that certain bank statements provided to Paul as part of the monthly disclosure package were missing pages;

g. Rana does not dispute Paul's responding evidence concerning ASR's steeper decline in revenue in comparison to ProEx and the trucking industry in general;

h. There is no document demonstrating any legitimate relationship between ASR and Motion;

i. Rana's son presented himself as a part-time employee of Motion who was to be paid a lump sum at the end of his service, but he presented no documents in this regard and continued to draw a salary from ASR during this period;

j. Rana could not reconcile any of the conflicting QuickBooks records which demonstrated that ASR paid a driver, Mr. Narinder Singh, while the latter was working for Motion. Rana suggests that these payments were an advance to assist Narinder maintain his work visa but the payments are not characterized as an advance in QuickBooks and there is no corroborating documentary evidence confirming whether Narinder was also paid by Motion during this time; and

k. Rana could not properly explain the incident at the Petro Station with his son, and Mr. Singh.

4. Injunctive Relief

233. Paul submits that the appropriate legal test was initially applied in granting injunctive relief, and objects to Rana's bald assertion that there is no evidence of irreparable harm and no evidence that Rana would alter the records of ASR.

234. Rather, Paul asserts that Rana has admitted in his affidavit that his staff did amend the books and records of ASR, which Paul submits is a clear violation of the injunction and sufficient to warrant its continuation until the inspector is done the inspection.

VII. ANALYSIS

A. JURISDICTION TO ISSUE AN EX PARTE AWARD PURSUANT TO OBCA

235. It is trite law that my jurisdiction to grant any relief is determined by the terms of the arbitration clause agreed to by the parties.

236. Paragraph 22 of the October Minutes provide as follows:

> 22. Paul and Rana each agree that any dispute arising in respect of the completion or implementation of these Minutes of Settlement, then Paul and Rana agree to appoint an arbitrator from among the resident or member arbitrators associated with Arbitration Place in Toronto or alternatively any other person who is a retired judge of the Ontario Superior Court of Justice or Ontario Court of Appeal (the "Arbitrator") to determine any such dispute acting as arbitrator pursuant to the provisions of the Arbitration Act, 1991, S.O. 1991, c. 17 and any such determinations shall be made on a summary basis and be final and binding on the Parties and shall not be subject to appeal.
>
> (My emphasis.)

237. The parties evidenced their agreement to confer upon me as the appointed arbitrator, final and binding jurisdiction of "any dispute" arising in respect of the completion or implementation of the October Minutes. Since 2018 the parties have attorned to the exercise of that jurisdiction on several occasions, including for relief in the nature of injunctive relief, whether or not any underlying claim had been commenced. For example, the first motion brought by Paul in November 2018, without any underlying claim, sought to compel Rana to use RGC Group funds to finance ProEx's cash flow shortage. Similarly, in January 2020, the parties agreed to have me adjudicate, on an urgent basis, an access issue in respect of real property in India.

1. ***Authority to Grant Ex Parte Relief***

238. In light of my conclusion above at paragraphs 47-53 concerning my jurisdiction to hear Rana's motion to review the *ex parte* Award, both parties have now had an opportunity to make submissions regarding the appointment of an inspector as contemplated in the *ex parte* Award. Therefore, any concerns of a denial of natural justice which discourages *ex parte* proceedings, have been addressed.

239. No harm nor prejudice has been caused to Rana by Paul having proceeded on an *ex parte* basis as Rana has now been afforded a full opportunity to present his position and be heard.

240. In addition, I similarly conclude that the broad language of the parties' arbitration agreement, together with the historical circumstances of the parties' dispute and the lack of explicit limitations on my authority, is sufficient to authorize the award of *ex parte* relief.

241. Rana argues that there is nothing in the arbitration agreement that allows a party to seek *ex parte* relief, and therefore, absent explicit authority, such relief is contrary to various provisions of the Arbitration Act. He refers me to the decision in *Farah*, above.

242. In *Farah*, the Court states that whether an arbitrator may proceed *ex parte* depends on the agreement of the parties. That case does not require such agreement to be explicit.

243. The Court in that case did find that the arbitrator lacked authority to grant *ex parte* relief, but what was determinative of the issue was not the lack of explicit authority granting *ex parte* jurisdiction as much as the fact that the parties had explicitly agreed through reference to Rules 8 and 11 of the ADR Chambers Arbitration Rules that they were prohibited from communicating *ex parte* with the tribunal, and that they were only allowed interim measures of protection on notice to all other parties (see *Farah* at paragraphs 77-79). In *Farah*, the parties turned their minds to the explicit exclusion of *ex parte* relief. That decision is not helpful to the current analysis.

244. The provisions of the Arbitration Act identified as relevant to my authority to grant *ex parte* relief are as follows:

> **Equality and fairness**
>
> **19** (1) In an arbitration, the parties shall be treated equally and fairly.
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.
>
> **Procedure**
>
> **20** (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.
>
> ….
>
> **Hearings and written proceedings**
>
> ….
>
> **26** (2) The arbitral tribunal shall give the parties sufficient notice of hearings and of meetings of the tribunal for the purpose of inspection of property or documents.

> (3) A party who submits a statement to the arbitral tribunal or supplies the tribunal with any other information shall also communicate it to the other parties.
>
> (4) The arbitral tribunal shall communicate to the parties any expert reports or other documents on which it may rely in making a decision.
>
> ….
>
> **Application of law and equity**
>
> **31** An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

245. In the present case, while there is no explicit grant of authority to issue *ex parte* relief, there are similarly no related limitations on my authority. Rather, the parties agreed that "*any* disputes arising out of the completion or implementation" of the October Minutes would be determined by arbitration on a summary basis in accordance with the Arbitration Act.

246. The parties have previously relied on this broad language to refer to me disputes requiring exceptional relief, and I find that given the lack of specific exclusion or reference to provisions in the Arbitration Act that would impede my ability to award exceptional *ex parte* relief, the parties intended to vest me with the authority, in the appropriate circumstances, to grant *ex parte* relief.

2. Authority to Grant OBCA Remedies

247. I conclude that the Ontario authorities support my arbitral jurisdiction to grant a statutory remedy pursuant to the OBCA.

248. Rana relies on the *Pandora* and *Armstrong* decisions for the proposition that arbitrators cannot grant statutory remedies under the OBCA. The secondary argument he makes is one of privity, namely that as a third party, any inspector is necessarily outside the scope of my authority, which is limited to the parties to the arbitration agreement.

249. Disposing of the second concern first, I note, and Paul concedes, that no inspector will be compelled to investigate ASR, rather the inspector will have to agree. Once the inspector agrees to the appointment, it becomes a party to these proceedings *by agreement* and therefore within the scope of my authority. In any agreement appointing the inspector, the scope of my supervisory authority can be addressed.

250. Where either party seeks relief that involves true strangers to the arbitration, like Motion, the *ex parte* Award and Order make clear, and I am reiterating here, that such relief must be sought before the Superior Court of Justice.

251. In respect of my authority to grant statutory remedies pursuant to the OBCA as between the parties to this arbitration, the weight of the Ontario jurisprudence supports a finding of authority.

252. Sections 161-162 of the OBCA refer explicitly to “the court” defined in section 1 of the OBCA to mean “the Superior Court of Justice.”

253. Section 248, which deals with the oppression remedy also refers explicitly to a complainant applying to “the court” for relief.

254. Notwithstanding this statutory language, as noted by Justice Wilton-Siegel in his 2018 decision in *The Campaign*, above, “the law is now well established that parties can agree to adjudicate oppression claims by way of arbitration…” (paragraph 59). In support of this proposition, Justice Wilton-Siegal refers to the 2014 Superior Court decision in *Blind Spot* which I return to below.

255. In *The Campaign*, similar to the present case, the applicable arbitration agreement does not explicitly refer to statutory remedies as being within the scope of the arbitrator’s

powers. As with the parties' agreement to resolve "any dispute" by arbitration in the present case, in *The Campaign*, that agreement provided for resolution by arbitration of "a dispute or controversy… arising out of or related to the articles or By-laws, or out of any aspect of the operations of the Society …not resolved in private meetings…" (see paragraph 47).

256. In *Blind Spot*, above, the Superior Court found that where an arbitration clause provided for the arbitration of "dispute[s]… relating to the … implementation of any of the provisions of" the Shareholders' Agreement" even where a party's complaints were "couched in the language of the oppression remedy under *OBCA* s.248" they fell within the scope of the arbitration clause.

257. The present arbitration clause applies to "any dispute arising in respect of the completion or implementation" of the October Minutes, and in my view, consistent with *The Campaign* and *Blind Spot*, is broad enough to encompass the arbitration of statutory remedies provided by the OBCA.

258. Rana relies on *Armstrong*, above, wherein he says the Ontario Divisional Court upheld the arbitrator's decision that he did not have jurisdiction to grant statutory remedies under the OBCA.

259. I note that the *Armstrong* decision was decided in 2000, well over a decade prior to *The Campaign* and *Blind Spot*. Most importantly, however, as the Divisional Court notes in *Armstrong*, neither party took any issue with the decision of the arbitrator that he lacked jurisdiction to grant remedies pursuant to the OBCA (see paragraph 21) – that issue was not in dispute before the Court.

260. Notwithstanding this, the Divisional Court went on to state, prescient of Justice Wilton-Siegal's 2018 determination, that "[i]t is open to shareholders, by agreement, to choose arbitration as the sole means of resolving their disputes and thus, absent extraordinary circumstances as in *Deluce Holdings*, discussed below, to oust the jurisdiction of the court to entertain oppression remedy proceedings under the *OBCA*. …" (see paragraph 22).

261. At paragraph 26 of its decision, the Divisional Court explained that in *Deluce*, referring to *Deluce Holdings Inc v Air Canada* (1992), 12 OR (3s) 131 (Ont Gen Div [Commercial List]), there "was no general "resort to arbitration" clause…" and the Court in *Deluce* found that Air Canada's resort to arbitration in that case was oppressive.

262. In the present case there is a general resort to arbitration clause and there is no argument, let alone evidence, that resort to arbitration for the appointment of an inspector is for any oppressive or vexatious reason, or is an abuse of process. Absent these criteria, there is no reason to interpret the parties' arbitration agreement to exclude statutory remedies pursuant to the OBCA.

263. Hence, I conclude that the *Armstrong* decision from the year 2000 does not support Rana's position on the facts before me in 2020.

264. Similarly, the decision in *Pandora*, is distinguishable. It was rendered in 2007, also prior to *The Campaign* and *Blind Spot*. Moreover, Justice Lax did not conclude, as suggested by Rana, that statutory remedies under the OBCA are the exclusive jurisdiction of the courts. Consistent with *Farah*, she concluded that the arbitration clause could, but did not in that case, contain language that would encompass the determination of statutory obligations and remedies pursuant to the OBCA (see paragraph 20).

265. It is important to note that in *Pandora*, the agreement in question was a subscription agreement that contained "inconsistent mechanisms for the resolution of disputes" (see paragraph 4).

266. On the one hand, it contained a choice of law and forum clause providing state and federal courts in New York with exclusive jurisdiction over the parties' disputes which were also to be governed by New York law.

267. On the other hand, it contained an arbitration clause providing that "any dispute …arising out of, relating to or in connection with the Company [i.e. SREI] or this subscription Agreement or the Subscriber's investment in the Company … shall be resolved

exclusively by arbitration to be conducted in New York, New York, in accordance with the rules of the American Arbitration Association. …" (see paragraph 3).

268. After a dispute arose between the parties related to the purportedly inadequate financial reporting made by the company to its investors, the Applicants, subscribers in the Company, sought an Ontario oppression remedy and the appointment of an inspector pursuant to the OBCA.

269. Justice Lax determined that the arbitration clause was insufficient to oust the Ontario Court's jurisdiction to award remedies under the OBCA, because, *inter alia*, "if the arbitration clause prohibits the Applicants from seeking judicial enforcement of SREI's core obligations [financial disclosure under the OBCA], it is likely the case that there is no forum to which the Applicant can turn to enforce those core obligations, thereby rendering the obligation nugatory."

270. The same concern does not apply in the present case. The arbitration clause in issue is not inconsistent. Additionally, it does not force the parties to apply foreign law in a foreign forum, and there is no concern that in referring the request to arbitration, one party will be deprived of its statutory rights.

271. For the foregoing reasons, therefore, I conclude that I do have the jurisdiction to award statutory remedies, and in particular to appoint an inspector in accordance with sections 161-163 of the OBCA.

272. Rana also referred me to the British Columbia decisions in *ABOP* and *Elton,* above. Given Paul's request for relief pursuant to the OBCA, the British Columbia jurisprudence cannot outweigh the established legal principles arising out of Ontario case law, dealing specifically with the OBCA.

273. For the sake of completeness, however, I note:

    a. These decisions concern the *Canada Business Corporations Act* not the OBCA and the British Columbia *Commercial Arbitration Act* not the Ontario *Arbitration Act.*

b. While there are comments in both decisions that certain statutory rights, such as the finding of oppression and the appointment of a receiver or inspector under the *Canadian Business Corporations Act*, are within the exclusive jurisdiction of the Court, the issue before the Court was whether to stay the proceedings in favour of the parties' arbitration clause, which they did in both cases. The arbitrator's jurisdiction to award those statutory remedies was not the primary issue.

c. At least in *Elton*, above, the British Columbia Supreme Court notes that there is a difference between the jurisprudence in British Columbia and the jurisprudence in Ontario in respect of an arbitrator's jurisdiction to award statutory remedies. Specifically, Justice DeWitt-Van Oosten of the British Columbia Supreme Court cites the *Pandora* and *Blind Spot* decisions referred to above, noting in her opinion, that "[t]he Ontario authorities appear divided on this issue [of arbitrator's jurisdiction to award statutory remedies]" (see paragraphs 81-82 in *Elton*, above).

d. For the reasons already provided, I do not think *Pandora* and *Blind Spot* are necessarily inconsistent – Justice Lax in *Pandora* was appropriately concerned with the arbitration clause effectively denying a party its statutory rights. That is not the issue in *Blind Spot* nor in the present arbitration.

274. Given my conclusion, I do not also need to determine my authority to appoint an investigator pursuant to the *Courts of Justice Act*, which has not been considered as support for my jurisdiction.

B. ADVERSE INFERENCES

275. Before considering other arguments, I need to make a few observations concerning the evidentiary record. Specifically, I note that where a party possesses relevant evidence that it does not produce, an adverse inference may be drawn.

276. In the present case, where Rana baldly disputes an allegation put forward by Paul concerning the operations of ASR, I find it difficult to understand why he did not fortify his objection with corroborating documentary evidence. He is the person with access to all of ASR's books and records, and I find the absence of such evidence, as detailed above, concerning to say the least.

277. Paul is supposed to receive financial disclosure on the 15th of each month in respect of ASR, in exchange for this disclosure, Paul has no independent access to the books and records of ASR.

278. In his initial affidavit, Paul provided evidence concerning the incomplete monthly disclosure made by Rana, to which Rana did not respond. Moreover, Paul swore evidence concerning the ongoing lack of access to various informational portals which were supposed to have been provided to Paul as early as April 2019, and which access was a term of the UB Minutes; none of which was responded to by Rana.

279. The evidence that Rana delivered in response to Paul's concerns raise more questions than answers. As noted above, in a number of cases, where one would expect there to be documentary corroboration, none was provided, and much of Rana's evidence, and the evidence presented in support of his position, lacks an air of reality.

280. For example, Rana has asserted, without meaningful documentary support or any substantiation that one would expect to be available to him as the sole operator of ASR, the cause and source of ASR's revenue decline.

281. Specifically, the evidence relied upon by Rana includes a selection of lane cancellation notices from Ford, a spreadsheet presumably created by ASR staff detailing the decline in revenue from 2018-2019, without supporting documents, and e-mails between a representative of ASR, Mr. Dave Rawn, and a number of ASR customers wherein Mr. Rawn purports to confirm in writing a conversation ostensibly between him and the recipient of the e-mails wherein the ASR customers confirm a decrease in their freight volumes. Neither Mr. Rawn nor the recipients of his e-mails were witnesses on the present motion, and Rana confirmed that Mr. Rawn reached out to these customers in

response to the concerns raised by Paul in his *ex parte* motion record in respect of ASR's declining revenue. Rana admitted that he was not a part of the telephone conversations referenced in the e-mails and he confirmed that he has no knowledge as to what was discussed.

282. The only other documents relied upon by Rana to explain ASR's decline in revenue is a single Business Insider article from 2019 and a spreadsheet, presumably prepared by someone at ASR, comparing the decline in revenues between ASR and ProEx, without supporting documentation.

283. In addition to Rana's failure to adequately respond to the issues raised by Paul particularly given that Rana operates the day-to-day business of ASR, I find that there is an objective informational imbalance between the parties for the same reason. Paul is restrained by the Order of Justice Wilton-Siegel from attending at, or interfering with, the business of ASR. These realities necessarily impact the evidence that Paul can be expected to have delivered in support of his motion. In fact, the purpose of the *ex parte* motion was to appoint an inspector to investigate the day-to-day operations of ASR and provide Paul with the information and oversight the parties agreed to in the October Minutes precisely because Rana has not complied with the terms.

284. Rana and/or his witnesses could have, but chose not to deliver objective evidence in respect of ASR's relationship with Motion, as a result of which I make an adverse inference and presume that the evidence that has not been produced does not support Rana's position. In particular, I make an adverse inference in respect of the following:

    a. The lack of documented or demonstrable terms of Subeet's employment with Motion,

    b. The lack of evidence concerning Subeet's remuneration from Motion, as ASR was said to have stopped paying him sometime after the COVID-19 pandemic in the Spring of 2020,

c. The lack of documentation related to the circumstances of the lending or transfer of equipment between ASR and Motion,

d. The lack of evidence of Motion reimbursing Subeet $150 for fuel said to have been paid by him in cash on June 6, 2020,

e. The lack of evidence concerning reasons for the increased payments by ASR to Border Bound in June 2018,

f. The lack of evidence in respect of Motion paying Narinder Singh,

g. The lack of evidence of any contractual relationship between Border Bound and Motion, and

h. The lack of evidence from the ASR bookkeeper who would have had firsthand knowledge of the matters to which Rana testified.

C. FULL AND FRANK DISCLOSURE

285. The parties are generally in agreement as to the applicable legal principles of disclosure when seeking *ex parte* relief.

286. The moving party "must make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff." See *Friedland*, above, at paragraph 30, citing *Chitel v Rothbart* (1982), 39 OR 2d 513.

287. Full and frank disclosure imposes "high obligations of candour and disclosure" and requires the moving party to present "points of fact or law known to it that favour the other side" (see *Boal*, above, at paragraph 59).

288. It is insufficient to simply attach relevant documentary evidence to the moving party's affidavit, material facts must be revealed or highlighted. Where a party fails to comply with this duty the *ex parte* order may be set aside (see *Friedland* at paragraphs 28-29).

289. In the event of non-disclosure of a material fact, whether to set aside an *ex parte* order is determined on the basis of whether the omitted disclosure might have had an impact on the original order (see *Two Tyme*, above at paragraph 20). What is a material fact is determined objectively, not on the subjective understanding of the moving party (see *Boal*, at paragraph 59).

290. In addition to the above it is important to note that the disclosure duty is not to be applied too rigidly, and "[a] plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed" (see *Friedland* at paragraph 31).

291. Absent a finding of intentional non-disclosure, there remains a residual discretion to decline to set aside an *ex parte* order even where a failure to make full and frank disclosure is found (see *Two-Tyme* at paragraphs 20-21).

292. Rana sets out a long list of what he describes as material non-disclosure. First among them is Paul's failure to disclose binding case law regarding my lack of jurisdiction. Given my conclusion above, I disagree that this constitutes material non-disclosure.

293. In respect of the specific allegations of factual non-disclosure, my original conclusion granting Paul relief has only been fortified upon a close review of the comprehensive responding records filed on this current motion. It is even more clear from the material filed by Rana, and the cross-examinations, that Rana has perpetuated a lack of transparency into the operations of ASR, and a lack of good faith in providing the financial, operational and other relevant information required to secure the sale of the Trucking Business.

294. For example, I note that Rana did not provide any evidence in response to the specific allegations from Paul that:

    a. Paul did not receive draft financial statements for ASR in accordance with the parties' agreement;

b. Rana provided incomplete banking statements as part of his monthly financial disclosure;

c. Rana did not provide the records sufficient to enable Paul to monitor the petty cash as required by the UB Minutes; and

d. Rana still has not provided Paul with full access to the information portals described at paragraph 5 of the UB Minutes.

295. Rana similarly failed to explain why repair and maintenance costs increased for ASR at a time when revenue was in decline. He also did not present any reasonable explanation or documentary record himself, or through his witnesses, to dispel the suspicion of an inappropriate link between ASR and Motion. For example, there were no details provided concerning Subeet's role with Motion, there were no records for the equipment borrowed by Motion from ASR, there were no records confirming whether ASR drivers who worked for Motion were ever paid by Motion, and there was no explanation for the increase in fees paid by ASR at Border Bound shortly after the incorporation of Motion in May 2018.

296. In noting Subeet's involvement with Motion, I have no information in respect of Subeet Carriers Inc, apparently a corporation included in the Respondent's group of companies.

297. Rana had a fulsome opportunity but failed to present evidence to contradict the allegations of Paul. I find that Rana has failed to comply with his disclosure obligations under the October Minutes and reiterated in the UB Minutes.

298. I also reject Rana's criticism of Paul's non-disclosure of aspects of Mr. Colbourn's evidence in the *ex parte* motion record. Many of Rana's allegations are unfounded. For example, contrary to Rana's assertion, Paul did identify that transfers of equipment from ASR to Motion happened both directly and indirectly, i.e. through resellers. Other purported non-disclosures are of little, if any, consequence. For example, Paul did not initially disclose Mr. Singh's presence at the Petro Station on June 6, 2020, but his being there does not assist Rana or undermine Paul's concerns at all. To the contrary, Mr. Singh

and Subeet's evidence in respect of their interaction only begs more questions as to the relationship between ASR and Motion. Furthermore, where Rana states that Paul ought to have disclosed a variety of "industry practices," to explain ASR's allegedly suspicious conduct. It is far from clear that there are in fact industry practices as identified by Rana. Even if there were, however, any purported industry practice does little to address the concerns of Rana's impropriety. I return to this below.

299. I find that the general criticisms raised by Rana are not substantive nor material to my decision. The evidence from the private investigator is not determinative in and of itself of any issue in dispute, but initiated this process within which the brothers have now had an opportunity to address suspicious operations of ASR. It is the parties' responding evidence, which I address herein, that fortify the original *ex parte* Award and Order and that I rely on in reaching my current conclusions.

300. I turn now to the specific allegations of insufficient disclosure.

1. *Well-Known Practices and Trends in the Trucking Industry*

301. Rana provided evidence of what he refers to as well-known practices and trends in the trucking industry, including the sale of assets in the ordinary course of business, the use of trucking yards by numerous trucking companies, the designation of drivers as independent contractors, and the lending and borrowing of equipment to other trucking companies.

302. Aside from Rana's evidence that these are well-known practices, he provided no expert report nor corroborating evidence for his views. However, even if demonstrated to be industry practice on the basis of cogent and admissible evidence, such practices would not establish the particular ASR conduct as being in the ordinary course of business rather than for some collateral and improper purposes.

303. For example, while I may accept that in the ordinary course of business, ASR and other trucking companies engage in the sale or purchase of assets, what is suspicious in the current circumstance is that since the incorporation of Motion in May 2018, ASR just

happened to transfer, directly or indirectly, 13 of its assets to Motion. The concern is amplified because both Rana and Mr. Dhindsa professed to have no knowledge that these assets were exchanged between their two companies, despite being friends for many years and across continents, and despite Mr. Dhindsa's company being operated by Rana's son since November 2019.

304. Similarly, Mr. Dhindsa, who said that he has been retired since August 2017, could not provide a clear answer as to what Motion was doing between May 2018 and December 2019 when it commenced business operations. Despite being the sole owner and director, Mr. Dhindsa could not explain basic aspects of Motion's finances, including how it was able to purchase assets from ASR prior to December 2019 when it first started engaging in revenue generating activity, as well as after the onset of COVID-19 at which time Mr. Dhindsa said Motion did not have sufficient funds to pay its monthly rent to Border Bound. Mr. Dhindsa similarly provided no evidence of how Motion will operate after Subeet resigns, which he has ostensibly done at the end of August, shortly after the hearing of this motion.

305. In respect of the use of the Border Bound Trucking Yard by both Motion and ASR, again, I may accept that trucking yards are typically used by numerous arm's-length trucking companies, but Rana's evidence does not help resolve the suspicion that ASR and Motion may be improperly interconnected. Specifically, according to Rana, ASR has been paying rent to Border Bound since January 1, 2017. Until May 2018, the paid rental amounts set out in the record are small, less than $250. However, in May 2018, coinciding with the time Motion is incorporated, ASR begins paying Border Bound $2,260 per month. Rana does not provide any explanation for that increase. That raises suspicions of whether ASR is paying rent at Border Bound for Motion, which Rana could have, but did not address.

306. Mr. Dhindsa's evidence only further muddies the water. According to Mr. Dhindsa, Motion negotiated rent at Border Bound commencing around the onset of the COVID-19 pandemic in March 2020 for approximately $1,000 per month. However, Mr. Dhindsa advised that Motion has been unable to pay rent due to cash flow issues as a result of the

pandemic. I note that no invoices or communications between Motion and Border Bound were included with Mr. Dhindsa's affidavit.

307. Moreover, Mr. Dhindsa also confirmed that in May 2020, at the time of Motion's purported cash-flow shortage, Motion purchased an ASR trailer for an undisclosed amount from a re-seller, Next Truck, which the evidence from Rana demonstrates was sold to Next Truck for $15,500. Remarkably, according to Mr. Dhindsa, the fact that it was an ASR trailer was unknown to him. In addition to it being implausible, in my view, that Mr. Dhindsa was unaware that the equipment being purchased originated with ASR, there is no evidence from where Motion would have had the funds to purchase such expensive equipment and if Mr. Dhindsa is otherwise to be believed Motion was, at the same time, unable to pay Border Bound. The suggestion that Mr. Dhindsa may have used his personal funds from time to time cannot be accepted as he provided no corroborating evidence.

308. Rana's evidence in respect to the borrowing and lending of equipment between ASR and Motion is similarly unsatisfying. I do not accept Rana's evidence that in the normal course of business, purportedly arms-length competitors such as ASR and Motion would lend each other equipment without any record of a fee for use or sufficient documentation and insurance arrangements. As well, I reject the evidence of Mr. Peet to the extent that he suggested that it is normal practice for competitors to lend each other equipment. He is only a driver and had no knowledge of any Motion and ASR arrangement or the terms thereunder.

309. Rana and Paul both acknowledge that there is a practice of lending or borrowing equipment where a customer is also a trucking company and may require use of a trailer or truck while completing paid work. This seems reasonable and makes commercial sense. However, this is not the situation between ASR and Motion. Despite Rana's opinion to the contrary, based on the evidence before me, including that of Subeet, I find ASR and Motion to be competitors in the trucking industry.

310. I also note that in explaining Mr. Narinder Singh's use of ASR trucks and trailers while working for Motion, the explanation was not that it was common practice in the industry, but that due to exceptional concerns related to Narinder's work visa he thought it prudent to use ASR trucks.

311. The additional evidence in respect of Narinder raises further concerns. The evidence in respect of why ASR continued to pay Narinder while he was working for Motion is less straightforward. According to Rana, Subeet, and Narinder, ASR provided Narinder with "advances" of his pay to keep him on payroll with ASR to avoid issues with his work visa. While there is a promissory note produced wherein Narinder apparently agrees to repay ASR, there is no documentary proof that repayment has been made, and more suspiciously, despite his evidence that he was also paid by Motion, neither Narinder, nor Mr. Dhindsa or Subeet provided records of any payment from Motion to Narinder.

312. I note here that I must reject the evidence of Narinder Singh. He has been beholden to Rana and ASR which are complicit in entering into questionable arrangements for immigration purposes. I find his evidence to be unreliable as a possible accommodation to his employer, Rana and ASR.

313. Mr. Peet also testified that he drove an ASR truck in March 2020 while working for Motion. While he seemed to suggest that this was not uncommon between trucking companies, there is no basis to conclude that this was any more of an industry practice than an unexplained ASR accommodation to benefit Motion, which Subeet confirmed to be a competitor

314. Lastly, while I accept that drivers may tend to be independent contractors within the trucking industry, I do not agree that Paul's failure to highlight that in the *ex parte* motion is material. The issue before me is not the drivers' characterization or ability to work for multiple companies, but whether a particular driver working for both ASR and Motion is something that ought to have been disclosed to Paul as a person contractually entitled to transparency in the business's operations and as a person with a recognized interest in the Trucking Business.

315. I find that the information dealing with the sharing of drivers between ASR and Motion, including payment arrangements and the use of ASR equipment ought to have been but was not disclosed to Paul, particularly given the evidence of ASR's "reluctance" since 2019 to allow any drivers to work for ProEx because it purportedly could not risk losing any of its drivers. I note that ASR's "reluctance" flies in the face of the April 2018 Consent Order of Justice Wilton-Siegel by which the bothers agreed that Rana is restrained from interfering with Paul's ability to access staff employed by or associated with RGC Group for the purpose of carrying out the business of ProEx.

316. For the foregoing reasons, there is insufficient evidence of what Rana contends are well-known industry practices, and even were I to accept Rana's evidence of the existence of industry wide practices, I disagree that the failure to identify such practices in Paul's *ex parte* motion constitutes material non-disclosure by Paul.

2. Remaining Material Non-Disclosure

317. In addition to the above, Rana argues that Paul ought to have disclosed the ASR declining revenue trends as well as ProEx's declining revenues, and that the failure to do so suggested improperly that ASR's decline in revenue must be due to the improper shifting of its business to Motion.

318. Considering Rana's evidence at face value does not impact the *ex parte* Award or Order.

319. Consistent with Rana's own evidence, Paul asserts that the decline in ProEx's revenue between 2017-2018 is due largely to the agreed upon transfer of its business with TST to ASR.

320. Rana provided no response to this, and therefore no explanation for why ASR's decline in revenue not only coincided with the incorporation of Motion, but greatly exceeded the decline in revenue experienced by ProEx.

321. In respect of the purported industry-wide decline in revenue, as expected, each party was able to point to secondary sources seeking to undermine the other's position. I conclude

that nothing turns on the industry revenue trends, and therefore I decline to make any finding in that respect in the absence of qualified expert evidence.

322. In respect of the allegation that Subeet, Rana's son was operating Motion, the evidence remains opaque. Subeet had no prior work experience in the trucking industry and apparently worked for Motion part time. It is clear, however, that Subeet was in fact the dispatcher for Motion and the point of contact for its drivers. Based on Mr. Dhindsa's evidence, Subeet seemed to be in charge of the day-to-day operations of Motion. Rana does not dispute that Subeet had not, at the time of the hearing, received any remuneration from Motion. It is not contested that he continued to receive monthly remuneration from ASR between at least November 2019 and March 2020. I accept that both Rana and Paul had previously advanced salaries to their children, but am concerned by the lack of transparency in respect of the arrangement between Subeet and Motion at a time when Subeet worked for Motion, but continued to receive remuneration from ASR. There are no details concerning the scope of Subeet's role and any purported remuneration from Motion, including the amount he is yet to be paid.

323. In respect of the use of ASR funds to refuel Motion trucks, and specifically the incident at the Petro Station on June 6, 2020, I similarly disagree that Paul did not make full and frank disclosure.

324. I accept that it was not initially disclosed that Mr. Singh was at the Petro Station on June 6, 2020, but his presence is not the complete answer Rana purports it to be in respect of Paul's suspicion that ASR funds were used to refuel a Motion truck.

325. In particular, Mr. Singh's evidence evolved continuously throughout these proceedings. First, he made no mention of having refueled a Motion truck for Subeet who was also at the Petro Station that morning. According to Mr. Singh's first affidavit he refueled an ASR truck and reefer van at the Petro Station at 9:11am and 9:26am. Upon disclosure of a video of Mr. Singh refueling Subeet's Motion truck in or around 9:26am, Mr. Singh revised his evidence to explain that Subeet had forgotten his gloves and asked Mr. Singh whom he just coincidentally encountered at the Petro Station, to refuel his truck.

According to Mr. Singh he was given $150 cash from Subeet for the fuel, which was used to pay for the fuel inside the station.

326. Upon further challenge, because Mr. Singh can be seen on a video swiping a card at the pump, Mr. Singh changed his evidence again, suggesting that he borrowed a pass card from the attendant that morning to use to swipe at the pump and then he went into the station to pay cash.

327. Needless to say, I am not able to accept any of Mr. Singh's evidence on this point and find it of no consequence that his presence was not highlighted in Paul's initial affidavit. I am similarly unconcerned by Paul's failure to note the timing discrepancies between the video surveillance and the fuel receipts on June 6, 2020. At minimum, Subeet, Rana and Mr. Singh were at the Petro Station refuelling a Motion truck around 9:26am, being the same time that a receipt was issued for the use of the ASR fuel card. Subeet's evidence that he submitted a receipt to Motion for reimbursement was simply not corroborated and is inconsistent with the versions of events advanced by others.

328. Finally, in respect of the issue concerning the private investigator's access into ASR vehicles, I understand Rana's concerns regarding the lawful authority to do so, but decline to set aside the *ex parte* Order on that basis. I am in no position to assess whether the access was an unlawful trespass.

329. There is no question that the parties intended to share in the ownership, including the benefits and liabilities of each of the entities of the RGC Group, equally. The October Minutes are explicit that this principle of equality governs the parties' settlement agreement.

330. Whether or not this is sufficient at law to enable Paul to authorize entry into ASR property is irrelevant for the present purposes. I find that Paul had ostensible entitlement and believed he had the authority to do so. Moreover, I conclude that Paul did not intentionally hide the fact that he authorized investigators to enter ASR trucks. It is clear that he was the instructing client, whether through counsel or otherwise, and upon request

he made full disclosure of Mr. Colbourn's file to Rana, and readily acknowledged that he provided the authorization to investigate ASR's equipment.

331. Nothing in my Award or Order relies on the evidence of Mr. Colbourn purportedly retrieved improperly, and even if there was an unlawful trespass that may have constituted non-disclosure, its non-disclosure was not intentional and even if disclosed, it would not have altered my determination, and in any event, I would exercise my discretion not to set aside the *ex parte* Award and Order on that basis.

332. I cannot agree that Paul failed to provide full and frank disclosure as required of all material facts. His affidavit and the corresponding exhibits were comprehensive and set out the information reasonably known to Paul at that time. I recognize that certain facts were contained in the comprehensive motion record but not highlighted in Paul's affidavit, however the standard on the *ex parte* motion is not one of perfection, and I do not find that those facts, if highlighted would have had any impact on the original order.

333. Even if some of the omissions in Paul's affidavit may have been material, having now considered the evidence as a whole, including that of Rana which fortifies Paul's claim for relief, I would in any event exercise my discretion to not set aside the *ex parte* Award and Order.

D. THERE ARE GROUNDS TO APPOINT AN INSPECTOR

334. I am satisfied on the record before me that Paul has standing under the OBCA given his 50% interest in RGC, including ASR, "as owner, director or directing mind."

335. Specifically, the October Minutes provide that:

> Paul and Rana agree that [the October Minutes] shall be interpreted in accordance with this underlying principle that they each own a 50% interest in the Trucking Business and the Real Estate Business and each share equally in all of the liabilities incurred in the ordinary course of the operation of the Trucking Business and the Real Estate

> Business as owners, directors or directing minds, as the case may be.
>
> (My emphasis.)

336. Having carefully reviewed the comprehensive response delivered by Rana, I remain convinced, perhaps more so now, that on the face of the material submitted "there is good reason to think that the conduct complained of may have taken place" (*Jones v Mizzi*, 2016 ONSC 4907 (*Jones*) at paragraph 13, citing Consolidated *Enfield Corp v Blair*, 1994 CarswellOnt 249 at paragraph 83).

337. Paul has made out a *prima facie* case of oppressive conduct.

338. Rana, despite being given a fulsome opportunity to do so, failed to respond to the allegations of obstructing Paul's oversight of the financial operations of ASR, and the declining revenues evidenced by the reporting Paul has received.

339. In addition, however, the evidence in respect of ASR's relationship with Motion raises more serious questions. It is clear that Motion has been operated by Rana's son, Subeet, for all intents and purposes since November 2019. Mr. Dhindsa, the purported owner and director, provided no documentary records to assist in the present motion, and had little awareness of the operations of his own company. On his own evidence, Subeet takes care of that. There is no documentary evidence corroborating Subeet's employment or termination from Motion, nor is there any corroborating evidence that Subeet was ever paid by Motion for his service during the same period he was being paid by ASR. Similarly, given the evidence of Mr. Dhindsa that he retired in August 2017, I find it unlikely that Mr. Dhindsa is operating Motion independently. In light of this, I find it highly suspect that 13 pieces of ASR equipment coincidentally ended up with Motion during periods of time when Mr. Dhindsa confirmed that Motion had either not begun business operations, or was experiencing cash-flow issues preventing it from paying routine operating costs, let alone making sufficient revenue to afford costly equipment.

340. In addition if it is to be found that the ASR transactions by Rana were not in the ordinary course of business, that might be a breach of the April 2018 Consent Order of Justice Wilton-Siegel, by which the brothers agreed that both Paul and Rana are restrained from, directly or indirectly, selling, transferring or otherwise disposing of any of the assets owned by the RGC Group, including transferring money out of any RGC Group bank account, outside the ordinary course of business without express written consent of the other party.

341. Further, there are unresolved and undocumented questions concerning increased ASR payments to Border Bound, ASR payments to Narinder Singh and Subeet while working for Motion, and ASR vehicles used by Motion.

342. On balance there are substantive reasons for me to believe there is more than an arms-length competitive relationship between ASR and Motion that Rana would not acknowledge. An inspector's investigation could confirm or dispel that belief and afford to Paul disclosure of information to which he is entitled.

343. In respect of Rana's argument that the *ex parte* Order be set aside due to credibility concerns on both sides, I find that he has failed to identify legitimate credibility concerns in respect of Paul. Rana seems to rely on his same allegations of non-disclosure to suggest that Paul is not credible. For the same reasons articulated above, I reject this argument.

344. In reaching a conclusion I am mindful of the agreement and aspirations of this family seeking a full and final divorce of their business investments through "good faith" actions recognizing that they "each own a 50% interest in the Trucking Business and … each share in all the liabilities incurred in the ordinary course of operation…". Where there are additional concerns arising out of the evidence on this now hotly contested motion, I am well satisfied on a balance of probabilities that the foregoing meets the requirements for the appointment of an inspector under the OBCA.

E. INJUNCTIVE RELIEF

345. For the same reasons set out above, I reject Rana's arguments in respect of my jurisdiction to grant Paul's *ex parte* injunctive relief and conclude that there are sufficient grounds to continue the injunctive relief until an inspector has been appointed and ASR's records preserved for use in the investigation.

346. As set out in the *ex parte* Award, the test for injunctive relief is well-established.

347. Paul is to establish on a balance of probabilities that: (1) there is a serious issue to be tried in the underlying arbitration; (2) he would suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction. See *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

348. Rana objects to the injunction granted by the *ex parte* Award on two grounds: (1) the lack of an underlying claim, and (2) no evidence of irreparable harm.

349. I have been provided with no legal authority that requires a separate underlying action to have been commenced prior to injunctive relief being granted. In any event, the parties have authorized me to arbitrate their dispute arising out of the implementation of the October Minutes.

350. The October Minutes also require the parties to exchange financial, operational and any other information in good faith to ensure that an orderly sale of the Trucking Business proceeds in an open and transparent manner.

351. There is serious doubt as to whether Rana has provided the requisite information and cooperated in effecting the sale of the Trucking Business in accordance with the October Minutes.

352. Given the long history of obfuscation and Rana's own evidence that he did not provide ASR's accountant with the *ex parte* Order, or with instructions not to amend the books and records of ASR, there is a real concern that Paul would suffer irreparable harm if the records are altered or destroyed prior to the appointment and finding of the inspector

needed to assess whether there has been wrongdoing by Rana or to effect the sale of the Trucking Business.

353. Moreover, as explained at paragraph 40 of the *ex parte* Award, the balance of convenience favours granting the injunction:

> The injunction is only for short period of time until the parties return before me or appear in Superior Court to determine the relevant scope of the investigation. Most importantly, it only requires Rana to do that which he has already agreed to do in the October Minutes, namely "act in good faith to provide [Paul] with financial, operational and any other information that is required to ensure that the events described in [the October Minutes] proceed in an open and transparent manner, including, but not limited to, information to allow the Parties to monitor the Trucking Business … while the steps contemplated by [the October Minutes] are being implemented."

354. I note that Paul initially agreed to provide security for the costs of the inspector should the appointment of the inspector be determined to not have been reasonable. In his responding affidavit, he revises this position, suggesting that if I Award the appointment of the inspector on the basis of the present comprehensive records of which both parties had notice, he would request that the costs of the inspector be paid by the RGC Group, or the individual parties equally, subject to any determination of costs following the results of the investigation. I decline to do so.

355. Pending the outcome of the inspection, the costs of the inspector shall be borne by Paul as initially determined subject to further costs submissions upon completion of the inspection if the parties are unable to then agree upon financial responsibility for the inspector's services.

356. In order to ensure this matter does not languish, the parties shall have 30 days from the date of this Award, unless extended on consent of the parties or by further Award, to

secure the appointment of the inspector and to determine the scope of the inspection, either by return before me or the Superior Court of Justice if a party seeks to empower the inspector vis-à-vis strangers to this arbitration.

357. Paul shall have the same 30-day period to seek an extension of any injunctive relief, if so advised.

358. As an end note, I find it incredible that the relief ordered herein is necessary to have the parties abide by their agreements to date. It is time for a concerted effort by all professional advisors to assist the parties to promptly "achieve an orderly sale" of the Trucking Business as agreed in the October Minutes. In the absence of an effective effort and expeditious action, I may be spoken to, to fix a procedural timetable for the purpose of the sale of the Trucking Business and the balance of any outstanding obligations.

VIII. CONCLUSION

359. For the foregoing reasons, I dismiss Rana's motion and conclude that:

a. Rana has standing pursuant to the explicit language of the *ex parte* Order, or in the alternative section 44(1)(b) of the Arbitration Act to bring the present motion;

b. It is not necessary to resolve the issue of admissibility of Amar Randhawa's August 26, 2020 affidavit as it is not determinative of the issues before me;

c. I had the authority to issue the *ex parte* Award and Order;

d. I do have the jurisdiction to award statutory remedies, and in particular to appoint an inspector in accordance with sections 161-163 of the OBCA;

e. Paul made full and frank disclosure of all material facts and even if he did not, I would exercise my discretion not to set aside the *ex parte* Award and Order, particularly in the context of and reflection upon the evidence addressed by Rana;

f. Paul has standing under the OBCA given his 50% interest in RGC, including ASR, "as owner, director or directing mind" and has made out a *prima facie* case of oppressive conduct such that grounds exist for the appointment of an inspector pursuant to sections 161-163 of the OBCA;

g. Paul shall pay the costs of the inspector subject to further costs submissions upon completion of the inspection if the parties are unable to then agree upon financial responsibility for the inspector's services;

h. The parties shall have 30 days from the date of this Award, unless extended on consent of the parties or by further Award, to secure the appointment of the inspector and to determine the scope of the inspection, either by return before me or the Superior Court of Justice if a party seeks to empower the inspector vis-à-vis strangers to this arbitration;

i. Paul shall have the same 30-days from the date of this Award to seek an extension of any injunctive relief, if so advised; and

j. Costs associated with this Award, including the costs of the *ex parte* Award and Order, shall be determined following completion of the inspection contemplated herein or upon submission if the inspector is not appointed within 30 days of this Award.

Dated at Toronto, this 26th day of October, 2020.

LARRY BANACK

SCHEDULE 1 TO 2020-10-26 - AWARD - RANDHAWA ARBITRATION (RANA'S MOTION)

IN THE MATTER OF AN ARBITRATION under the *Arbitration Act 1991*, SO 1991, C 1:

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

AWARD
(*Ex Parte* Hearing by Teleconference June 30, 2020)

Arbitrator: Larry Banack

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto Ontario M5L 1B9

Aaron Kreaden
akreaden@stikeman.com
Tel: 416-869-5565

Lawyers for the Applicant

SIMPSONWIGLE LAW LLP
1006 Skyview Drive, Suite 103
Burlington, Ontario L7P 0V1

Rosemary A Fisher
fisherr@simpsonwigle.com

Bart Sarsh
sarshb@simpsonwigle.com

Tel: 905-639-1052

Lawyers for the Respondents

I. OVERVIEW

1. On June 30, 2020, the Applicant, Swinderpal Singh Randhawa ("Paul"), brought an *ex parte* motion for, among other things:

    a. A Declaration that grounds exist for the appointment of an inspector pursuant to sections 161-163 of the Ontario Business Corporations Act, RSO 1990, c B 16 (the "OBCA") or for the appointment of an investigative receiver pursuant to section 101 of the *Courts of Justice Act*, RSO 1990, c C 43 (the "*CJA*"); and

    b. An Order restraining the Individual Respondent, Rana Pratap Singh Randhawa ("Rana"), from, directly or indirectly, removing or making any changes to the books, records, and business and affairs of the Respondent entities (collectively the "RGC Group") and Motion Transport Ltd ("Motion), an entity not a party to the current arbitration. Paul also seeks to restrain Rana from entering the premises owned or controlled by Motion.

2. Paul and Rana are brothers and business partners. They have been engaged in a lengthy, acrimonious, and bitter divorce of commercial assets as detailed in my Award dated March 13, 2020, appended to this Award as Schedule A (the "March Award").

3. At paragraphs 6-28 of the March Award, I outline the extensive procedural history of the dispute since the parties commenced litigation in the Superior Court in 2018.

4. On October 1, 2018, the parties removed their dispute from traditional court litigation by executing Minutes of Settlement (the "October Minutes") containing an arbitration clause at paragraph 22 that provides that "any dispute arising in respect of the completion or implementation" of the October Minutes shall be determined by an arbitrator pursuant to the provisions of the *Arbitration Act, 1991*, SO 1991, c 17 (the "Arbitration Act").

5. Shortly after the execution of the October Minutes, I was appointed as arbitrator in accordance with paragraph 22.

6. Since my appointment, the parties have sought repeated and expensive intervention to implement their settlement, which remains outstanding. Since November 2018, I have issued numerous Endorsements, Directions, Consent and Contested Awards. I have thus

become very familiar with details of the scope of the parties' business dealings which had also included the acquisition of real property for personal use.

7. The purpose of the October Minutes is described as achieving an orderly sale of the parties' joint business, namely their Trucking Business and the Real Estate Business. The proceeds of sale are then to be distributed between Paul and Rana in accordance with the October Minutes.

8. The October Minutes also contemplate the determination of any Aggregate Unequal Benefit, defined as the total unequal benefit obtained by a party in the period following January 1, 2011.

9. The Real Estate Business has been sold and the Aggregate Unequal Benefit was determined by the March Award. What remains outstanding between the parties is the sale of the Trucking Business.

10. According to Paul, as detailed in his affidavit sworn on June 26, 2020, an issue has arisen in respect of "the completion or implementation" of the sale of the Trucking Business, and therefore paragraph 22 of the October Minutes has been triggered, engaging my jurisdiction as arbitrator.

11. At paragraph 3, the October Minutes require the parties to, *inter alia*, "act in good faith to provide each other with financial, operational and any other information that is required to ensure that the events described in [the October Minutes] proceed in an open and transparent manner, including, but not limited to, information to allow the Parties to monitor the Trucking Business … while the steps contemplated by [the October Minutes] are being implemented."

12. Paul now alleges that Rana has failed to provide him with sufficient information concerning the Trucking Business and its financial operations since 2018. This includes, but is not limited to, the completion of the financial statements necessary to advance the sale of the Trucking Business. As a result, Paul hired a private investigator who has purportedly discovered that Rana has set up a new company, outside of the RGC Group, to which he has allegedly been selling assets related to the Trucking Business and

gradually taking over its operations, possibly to reduce the value of the Trucking Business, and therefore Paul's interest in it.

13. In support of the present *ex parte* motion, Paul has delivered over 1200 pages of material, including an investigation report from Don Colbourn, a private investigator with over 40 years of experience. Mr. Colbourn conducted an investigation into Rana, and specifically the various companies and individuals believed to be connected with ASR Transportation Inc. ("ASR"), one of the RGC Group companies engaged in the Trucking Business, and a Respondent in the present arbitration.

14. I have reviewed the extensive record filed, but given the urgency of the issue I have only summarized herein those parts of the motion record necessary to issue this Award.

II. JURISDICTION

15. Paul acknowledges that to the extent that the relief sought extends to a person or entity outside of the RGC Group it is beyond the scope of my authority agreed upon between the parties as set out by the arbitration agreement.

16. With respect to the parties to this Arbitration, however, I have the authority to provide the relief sought.

17. Specifically, section 18 of the *Arbitration Act* provides that, upon request by a party, I may make an order "for the detention preservation or inspection of property and documents that are subject of the arbitration or as to which a question may arise in the arbitration…".

18. Moreover, section 31 of the *Arbitration Act* specifies that I shall decide a dispute "in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies."

19. Unless the parties have agreed otherwise, the *Arbitration Act* authorizes me to grant the declaratory and injunctive relief sought by Paul on this motion as it pertains to any other party to the arbitration agreement (see *Seidel v Telus Communication*, 2011 SCC 15 at paragraph 148 and *Farah v Sauvageau Holdings Inc*, 2011 ONSC 1819 at paragraphs 70 and 73).

20. While he seeks relief under both the OBCA and the CJA, counsel for Paul acknowledged that he only requires relief pursuant to one or the other and focused his attention on sections 161-163 of the OBCA.

21. For the following reasons, therefore, I grant the following:

    a. A Declaration that grounds exist for the appointment of an inspector pursuant to section 161-163 of the OBCA;

    b. An Order that Rana is forthwith restrained from, directly or indirectly, removing or making changes to the books, records, and business affairs of the RGC Group and Motion and from entering the premises owned or controlled by Motion, including the premises at 1453 Cornwall Road in Oakville, Ontario, pending either the determination of a Court or further order from me;

    c. An Order that Paul serve a copy of this Award, the resulting Order, and the Motion Record filed in support of it on Rana within three (3) business days of this Award; and

    d. Direct that the costs associated with this Award and resulting Order, including the costs of the Inspector, shall be determined following completion of the inspection contemplated herein.

22. A motion must be made to the Superior Court of Justice to determine the applicable scope of the inspector's investigation should it need to extend beyond the parties to this arbitration.

23. The part of Sections 161-163 of the OBCA relevant to the present motion are as follows:

PART XIII
INVESTIGATION

Investigation

161 (1) A registered holder or a beneficial owner of a security or, in the case of an offering corporation, the Commission may apply, without notice or on such notice as the court may require, to the

court for an order directing an investigation to be made of the corporation or any of its affiliates. 2006, c. 34, Sched. B, s. 33 (1).

Idem

(2) Where, upon an application under subsection (1), it appears to the court that,

(a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person;

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder;

(c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or

(d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the court may order an investigation to be made of the corporation and any of its affiliates. R.S.O. 1990, c. B.16, s. 161 (2).

….

Matters that may be covered by court order

162 (1) In connection with an investigation under this Part, the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order to investigate;

(b) an order appointing and fixing the remuneration of an inspector or replacing an inspector;

(c) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(d) an order authorizing an inspector to enter any premises in which the court is satisfied there might be relevant information, and to examine anything and make copies of any document or record found on the premises;

(e) an order requiring any person to produce documents or records to the inspector;

(f) an order authorizing an inspector to conduct a hearing, administer oaths and examine any person upon oath, and prescribing rules for the conduct of the hearing;

(g) an order requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath;

(h) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

(i) an order requiring an inspector to make an interim or final report to the court;

(j) an order determining whether a report of an inspector should be made available for public inspection and ordering that copies be sent to any person the court designates;

(k) an order requiring an inspector to discontinue an investigation;

(l) an order requiring the corporation to pay the costs of the investigation. R.S.O. 1990, c. B.16, s. 162 (1).

Inspector's report

(2) An inspector shall send to the Director and, where an offering corporation is involved, the Commission, a copy of every report made by the inspector under this Part which, subject to clause (1) (j), shall be placed on the corporation file for public inspection. R.S.O. 1990, c. B.16, s. 162 (2).

Powers of inspector

163 (1) An inspector under this Part has the powers set out in the order appointing the inspector. R.S.O. 1990, c. B.16, s. 163 (1).

…

24. Upon review of the affidavit evidence and the investigation report by Mr. Colbourn, I am convinced that on the face of the material submitted "there is good reason to think that the conduct complained of may have taken place" (*Jones v Mizzi*, 2016 ONSC 4907 (*Jones*) at paragraph 13, citing Consolidated *Enfield Corp v Blair*, 1994 CarswellOnt 249 at paragraph 83).

25. I find that:

    a. In accordance with paragraph 22 of the October Minutes and the provisions of the *Arbitration Act* I have the arbitral jurisdiction to grant the relief sought.

    b. In accordance with the October Minutes, Paul is registered owner or beneficial owner of 50% of the RGC Group Trucking Business which includes ASR.

    c. Paul has made out a *prima facie* case of oppressive conduct such that he meets the requirements of section 161(2)(a) (b) and (d) of the OBCA (*Jones* at paragraph 14).

26. In particular, I find that there is evidence of a lack of transparency and disclosure from Rana to Paul in respect of the operations and financial standing of ASR.

27. Moreover, there is some evidence that Rana has been involved with a new entity, Motion Transport Ltd ("Motion") which was incorporated by a third party in 2018 and to which he has apparently caused ASR to sell vehicles, either directly or indirectly through intermediaries since September 2018.

28. The corporate profile report for Motion suggests that its sole officer and director is a person purportedly known to Rana, but according to Mr. Colbourn's investigation report, this individual has never been observed at the Motion offices or observed to be engaged in any activity related to Motion. It seems Motion may be operated by Rana's son and operated out of locations leased by ASR.

29. There is further evidence that Motion has been servicing ASR clients, and using ASR drivers, vehicles and fuel for Motion's benefit.

30. Coupled with the evidence of a lack of transparency through the denial of records to Paul, I am satisfied that there is an appearance of oppressive conduct that warrants the appointment of an inspector.

31. For the foregoing reasons, I grant Paul's request to appoint an inspector in accordance with section 161 of the OBCA.

32. I note that Paul has undertaken to initially finance the cost of the inspector on the basis that he is able to seek recovery of those costs from Rana if warranted by the ultimate findings of the inspector.

33. In his affidavit, Paul advises that KSV Kofman Inc., and in particular Noah Goldstein, a licensed insolvency trustee, has consented to act as the inspector pursuant to section 161 of the OBCA. Paul has not delivered any detailed submissions concerning the scope of the inspector's investigation.

34. Both the appointment of the inspector and the scope of the investigation will be determined following service on Rana of the present Award, resulting Order, and Motion Record. The parties may make a motion to return before me or before the Superior Court if the investigation is to extend to persons or entities not party to the October Minutes.

35. Given the conduct complained of, I am also granting Paul's request for injunctive relief restraining Rana forthwith from removing or making changes to the books, records, and business affairs of the RGC Group and Motion and from entering the premises owned or controlled by Motion, including the premises at 1453 Cornwall Road in Oakville, Ontario, pending either the determination of a Court or further order from me.

36. The test for injunctive relief is well-established.

37. Paul is to establish on a balance of probabilities that: (1) there is a serious issue to be tried in the underlying arbitration; (2) he would suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction. See ***RJR MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311.

38. I find that the underlying issue is a serious one: namely whether Rana has breached the October Minutes and/or engaged in oppressive conduct by failing to provide Paul, in good faith, with the records to which he is entitled in order to monitor the operations of the Trucking Business and to effect its timely sale as agreed upon.

39. Moreover, I agree that without the injunction Paul may suffer irreparable harm. Given the conduct and possible deception to date there is a real concern that if not preserved by this

Award, the records necessary to give effect to the October Minutes and to assess whether there has been any wrongdoing by Rana, will no longer be available.

40. Finally, the balance of convenience favours granting the injunction. The injunction is only for short period of time until the parties return before me or appear in Superior Court to determine the relevant scope of the investigation. Moreover, it only requires Rana to do that which he has already agreed to do in the October Minutes, namely "act in good faith to provide [Paul] with financial, operational and any other information that is required to ensure that the events described in [the October Minutes] proceed in an open and transparent manner, including, but not limited to, information to allow the Parties to monitor the Trucking Business … while the steps contemplated by [the October Minutes] are being implemented."

41. I further note that Paul has provided the necessary undertaking to pay any damages caused to the Trucking Business as a result of this Award and resulting Order should it be determined that the inspector was not reasonably necessary in the circumstances.

42. I carefully considered the facts set out herein and in my prior determinations to assess whether this motion should have been brought on notice to Rana. However, given the nature of the issues between the parties in respect of the Trucking Business, I accept that this motion was properly brought *ex parte*. Paul is ordered, however, to serve the present Award, resulting Order, and Motion Record on Rana within three days of the date of this Award.

43. For the foregoing reasons I grant:

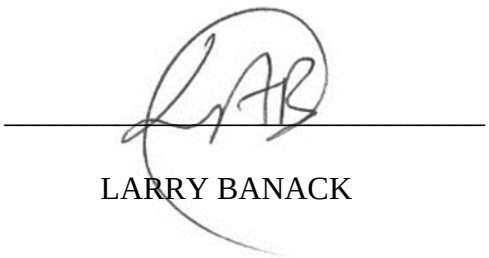
    a. A Declaration that grounds exist for the appointment of an inspector pursuant to section 161-163 of the OBCA;

    b. An Order that Rana is forthwith restrained from, directly or indirectly, removing or making changes to the books, records, and business affairs of the RGC Group and Motion and from entering the premises owned or controlled by Motion, including the premises at 1453 Cornwall Road in Oakville, Ontario, pending either the determination of a Court or further order from me;

c. An Order that Paul serve a copy of this Award, the resulting Order, and the Motion Record filed in support of it on Rana within three (3) business days of this Award; and

d. Direct that the costs associated with this Award and resulting Order, including the costs of the Inspector, shall be determined following completion of the inspection contemplated herein.

Dated at Toronto, Ontario this 3rd day of July, 2020.



LARRY BANACK

SCHEDULE "A" to AWARD DATED JULY 3, 2020

IN THE MATTER OF AN ARBITRATION under the *Arbitration Act 1991*, SO 1991, C 1:

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

AWARD
(Hearing February 27, 2020)

Arbitrator: Larry Banack

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto Ontario M5L 1B9

Aaron Kreaden
akreaden@stikeman.com
Tel: 416-869-5565

Lawyers for the Applicant

SIMPSONWIGLE LAW LLP
1006 Skyview Drive, Suite 103
Burlington, Ontario L7P 0V1

Rosemary A Fisher
fisherr@simpsonwigle.com

Bart Sarsh
sarshb@simpsonwigle.com

Tel: 905-639-1052

Lawyers for the Respondents

I. ISSUE FOR DETERMINATION

1. The present dispute is a narrow one: Do the Unequal Benefits Minutes of Settlement executed between the parties on September 13, 2019 (the "**UBMS**") require the individual respondent, Rana ("**Rana**"), to pay out of his personal funds $1,035,000.00 to the applicant, Paul ("**Paul**")?

2. Put another way, do the UBMS allow Rana to direct one of the corporate respondents (which I will collectively refer to as the Randhawa Group of Companies, or "**RGC Group**"), to distribute to Paul the $1,035,000.00 out of Rana's share of proceeds from the sale of real properties held by the RGC Group, which funds will then be taxed in Paul's hands.

3. The parties agree that $1,035,000.00 is to be paid to Paul, and further agree that I am not to determine the specific tax treatment to be applied in respect of that payment.

4. Paul and Rana each swore and delivered affidavits dated October 25, 2019. Each of them was cross-examined on his affidavit at a hearing held on February 27, 2020. Prior to the hearing, the parties exchanged written submissions, which counsel supplemented with fulsome oral submissions at the hearing.

5. **For the reasons that follow, I conclude that Rana, and not any of the entities in the RGC Group, shall forthwith pay to Paul $1,035,000 that is being held in trust by Dale & Lessman LLP, which firm is authorized to do so in accordance with the plain language of the UBMS having regard for the surrounding circumstances.**

II. BACKGROUND

6. Before getting into the present dispute, it is necessary to set out some of the long and acrimonious history between the parties, to record, in part, the protracted proceeding described below if required for future purposes.

7. The individual parties are brothers and business partners. They shared interest in the corporate respondents, which, as I understand it, were engaged in the business of trucking, warehousing, and logistics (the "**Trucking Business**"), as well as real estate (the "**Real Estate Business**").

8. In 2018, Paul commenced a Superior Court Application (Court File No. CV-18-593636-00CL), for among other things:

    a. An Order that recognized his 50% interest, beneficial or otherwise, in the RGC Group; and

    b. Declarations that Paul and Rana owned and operated the RGC Group as equal partners or 50/50 shareholders.

A. THE OCTOBER 1, 2018 MINUTES OF SETTLEMENT

9. By Minutes of Settlement dated October 1, 2018 (the "**October Minutes**"), the parties agreed to resolve the issues raised in the Application, and agreed, among other things, that Paul and Rana each own a 50% interest in the RGC Group.

10. They further agreed that the October Minutes "shall be interpreted in accordance with th[e] underlying principle that they each own a 50% interest in [the RGC Group] … and each share equally in all of the liabilities incurred in the ordinary course of [its] operations … as owners, directors or directing minds, as the case may be."

11. The purpose of the October Minutes is described as achieving an orderly sale of the Trucking Business and the Real Estate Business, which proceeds are then to be distributed between Paul and Rana in accordance with the October Minutes.

12. The October Minutes also contemplate the determination of any Aggregate Unequal Benefit, defined as the total unequal benefit obtained by a party in the period following January 1, 2011.

13. In accordance with paragraph 20 any proceeds from the sale of any item or the wind up of any of the corporations, by way of asset or share purchase, would be split equally between the parties, subject to an equalization for any Aggregate Unequal Benefits.

14. The parties also agreed within the October Minutes to conduct themselves in the implementation of the settlement in a good faith manner. The parties' good faith obligations are mentioned nine times throughout the October Minutes, including at paragraph 3, wherein the parties agree:

    a. to "act in good faith to provide each other with financial, operational and any other information that is required to ensure that the events described in these Minutes proceed in an open and transparent manner…"; and

    b. that "[i]f the Parties dispute the relevance of the information requested in this section, they will work together in good faith, through counsel, to resolve the disagreement in a mutually agreeable manner."

15. In accordance with paragraph 22 of the October Minutes, "any dispute arising in respect of the completion or implementation" of the October Minutes shall be determined by an arbitrator pursuant to the provisions of the *Arbitration Act, 1991*, SO 1991, c 17.

16. I note that the October Minutes is a carefully crafted, comprehensive document settled only after extensive negotiation by counsel.

B. ISSUES IMPLEMENTING THE OCTOBER MINUTES

17. Immediately following the execution of the October Minutes, disputes arose in respect of the disclosure of information and the financial operations of the RGC Group. I was appointed as arbitrator, pursuant to paragraph 22, above.

18. In and around late November and early December 2018, Paul and Rana each brought formal motions within the arbitration, which are described in more detail in the Inspection and Costs Award dated December 12, 2018.

19. Due to the parties' inability to reasonably reach an accommodation, prior to the determination of the motions, I issued two Endorsements on November 27 and 29, 2018, respectively,

20. Paul's motion was then addressed by Consent Award dated December 5, 2018.

21. On December 12, 2018, I issued the Inspection and Costs Award to resolve Rana's motion for unfettered and unconditional access to certain documents in the office of Paul's lawyers as well as the costs of both Rana's and Paul's motion.

22. The Inspection and Costs Award openly questions whether the parties' motions were required, particularly in light of their good faith obligations under the October Minutes.

23. I also forewarned the parties that the arbitration process is an enormously costly means of addressing disputed issues which should be resolved directly between them in a cost effective and timely manner.

24. Notwithstanding these observations, further intervention was required in the form of three timetable Endorsements dated April 23, 2019, July 23, 2019, and September 3, 2019, to again address the issue of document disclosure and a timetable for the exchange of the parties' unequal benefits analysis. I note that sometime just prior to July 2019, the Respondents retained new counsel.

25. Each of these endorsements noted the amount of time the parties had, but failed, to implement the settlement process contemplated by the October Minutes.

26. On September 6, 2019 a further procedural endorsement was issued, again concerning the identification and production of documents after the delivery of Rana's expert's evidence.

27. The issue of documentary disclosure was an ongoing one, notwithstanding both parties' representations at various stages that disclosure was complete. I again cautioned the parties that an enormous amount of time, energy and client money have been expended, without a clear sense of whether that was warranted in the context of the dispute.

28. At some point between December 2018 and September 13, 2019 the parties caused the RGC Group to sell the properties owned by the Real Estate Business, the proceeds of which are being held, by Paul's counsel and Rana's former counsel (Dale & Lessman LLP), in trust.

29. A hearing to determine the unequal benefits issue between the parties was scheduled for September 16-20, 2019.

C. THE SEPTEMBER 2019 MEDIATION AND UBMS

30. On September 13, 2019, the parties participated in a last-minute mediation, and were successful in resolving the unequal benefits issue, thereby avoiding a costly arbitration hearing.

31. The UBMS, which were executed at the end of this mediation and which are the subject matter of this Award, "resolve all issues relating to the Aggregated Unequal Benefit analysis described in paragraphs 4 and 9 of the October Minutes…" The UBMS was entered into with the assistance of the mediator and extensive negotiations by counsel.

32. In accordance with paragraph 1 of the UBMS:

> Within 30 days of the execution of these Unequal Benefit Minutes of Settlement, Rana shall pay Paul $1,035,000 inclusive of HST, interest, and all claims for costs of any kind existing up to now, (the "**UB Settlement Payment**"), which amount is to be paid to Stikeman Elliott LLP in trust, either by cheque or wire transfer. … (my emphasis)

33. The other relevant paragraphs of the UBMS include:

> 2. Within 30 days of the execution of these Unequal Benefits Minutes of Settlement, Rana shall cause RGC to pay Paul the amount to equalize the salary payments that were made from RGC to Rana's family in the period between September 1, 2018 and the present, which amount is to be agreed to by the Parties, acting reasonably and in good faith. (My emphasis.)
>
> ….

9. The Parties agree that these Unequal Benefits Minutes of Settlement are intended to and do resolve, in their entirety, the Aggregate Unequal Benefits issue, which includes, but is not limited to, any Unequal Benefit with regard to the India Properties, the Florida properties, the Sismet Property, and the cottage located at 428 Robins Point, Tay Township.

10. The Parties agree that Derry Millar shall mediate any disputes arising from these Unequal Benefits Minutes of Settlement or the October Minutes of Settlement, but in the absence of a resolution of any such dispute, the Arbitrator shall remain seized to resolve disputes in accordance with the October Minutes of Settlement. (My emphasis.)

11. The Parties agree that as they are "joint-owners" of 243, Noor and 222, (the Real Estate Holdcos") and they are each liable to ensure that the correct remittances are made on the gains resulting from the sale of the Properties to CRA. Accordingly, MDP will provide calculations, to be reviewed and approved by both Parties acting reasonably, of the appropriate instalment tax payments arising from the sale of each Property and same will be paid to CRA by the Parties from the funds currently held in trust, following which Stikeman Elliott LLP shall release the funds it holds in trust to Paul as a representative of the entities that sold the Properties and Dale and Lessmann LLP shall release the funds it holds in trust to Rana as a representative of the entities that sold the Properties, with the exception that $1,035,000.00 that is being held in trust by Dale and Lessman LLP shall be paid to Paul on Rana's behalf in satisfaction of the obligation set out in section 1 of these Unequal Benefits Minutes of Settlement. (My emphasis.)

12. For the avoidance of doubt, the proper accounting of the proceeds from the sale of the Properties is for the Parties to determine and will be subject to the process described in paragraph 10 herein.

….

16. These Unequal Benefits Minutes of Settlement and the October Minutes of Settlement, together with any documents explicitly referenced in both constitute the entire understanding and agreement between the Parties in connection with the subject matter hereof, and supersedes all prior agreements, understandings, negotiations and discussions between the Parties, whether oral or written. However, these Unequal Benefits Minutes of Settlement may be modified on consent of the Parties or by an order of the Arbitrator if the Arbitrator is satisfied that any such amendment is necessary to give effect to the underlying principles of these Unequal Benefits Minutes of Settlement. (My emphasis.)

17. The Parties shall each bear their respective legal costs associated with the drafting, execution and, unless stated to the contrary herein, the implementation of these Unequal Benefits Minutes of Settlement.

…

34. Shortly after the execution of the UBMS, consistent with the parties' prior conduct, the present issue arose, concerning the interpretation of paragraph 1, and in particular the phrase "Rana shall pay Paul $1,035,000…", reproduced above.

35. On October 4, 2019, counsel for the Respondents forwarded to counsel for the Applicant a memorandum prepared by the RGC Group's accountants, MDP, at Rana's request.

36. On page 1 of the memo, MDP states that they are "requested to comment on how to effect same [the $1,035,000 UB Settlement Payment] and the tax implications of effecting the $1,035,000 UB Settlement Payment to be received by Paul from the corporate funds currently held in trust by the law firms".

37. Page two of that memo further provides that "[i]t is our view that the UB Settlement Payment to be received by Paul will be considered a distribution from the corporation(s) to Paul."

38. Nothing in the MDP memo addresses the characterization of the funds personally received by Rana that gave rise to the unequal benefit. Nor is there any explanation for why MDP considered the payment to Paul to be "a distribution from the corporation(s) to Paul."

39. It is not in dispute that the request of MDP was made by Rana, and that neither Paul nor his counsel have seen any record related to that request to date.[1]

40. I further note that there is nothing within the UBMS that contemplates either party seeking guidance from MDP in respect of the characterization of the UB Settlement Payment.

41. Following receipt of MDP's memo, counsel for Paul contacted counsel for the Rana objecting to MDP's assumption that the UB Settlement Payment would be paid out of corporate funds.

[1] I note that the record indicates that Rana's counsel advised that Rana made the request that MDP prepare the memo in question over the phone.

42. Counsel for Rana disagreed that the assumptions were incorrect, and following two further e-mails from Paul's counsel dated October 7, 2019, Rana delivered the present motion, seeking an Order directing the UB Settlement Payment be made "from the sale proceeds of the land owned by 2221589 Ontario Inc, 2435963 Ontario Inc., and Noor Randhawa Corp, currently held in trust by Dale & Lessman LLP and Stikeman Elliot LLP."

43. If required, Rana also seeks an Order "varying the meaning of the UB Settlement Payment as set out in paragraph 1" of the UBMS.

44. There is no dispute that Rana never paid to Paul the $1,035,000, or any other amount, within the 30-day timeframe contemplated therein, and that neither party sought to extend the deadline.

D. <u>THE INDIA PROPERTY DISPUTE</u>

45. Prior to the hearing of this matter, another issue arose in the implementation of the UBMS. The details of this dispute are set out more thoroughly in my Amended Endorsement dated January 19, 2020.

46. Following a dispute with Indian tax authorities, Rana flew to India and sought access to a property in India he had agreed pursuant to the UBMS to relinquish to Paul (the "Family Home").

47. In the period pending transfers of title in respect of the properties in India, including the Family Home, the parties agreed in paragraph 4(e) of the UBMS that each brother would not have access to the properties to be transferred to the other brother. In respect of the

Family Home, this restricted access was subject to Rana's right to attend the Family Home in accordance with a protocol to be agreed upon by the parties, through counsel.

48. No protocol was ever agreed upon, and the parties disagreed as to Rana's right to access the Family Home while in India dealing with the tax authorities.

49. The parties' inability to reach a reasonable accommodation necessitated, yet again, my intervention, a number of conference calls, the exchange of submissions, and three Endorsements.[2]

50. Ultimately, I imposed a protocol allowing Rana accompanied access to the Family Home during daytime hours, which visitation was later limited on consent to a maximum visitation of 6 hours over an aggregate of two days.

51. Other than with respect to the motions heard in December 2018, all costs have been reserved until the determination of the present motion.

III. THE POSITION OF THE PARTIES

A. RANA'S SUBMISSIONS

52. According to Rana, Settlement Agreements are to be interpreted using the following general rules of contractual interpretation:[3]

    a. The overriding concern is to determine the intent of the parties and the scope of their understanding;

[2] Dated January 17, 2020, January 19, 2020, and February 3, 2020.
[3] See *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at paragraphs 47-50.

b. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;

c. Contextual factors must be considered when determining the intent of the parties;

d. Principles of contractual interpretation must be applied to the words of the written agreement considered in light of the factual matrix; and

e. Only when there is more than one possible interpretation from the language of the contract is resort had to contract interpretation principles.

53. Applying the above to the present case, Rana argues that the phrase "Rana shall pay Paul" in paragraph 1 of the UBMS, must be read together with paragraph 11, which specifies that the funds are to originate from Rana's share of the monies realized from the RGC Group's sale of the Real Estate Business.

54. Read together, these paragraphs, according to Rana, can only support the conclusion that Rana is to direct payment of $1,035,000 from his share of the corporate real estate proceeds being held in trust by Dale and Lessman LLP. These funds would then be taxable to Paul as receipts from the RGC Group.

55. Rana highlights that the corporate real estate proceeds have already been split, such that Rana and Paul's respective shares are being held in trust, separately. Any payment from Rana's share of the proceeds cannot therefore be considered as the RGC Group paying Paul with funds he already has an interest in. It is not coming from the operating funds of

the company to which both parties have an equal entitlement; if it were not paid to Paul, it would be paid to Rana as his share of the corporate real estate proceeds.

56. Moreover, Rana argues that payment from the companies is consistent with the manner in which the parties dealt with unequal benefits in the past. Specifically, if one brother was found to have withdrawn more than the other from the RGC Group, an equalization payment would be made from the company to the brother who had received less money.

57. Interpreting the UBMS any other way is wrong, according to Rana, because:

    a. It ignores paragraph 11 of the UBMS which confirms that Rana has to make $1,035,000 of the real estate proceeds he controls available to Paul;

    b. Overlooks the undisputed fact that both Paul and Rana were receiving funds from the RGC Group and that both had previously used corporate funds for personal expenditures; and

    c. Would lead to an absurd result in that:

        i. A distribution of $1,035,000 from Rana to Paul on after tax dollars is not supported by any sound analysis since it would equate to an Aggregate Unequal Benefit received by Rana of $4,404,255.32 ; and

        ii. Paul's reasoning that $1,035,000 equates to an Aggregate Unequal Benefit received by Rana of $2,070,000 is only true if you are dealing with corporate funds *before taxes*.

58. According to Rana, the phrase "Rana shall pay Paul" in paragraph 1 of the UBMS only identifies which one of the brothers is to effect the equalization payment.

59. He asserts that this is the interpretation that makes the most commercial sense and therefore is the one that must be adopted (*Re Elez*, 2010 ONSC 1052).

60. Rana argues that if Paul wanted to ensure the funds were paid after-tax by Rana personally, he ought to have included language articulating that.

61. According to Rana, interpreting the UBMS in this manner would require reading in words that are not there, which words produce an unfair and prejudicial result by changing the amount of the settlement agreed to.

62. Rana submits that the evidence of the parties' negotiations, including any drafts of the UBMS exchanged between them, cannot be considered in interpreting the UBMS. Rana relies on the parole evidence rule and the principle that "contractual intent of the parties must be determined by referring to the words they used in drafting the document…evidence of one party's subjective intention has no independent place in this determination"[4]

63. However, relying on *Sattva,* Rana acknowledges that the parole evidence rule does not apply to preclude evidence of surrounding circumstances, namely "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting…"[5]

[4] See *1998726 Alberta Ltd v KIPS Land Development Ltd*, 2018 ABQB 117 at para 27.
[5] *Sattva, supra*,at paragraph 60.

64. According to Rana, part of the factual matrix includes how the parties arrived at the UB Settlement Payment, and in particular, Rana argues that they got to this number by using the unequal benefit amount determined by his forensic account, Larry Joslin, and factoring in amounts for a loan to a third party, undetermined transactions, and an amount for the value of the properties held between the parties in India.

65. Rana further submits that where the language of the contract could result in more than one interpretation, I may consider the surrounding circumstances but that I must also consider what a reasonable person would have meant by the words used and I cannot consider evidence of the subjective intentions of the parties.[6]

66. If I do not agree with Rana that the UBMS is clear on its face, he suggests that there can be no enforceable agreement because the parties did not agree on fundamental terms.

67. According to Rana, on a motion to enforce a settlement such as the present motion, I must consider whether the test set out by the Supreme Court of Canada in *Hyrniak v Mauldin*,[7] can be satisfied.[8] Rana argues that I need only to determine, similar to the powers articulated under Rules 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*, whether one interpretation can be clearly found to be correct over the other or whether there is no enforceable agreement.

[6] See *Commercial Alcohols v Suncor Energy Products Inc*, 2008 ONCA 261 at paragraph 37
[7] 2014 SCC 7 at paragraph 49
[8] See *Dick v Marek*, 2009 CarswellOnt 3179 at paragraphs 65-66.

68. Rana argues that whether the payment is taxable in the hands of Paul or Rana is an essential term because it affects the amount of the payment, which is the very essence of the dispute and the core issue on this motion.

69. Rana also relies on the doctrines of mutual and unilateral mistake, but submits that even if there is no mistake, as in *Marek,* I may apply the doctrine of equitable rescission to determine that the UBMS should not be enforced.

70. In respect of the doctrine of mutual mistake, Rana asserts that he believed the UB Settlement Payment to be taxable to Paul, while Paul believed it to be taxable to Rana. This constitutes "a fundamental mistaken assumption as to the subject-matter of the contract or …. A fundamental term of the contract."[9]

71. Rana acknowledges that he must establish that the mistake was "fundamental to the substance of the contract" and that he was not at fault "in arriving at the mistaken conclusion of fact."[10]

72. Whether the parties had the requisite meeting of the minds, according to Rana, is an objective test that requires an "objective, reasonable bystander [to] conclude that, in all of the circumstances, the parties intended to contract[.]"[11]

[9] *McMaster University v Wilchar Construction Ltd. et al*, 1971 CarswellOnt 775 at paragraphs 43 and 45.
[10] *478649 Ontario Ltd. (cob Green Acre Estates) v Corcoran*, 1996 CarswellOnt 1820 at paragraph 38.
[11] *UBS Securities Canada Inc v Sands Brothers Canada Ltd*, 2009 ONCA 328 at paragraph 47

73. Rana also relies on the doctrine of unilateral mistake, which provides for rescission of a contract where a party is induced to enter into that contract on the basis of an innocent misrepresentation from the other party.[12]

74. According to Rana, rescission is available where a material mistake is established, the mistake is actually or constructively known by the other non-mistaken side, and it leads to an unconscionable result if the agreement is enforced.[13]

75. Rana finally relies on the doctrine of equitable rescission. According to Rana, relying on *Re 0741508 BC Ltd*,[14] equity does not require the certainty that the common law doctrine of mistake requires, but is a "more elastic approach by attempting to do justice and to relieve against hardship."[15]

76. If the UB settlement payment is to be paid by Rana from after-tax proceeds, he submits that it does create hardship because he has to fund the difference whereas interpreting the UBMS such that Rana directs $1,035,000 to be transferred from his share of the corporate real estate proceeds does not result in any greater benefit to Rana, and is consistent with the agreement reached in the UBMS.

B. PAUL'S SUBMISSIONS

77. Paul seeks the following:

    a. An Order dismissing Rana's motion;

[12] *1076586 Alberta Ltd v Octagon Properties Ltd*, 2014 BCSC 268 at paragraph 67
[13] *256593 BC Ltd v 456795 BC Ltd*, 1999 BCCA 137 at paragraph 25.
[14] 2014 BCSC 1791.
[15] *Ibid* at paragraphs 64-66,69.

b. An Order confirming that the UB Settlement Payment is properly characterized as a payment from Rana in his personal capacity to Paul; and

c. An Order directing the UB Settlement Payment to be paid forthwith, with the balance of the proceeds held in trust to be distributed to the parties in accordance with paragraph 11 of the UBMS.

78. According to Paul, the equalization payment agreed to between the parties is 50% of the benefit received by the other party. The $1,035,000 UB Settlement Payment therefore settles the unequal benefit received by Rana at $2,070,000, which figure is consistent with the overarching principle of equality set out in the October Minutes.

79. Paul contends that Rana's position that the UB Settlement Payment could be made from the RGC Group is inconsistent with the plain language of the UBMS which provides that "Rana shall pay Paul."

80. Paul relies on the following facts for what he calls the factual matrix:

a. The exchange of drafts of the UBMS during the course of the parties' mediation on September 13, 2019 and the discussions related thereto.

b. According to Paul, prior to signing the final document Rana proposed to have the payment made to Paul from funds belonging to the RGC Group. Only after Paul required the language of "Rana shall pay Paul" did Rana ultimately agree to enter into the UBMS.

c. While the initial drafts contained language restricting Rana's access to the real estate proceeds until he had made payment to Paul for the total $1,035,000, during the course of the negotiations Rana's counsel advised that Rana was unable to make the UB Settlement Payment without first obtaining access to his portion of the corporate real estate proceeds. As a result, Paul submits that paragraph 11 was revised to direct Dale & Lessman LLP to pay the $1,035,000 "to Paul on Rana's behalf in satisfaction of the obligation set out in" paragraph 1 of the UBMS.

81. Paul relies on the Ontario Court of Appeal's decision in *Weyerhaeuser*, for a summary of the principles of contractual interpretation. In particular, he submits that in interpreting the UBMS I am to:

a. Determine the intention of the parties, in accordance with the language of the UBMS as the parties are presumed to have meant what they said;

b. Read the balance of the UBMS as a whole, giving the words their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms, avoiding an interpretation that would render one or more term ineffective;

c. Read the UBMS in the context of surrounding circumstances known to the parties at the time of the formation of the contract; and

d. Read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result.[16]

[16] *Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2017 ONCA 1007 at paragraph 65.

82. Applying the above principles to the UBMS, according to Paul, can only lead to the conclusion that Rana personally pay to Paul the $1,035,000.

83. In particular:

a. As the parties are assumed to mean what they say, the phrase in issue, "Rana shall pay Paul," can only be interpreted to mean that Rana is the payor, Paul is the payee.

b. Any alternate interpretation of this phrase relies on Rana's subjective interpretation of the UBMS, which is irrelevant and inadmissible.[17]

c. The UBMS as a whole supports the conclusion that Rana is to pay Paul personally:

i. First, paragraph 11, the only other paragraph that refers to the UB Settlement Payment describes the $1,035,000 payment "to be paid to Paul on Rana's behalf…" There is no dispute that this allows Rana to use his own share of the proceeds from the RGC Group's sale of real estate but regardless, the funds are being paid on Rana's behalf; and

ii. Second, where the corporation is being used to pay any amounts or carry out any steps under the UBMS, for example in paragraphs 2, 5, and 7, the language used, contrary to the language in paragraphs 1 and 11 is "Rana shall cause RGC to [pay/provide] …".

[17] See *RF Real Estate Inc v Rogers Telecom Holdings Inc*, 2008 CarswellOnt 4947 at paragraph 20.

d. According to Paul, any interpretation of paragraph 11 that simply allows Rana to direct corporate funds, requires that I disregard the phrase "on Rana's behalf" and is arguably inconsistent with the obligation in paragraph 1 that "Rana shall pay Paul".

e. Paul asserts that the following surrounding circumstances also support his interpretation:

i. There is no dispute that Rana had obtained an unequal benefit from the RGC Group;

ii. There is no evidence that Rana paid taxes on the use of corporate funds constituting the unequal benefit;

iii. Rana obtained personal benefits through the use of corporate funds effectively pegged by virtue of the UBMS at $2.07 million, which figure Rana acknowledged on cross-examination; and

iv. Rana at all times maintained that this was about identifying the unequal benefits, but not addressing the tax consequences, so it is unreasonable for him to now rely on asserted tax consequences as a basis for his refusal to make the payment personally.

84. According to Paul, Rana is putting forth an interpretation that would maintain his benefit of $2.07 million from the RGC Group while arguing that Paul is only entitled to $1.035 million, subject to tax, which does not achieve the goal of equalization.

IV. ANALYSIS

85. The starting point for this analysis is the contractual language of the UBMS. I am of the view that the UBMS is clear on its face and constitutes an enforceable agreement between the parties.

86. The basic principles of contractual interpretation are not in dispute.

87. The overriding goal is to determine the intent of the parties and the scope of their understanding.[18]

88. In determining the parties' intent, I must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the circumstances known to the parties at the time of formation of the contract.[19]

89. The parties are presumed to have intended what they have said, just as they are presumed to have intended to give effect to all terms of their agreement.

90. In interpreting the words of the agreement, I must consider the surrounding circumstances, or context, in which these words were used. These facts which are "known or reasonably capable of being known by the parties when they entered into the written agreement"[20] include the "commercial purpose of the agreement, as informed by the genesis of the transaction, the background, the context, [and] the market in which the

[18] *Sattva*, *supra*, at paragraph 47.
[19] *Ibid*.
[20] *Weyerhaeuser*, *supra*, at paragraph 65(iii).

parties are operating."[21] The surrounding circumstances, however, cannot "overwhelm the words of [the] agreement…"[22]

91. Surrounding circumstances must be established by "objective evidence of the background facts at the time of the execution of the agreement,"[23] but do not include the parties' subjective intention, which is precluded from admission under the parol evidence rule.[24]

92. Applying these principles to the present case, I can only conclude that the parties agreed in the UBMS that Rana would pay to Paul $1,035,000 in satisfaction of the Aggregate Unequal Benefit, from his personal funds. There is simply no contractual language or objective evidence to suggest that Rana could satisfy his personal contractual obligation through the direction of corporate funds.

93. The phrase in issue is found in paragraph 1, namely that "[w]ithin 30 days of the execution of these Unequal Benefit Minutes of Settlement, **Rana shall pay Paul** $1,035,000 inclusive of HST, interest, and all claims for costs of any kind existing up to now…" (my emphasis.).

94. On the ordinary and grammatical interpretation of this paragraph, it is clear that Rana, in his personal capacity, as there is no reference to any corporate or other entity, is obligated to pay to Paul a sum of $1,035,000 within 30 days of the execution of the UBMS.

[21] *Sattva*, *supra*, at paragraph 47.
[22] *Ibid* at paragraph 57.
[23] *Ibid* at paragraph 58.
[24] *Ibid* at paragraph 59.

95. Rana argues that this paragraph cannot be read in isolation, but takes its meaning from paragraph 11. I agree.

96. Paragraph 11 concerns the proceeds from the sale of real estate held by the RGC Group. The corporate proceeds of sale are held in trust by the parties' respective counsel (or former counsel in the case of the Respondents).

97. Paragraph 11 confirms that the parties, for the purpose of settlement, agree that they are joint owners of the real estate properties held by the RGC Group, and as such are equally liable to ensure that the correct remittances are made to the Canada Revenue Agency (CRA) on the gains resulting from the sale of those properties.

98. It further provides that MDP, the RGC Group accountants, will provide the calculations of the correct tax to be paid on the gains of the sale proceeds so that the appropriate instalment tax arising from the sales will be paid from the funds held in trust. Once the appropriate tax is paid to the CRA, paragraph 11 mandates that the law firms holding funds in trust release the balance of the sale proceeds to Paul and Rana respectively, "**with the exception that $1,035,000.00 that is being held in trust by Dale and Lessman shall be paid to Paul on Rana's behalf in satisfaction of the obligation set out in section 1 of these Unequal Benefits Minutes of Settlement."** (my emphasis).

99. It is clear from the language of paragraph 11 of the UBMS, that the funds being paid to Paul are Rana's funds, they are not corporate funds.

100. The ordinary and grammatical meaning of "shall be paid to Paul on Rana's behalf" is that the funds of Rana are to be paid to Paul. While the sale proceeds were

received from the RGC Group, there is no dispute that they are distributed equally between Rana and Paul, in accordance with the October Minutes. In fact, the division of the funds had already been made, and the distribution only held up on account of outstanding tax liabilities.

101. If not paid to Paul, the $1,035,000 would otherwise be paid to Rana.

102. This interpretation is not only supported on the plain language of the clause, but I note that there is simply no language referring to corporate funds, or the direction of corporate funds, in contrast to other paragraphs in the UBMS. On the contrary, the only indication that the $1,035,000 derives from corporate funds is the inherent knowledge between the parties that the funds held in trust by their respective legal counsel are funds received by the RGC Group following the sale of its Real Estate Business. But, in accordance with paragraph 20 of the October Minutes, those funds have already been split equally between them, and are to be distributed subject only to the appropriate tax remittances and the Aggregate Unequal Benefit.

103. In support of Rana's argument that paragraph 11 must be interpreted to provide for the payment of the UB Settlement Payment from corporate funds, he relies on his subjective understanding of the clause itself.[25] As noted above, and by both parties, the subjective intentions of the parties is not admissible in interpreting the UBMS. I disregard Rana's evidence in that respect, and all evidence of the parties' negotiations, including any drafts of the UBMS.

[25] See for example paragraphs 16, 19, and 21 of Rana's Affidavit sworn October 25, 2019.

104. He also states that there is no language requiring the funds be paid out of his personal assets. I disagree.The ordinary and grammatical interpretation of "Rana shall pay Paul" is that Rana shall pay to Paul out of his funds. This is entirely consistent with paragraph 11, as the proceeds held by Dale & Lessman LLP are identified as Rana's funds from the proceeds of the sale of real estate.

105. I also note that while in no way determinative, MDP was tasked with opining on the "calculations…of the appropriate instalment tax payments arising from the sale of each Property…" but there is no mention of MDP providing any insight as to the characterization of the payment from Rana to Paul.

106. Most importantly, my conclusion is consistent with the language of the remaining paragraphs. Wherever it is contemplated that Rana perform an obligation through a company, the UBMS uses the language of "Rana shall cause RGC…". For example:

a. In paragraph 2, "Rana shall cause RGC to pay Paul the amount to equalize the salary payments that were made from RGC to Rana's family in the period between September 1, 2018 and the present…";

b. In paragraph 5, "… Rana shall cause RGC to provide Paul with access to…"; and

c. In paragraph 7, "…Rana shall cause RGC to provide Paul with a USB key that contains a complete…".

(my emphasis.)

107. Where the parties intended Rana to affect his obligations through a company, they provided clear language to that effect. Rana argued that the phrase "Rana shall cause RGC" was not used in paragraph 1 because payments from the companies to equalize the brothers' benefits was their usual practice. However, I must reject that explanation because paragraph 2 also relates to equalization payments but is clear that payment is to be made with the use of corporate funds.

108. As previously noted the parties are presumed to have intended what they have said and hence I conclude that the parties intended different consequences in the application of their words, "Rana shall pay Paul" in contrast with "Rana shall cause RGC to…"

109. It is also important to remember the context in which the UBMS arose. The UBMS is a settlement agreement to be read together with the October Minutes, intended to resolve all issues related to the Aggregated Unequal Benefit. The principle underlying the October Minutes, and therefore the UBMS, is the parties' equality, and right to share equally in the profits and losses of the RGC Group, subject to equalization of the Aggregated Unequal Benefit.

110. Rana has argued in support of his interpretation of the UBMS on the basis that in the past if a brother received an unequal benefit from the RGC Group, an equalization payment would be made from the companies to the brother who had received less money. Whether or not accurate in respect of the parties' past conduct, that is not the circumstance before me. In fact, the brother put their minds to the very issue of the Aggregate Unequal Benefit and entered into a written agreement to resolve it: the UBMS.

111. There is no dispute that Rana made personal use of corporate funds, giving rise to the unequal benefit. Paul has consistently alleged that Rana did not pay tax on the benefits received. Rana could have, but did not dispute with any evidence of the taxes he paid in respect of the unequal benefit amounts he received from the RGC Group. I am left to conclude that Rana likely did not remit tax on the unequal benefit he received but that is not a necessary finding for this Award.

112. There is similarly no dispute that the UB Settlement Payment was agreed to be a resolution of the Aggregated Unequal Benefit received by Rana. While I place no weight on the parties' subjective understandings of how that amount was arrived at, it is clear that the negotiated amount was intended to equalize for Paul the benefit Rana had received.

113. Rana alleges that if the funds are paid from him personally, that results in a significantly higher unequal benefit than he actually received or would have agreed to. Under cross-examination, Rana admitted that he is not a tax professional and that any information he provided in his affidavit regarding the tax implications of paying the UB Settlement Payment was simply found on the CRA's website. He had no meaningful understanding of the tax implications. Rana's evidence relating to tax implications cannot be considered reliable.

114. Rana could have, but did not, tender expert testimony in support of his argument that Paul's interpretation cannot be right.

115. Given the clear language of the UBMS, I find that that there is no actionable mistake whether unilateral or mutual, and the only evidence of mistake is Rana's subjective understanding of the agreement which is inconsistent with its plain language.

116. Similarly, in my view this is not a situation warranting equitable rescission as there is no objective evidence of hardship. Again, Rana relies on the argument that paying what was agreed upon out of his personal funds would increase his total liability, but there is no evidence of what that liability would be, nor that it would create any hardship for Rana.

117. Nothing in the present Award prevents Rana from using the proceeds of the sale of RGC's Real Estate Business. Nor does anything in this Award purport to determine for tax purposes the appropriate characterization of the personal payment from Rana to Paul.

118. With the foregoing in mind, I conclude that Rana, and not any of the entities in the RGC Group, shall forthwith pay to Paul $1,035,000 that is being held in trust by Dale & Lessman LLP, which firm is authorized to do so in accordance with the plain language of the UBMS having regard for the surrounding circumstances.

V. COSTS

119. This has been a multi-year acrimonious dispute between family members that had all of the hallmarks of extravagantly expensive litigation at the heart of which were operating businesses and real estate investments which the parties agreed to unwind.

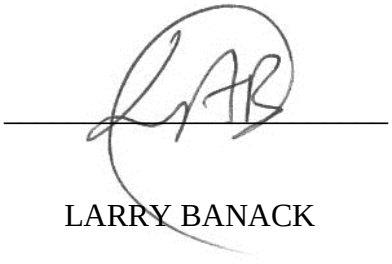
120. With the benefit of sophisticated advisors, the parties entered into an expansive settlement agreement -- the October Minutes -- followed by the UBMS, to resolve the issues between them.

121. Notwithstanding the significant efforts by the parties to resolve their dispute in a cost effective and efficient manner, they have expended significant time and resources in navigating various issues between them.

122. By extracting the dispute from the traditional superior court proceedings, the parties have, wisely, contained the possible public repercussions of their hostile relationship.

123. I am providing the parties, yet again, with an opportunity to avoid prolonging this dispute and avoiding the associated expense. While the parties have indicated that costs remain a live and contentious issue between them, I allow 30-days from today to come to an agreement in respect of the costs. Should the parties be unable to agree on costs, I will receive, by April 13, 2020, an agreed upon a timetable or competing submissions in respect of a timetable for page limited written costs submissions and reply.

Dated at Toronto, Ontario, this 13th day of March, 2020.



LARRY BANACK

IN THE MATTER OF AN ARBITRATION under the *Arbitration Act 1991*, SO 1991, C 1:

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

ORDER

(Appointing Inspector)

THIS MOTION, without notice, for an Order appointing an inspector pursuant to the *Ontario Business Corporations Act* (Ontario) RSO 1990, c B.16 (the "**OBCA**") and the *Arbitration Act,* SO 1991, c 17 (the "**Arbitration Act**") and certain injunctive relief to facilitate the requested investigation was heard before me, by teleconference, as Arbitrator pursuant to the arbitration clause set out in the Minutes of Settlement dated October 1, 2018 (the "**Minutes**") between Swinderpal Singh Randhawa ("**Paul**") and Rana Partap Singh Randhawa ("**Rana**");

ON READING the affidavits sworn by Paul and Don Colbourn and the exhibits thereto (the "**Motion Record**"), and on hearing the submissions of counsel for Paul;

1. **I HEREBY DECLARE THAT** this motion is properly brought before me without notice pursuant to section 161 of the OBCA, and section 18(1) of the Arbitration Act;

2. **I HEREBY DECLARE THAT** the criteria for the appointment of an Inspector pursuant to sections 161-163 of the OBCA have been met and the appointment of an Inspector is appropriate under the circumstances;

3. **I HEREBY DECLARE THAT** the scope of the investigation requested to be made by the Inspector and the appointment and powers of the Inspector are to be determined by return motion before me or the Superior Court of Justice (Commercial List) if the inspection could

potentially impact the rights of entities who are not parties to the arbitration clause contained in the Minutes and are therefore outside my jurisdiction as Arbitrator.

4. **IT IS HEREBY ORDERED THAT** Rana is forthwith restrained from, directly or indirectly, removing or making any changes to the books, records, and business and affairs of the Respondent entitles (collectively, "**RGC Group**") and Motion Transport Ltd. ("**Motion**") and from entering any premises owned or controlled by Motion, including the premises located at 1453 Cornwall Rd. in Oakville, Ontario, until such time as is determined by the Superior Court of Justice or further order from me.

5. **IT IS HEREBY ORDERED THAT** the costs associated with my Award dated July 3, 2020, and this Order, including the costs of the Inspector, shall be determined following the completion of the inspection contemplated herein.

6. **IT IS HEREBY ORDERED THAT** Paul shall serve a copy of my Award dated July 3, 2020, this Order, and the Motion Record on Rana within 3 business days from the date of this Order.

July 3, 2020

Larry Banack, Arbitrator

SCHEDULE 2 TO 2020-10-23 - AWARD - RANDHAWA ARBITRATION (RANA'S MOTION)

Court File No. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

JUSTICE WILTON-SIEGEL) **FRIDAY, THE 27th DAY OF APRIL, 2018**
)

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

APPLICATION UNDER SECTIONS 161, 207 AND 241 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16 AS AMENDED AND SECTIONS 35 AND 39 OF THE *PARTNERSHIPS ACT*, RSO 1990, c P.5

ORDER

ON READING the endorsement of the Honourable Justice Hainey dated March 12, 2018, and the consent of the Applicant, Swinderpal Singh Randhawa ("**Paul**"), and the Respondent, Rana Partap Singh Randhawa ("**Rana**", together with Paul the "**Parties**" and each separately a "**Party**");

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in Paul's affidavit, sworn March 22, 2018 (the "**Affidavit**").

2. **THIS COURT ORDERS** that the remaining steps in the Application shall be completed in accordance with the timetable that is attached as Schedule "A" to this Order.

3. **THIS COURT ORDERS** that Rana shall not interfere with the ability of Paul to access all staff employed by or associated with RGC for the purpose of carrying out the business of ProEx Logistics Inc., Guru Logistics Inc., Noor Randhawa Corp., and 2435963 Ontario Inc., pending a final decision in the Application, provided that Paul shall be limited to accessing and contacting such staff by e-mail and telephone only and that Paul shall not enter or be present at the RGC Office. For greater clarity, nothing in this paragraph prevents Paul from meeting in person with drivers employed by or associated with ProEx Logistics Inc., Guru Logistics Inc., Noor Randhawa Corp., and 2435963 Ontario Inc., provided such meetings do not occur at the RGC Office.

4. **THIS COURT ORDERS** that Rana shall, if applicable, rescind or revoke any instructions that have been made to staff employed by or associated with RGC which are contrary to paragraph 3 of this Order.

5. **THIS COURT ORDERS** that Paul shall not interfere with the operations, business and economic relations of ASR pending a final decision in the Application, or a further order of this Court.

6. **THIS COURT ORDERS** that Rana shall not fundamentally change the financial operation of RGC without Paul's written consent, including, but not limited to, by causing ASR to cease funding Guru on a monthly basis, pending a final decision in the Application.

7. **THIS COURT ORDERS** that Rana shall cause ASR to fund Guru in the amount of $7,112.00 each month, pending an agreement of the Parties or a further order of this Court.

8. **THIS COURT ORDERS** that neither of the Parties shall make any disparaging, defamatory or otherwise negative statements about the other Party, including with respect to their involvement and ownership interest in RGC, pending a final decision in the Application.

9. **THIS COURT ORDERS** that neither of the Parties shall, directly or indirectly, sell, transfer, or otherwise dispose of any of the real estate properties owned by RGC as described in the Affidavit (the "**Properties**"), or any interests RGC holds in the Properties, without the express written consent of the other Party, pending a final decision in the Application.

10. **THIS COURT ORDERS** that neither of the Parties shall mortgage, use as collateral, or otherwise encumber any of the Properties without the express written consent of the other Party, pending a final decision in the Application.

11. **THIS COURT ORDERS** that neither of the Parties shall sell, transfer, or otherwise dispose of any of the assets owned by RGC, or transfer money out of any RGC bank account outside of the ordinary course of business without the express written consent of the other Party, pending a final decision in the Application.

12. **THIS COURT ORDERS** that neither of the Parties shall pay their respective legal fees related to the Application out of RGC funds, provided that this shall not restrict the Parties' right or ability to, in the ordinary course of business, receive salary or other remuneration or to withdraw funds from RGC bank accounts.

13. **THIS COURT ORDERS** that this Order is made without prejudice to the arguments and positions the Parties may advance on the hearing of the within Application.

14. **THIS COURT ORDERS** that the Parties shall bear their own costs in connection with this Order.

WILTON-SIEGEL J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 27 2018

PER / PAR:

SCHEDULE"A"

Court File No. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

APPLICATION UNDER SECTIONS 161, 207 AND 241 OF THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16 AS AMENDED AND SECTIONS 35 AND 39 OF THE *PARTNERSHIPS ACT*, RSO 1990, c P.5

TIMETABLE

Timetable for the Application	
Step	**Date to be completed:**
Respondents to deliver responding affidavit(s)	May 14, 2018
Applicants to deliver reply affidavit(s)	May 22, 2018
Completion of cross-examinations	June 8, 2018
Applicants to deliver factum	June 20, 2018
Respondents to deliver factum	July 4, 2018

Applicants to deliver reply factum	July 11, 2018
Hearing	

Paul Randhawa Applicant	and	**Rana Randhawa et al.** Respondents	Court File No: CV-18-593636-00CL

184

1409118.3

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Aaron Kreaden LSUC#: 60157U
akreaden@stikeman.com
Tel: (416) 869-5565

Jordan S.A. Moss LSUC#:72321C
jmoss@stikeman.com
Tel: (416) 869-5572
Fax: (416) 947-0866

Lawyers for the Applicant

Appendix “D”

Court File No. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

PRIVILEGE PROTOCOL

KSV Restructuring Inc. in its capacity as the Court-appointed receiver and manager (the "**Receiver**") of all the assets, undertakings and property of Proex Logistics Inc., Guru Logistics Inc., 1542300 Ontario Inc. (operated as ASR Transportation), 2221589 Ontario Inc., 2435963 Ontario Inc., Noor Randhawa Corp., Superstar Transport Ltd., R.S. International Carriers Inc., Subeet Carriers Inc., Superstar Logistics Inc., Continental Truck Services Inc., and ASR Transportation Inc. (collectively, "**RGC**") acquired for, or used in relation to a business carried on by RGC and Rana Partap Singh Randhawa ("**Rana**" and with the Receiver, the "**Parties**") agree to the following, subject to the reservation of rights in respect of unforeseen issues that may arise:

DATA COLLECTION:

1. The Receiver, appointed pursuant to the Order of The Honourable Mister Justice Koehnen dated May 26, 2021, as amended from time to time, (the "**Appointment Order**") has taken

steps to collect data potentially relevant to its Investigation Mandate (as defined in the Appointment Order) data from various sources in the possession, power, or control of RGC.

2. The Receiver has retained the services of Kroll Canada to assist with the collection of potentially relevant data from RGC. Some of the data sources may include targeted collections from RGC's servers and cloud-based storage facilities, as well as personal and professional devices such as laptops, iPads and smart phones (the "**Devices**"). Collectively, all of the data collected (which for purposes of this protocol will not include RGC data collected from Swinderpal Singh Randhawa ("**Paul**")) will be referred to as the "**Data**".
3. Kroll Canada will preserve a clean copy of all of the Data it collects and maintain it in accordance with this Protocol until the conclusion of this matter.
4. Kroll Canada will conduct forensic analyses of the images of the Devices to determine whether, when, and how many files have been deleted from the Devices. Upon completion of the analyses, Kroll Canada shall be authorized to provide the result of such analyses (but no documents shall be released to the Receiver unless such documents are released pursuant to the protocol below) to the Receiver.

REPOSITORY:

5. Kroll Canada will host the Data in a repository (the "**Repository**") for access to the Data by the representatives of the Receiver, and, where required by this Protocol, by Rana. The Repository will be hosted in Relativity.
6. Kroll Canada will maintain the Repository and set permissions to restrict access to the Data in accordance with this protocol.
7. Access to the Repository and the Data will be strictly limited to the Receiver, its counsel and any other persons who require access to it for the purposes of implementing this protocol or as may be necessary for the purposes of the Investigation Mandate. Access to documents by the Receiver directly from RGC's systems for the purpose of the Sales Mandate (as

defined in the Appointment Order) shall continue to be governed by the Parties' agreement dated May 27, 2021 including, for greater certainty, paragraph 5 of that agreement.

SEGREGATION OF THE DATA:

8. Kroll Canada will process the Data and Kroll Canada will segregate the Data as follows:
    a. All user-created data which excludes operating or system files that may have been collected as a result of a forensic image of the Data;
        i. Potentially privileged files, as defined below, referred to as the "**Potentially Privileged Data**";
        ii. The mailbox paul@asrtransport.com ("**Paul's email**") and
        iii. Remaining files, after the segregation of the Potentially Privileged Data, referred to as the "**Remaining Data**".
    b. Kroll Canada will provide a report on the files that could not be processed ("**Exception Files**") due to encryption, corruption or for any other reason, for further consideration and instruction by the Receiver and Rana.
9. Kroll Canada will provide access to the Repository with the following restrictions:
    a. The Receiver and its representative will have immediate access to the Remaining Data only;
    b. No Party will have access to Paul's email until a protocol is agreed to with Paul regarding review of potentially privileged information;
    c. Rana and his representatives will have immediate access to the Potentially Privileged Data to determine whether such documents are privileged and relevant and/or whether Rana intends to waive any privilege asserted over such documents.

POTENTIALLY PRIVILEGED DATA:

10. Potentially Privileged Data will be identified as follows:

a. Any email communication (included sent, received, or copied) with the domain names “litigate.com”, “simpsonwigle.com”, “dalelessman.com” or “farber.com” or the email address adv.davinderdhir@gmail.com;

b. Email communications and documents identified by application of the search terms set out at **Schedule “A”** hereto, provided that Kroll Canada makes best efforts to identify and exclude any documents where the search terms hit on signature blocks or disclaimers on email communications; and

c. Email communications or attachments presumptively identified as privileged will be segregated to the Potentially Privileged Data together with their families.

11. Potentially Privileged Data may be categorized as solicitor-client privilege, litigation privilege, common interest privilege, or any other type of privilege that may be relevant to the matter.

12. Rana and his representatives will have 30 days from the date on which access to the Potentially Privileged Data is granted to assert any objections to disclosure to the Receiver of any Potentially Privileged Data on the Repository based on privilege or other reasonable basis (the “**Objections**” and the “**Objections Date**”).

13. After the Objections Date, the Receiver shall be given access to all the documents in the Repository except for Objections documents. If the Receiver has not received Objections by the Objections Date, the Receiver will be entitled to review all of the documents on the platform, including the Potentially Privileged Data.

14. Rana shall identify Objections by applying a suitable tag or tags in Relativity. Kroll Canada will facilitate this process, including the creation of a list of documents objected to (the “**Objections Documents**”).

    a. The list of all Objections Documents shall include, subject to sub-paragraph (b) below, at a minimum, the following fields for all documents in the family: date, date sent, author, sender, all recipients, title and subject. The list of Objections shall also include the basis for the assertion of privilege.

b. Rana may assert privilege over portions of the title and/or subject descriptions by the Objections Date. Kroll Canada shall redact the subject and/or title line in all cases where privilege has been asserted over the title and/or subject. For all claims of privilege over the title or subject, Rana shall provide the Receiver with a basis for the assertion of privilege.

15. The Receiver shall be permitted to challenge any of the Objections and claims of privilege within 45 days of being provided with the list of Objections Documents, provided however, that this deadline may be extended by order of the Court. The Parties shall attempt to resolve any such challenges within seven (7) days of the Receiver challenging an Objection, failing which the Receiver may address any such challenges before the Court. In the event of a challenge, the Receiver may request (but without prejudice to any position taken by Rana) that the challenged document be provided to the Court for non-public, confidential review outside the presence of any person(s) other than counsel for the Receiver and counsel for Rana.
16. Nothing in this Protocol shall prevent the Court from determining the scope or propriety of any claim of privilege or waiver thereof.

INADVERTENT DISCLOSURE OR PERMISSION:

17. The Parties agree that upon its representatives or its counsel identifying a document over which a potential claim of privilege may apply within the Remaining Data, the Party or its representatives or counsel will immediately notify the representatives of the other Parties, without further review, reproduction or any other handling or use of the document. Any copies of the document will be destroyed. Any Party notified of such a privilege claim will immediately undertake best efforts to retrieve a copy of any such document disclosed to any other persons and notify the Party who may assert a privilege over it of any such disclosure.

18. The Parties shall not rely on or otherwise use in any way any privileged information contained in the document.
19. Kroll Canada will move the document from the Remaining Data area of the Repository, to the Potentially Privileged Data area.
20. Collection by, access to or inadvertent identification or disclosure of privileged documents or information will not constitute a waiver of any privilege attaching to the documents or information, if reasonable, good faith efforts have been made to identify and withhold privileged documents.

Appendix “E”

Supplement to the First Report of KSV Restructuring Inc. as Receiver and Manager of Proex Logistics Inc., Guru Logistics Inc., 1542300 Ontario Inc. (operated as ASR Transportation), 2221589 Ontario Inc., 2435963 Ontario Inc., Noor Randhawa Corp., Superstar Transport Ltd., R.S. International Carriers Inc., Subeet Carriers Inc., Superstar Logistics Inc., Continental Truck Services Inc., and ASR Transportation Inc.

May 31, 2021

Contents

COURT FILE NO. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

SWINDERPAL SINGH RANDHAWA

APPLICANT

- AND -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., AND ASR TRANSPORTATION INC.

RESPONDENTS

SUPPLEMENT TO THE FIRST REPORT OF
KSV RESTRUCTURING INC.
AS RECEIVER

MAY 31, 2021

1.0 Introduction

1. This report ("Supplemental Report") supplements the Receiver's First Report to Court dated May 27, 2021 ("First Report").

2. Unless otherwise stated, capitalized terms used in this Supplemental Report have the meanings provided to them in the First Report.

1.1 Purpose

1. The purposes of this Supplemental Report are to:

   a) provide an update on the operations of RGC;

   b) discuss the projected funding requirement to wind down RGC's operations;

c) provide a preliminary update on the Receiver's investigation in respect of Motion Transport Ltd. ("Motion");

d) recommend that the Court issue an order:

i. increasing the Operations Charge from $50,000 to $250,000;

ii. requiring Motion to disclose the location of its server (the "Server") and any other electronic records and to assist the Receiver to access, locate, decode and decrypt any and all information on the Server and any other electronic records;

iii. authorizing the Receiver to examine under oath the former employees, directors and officers of Motion, to the extent required in order to carry out the investigative mandate contemplated in the Decision;

iv. sealing the confidential appendix; and

v. providing for the relief described in the First Report.

2.0 Operations of RGC

1. Immediately upon its appointment on May 26, 2021, representatives of the Receiver attended at RGC's premises in order to conduct meetings with management and review certain books and records. On May 28, 2021, the Receiver delivered a memorandum to Paul and Rana (the "Memo"). A copy of the Memo is attached as Confidential Appendix "1". The principal conclusion of the Memo is that RGC's business and operations need to be discontinued immediately as there is no funding available to continue to operate the business.

2. The Receiver respectfully requests that the Memo be filed with the Court on a confidential basis and be sealed ("Sealing Order") as the documents contain confidential information, including assumptions regarding paying pre-receivership expenses. The Receiver is not aware of any party that will be prejudiced if the information is sealed. Accordingly, the Receiver believes the proposed Sealing Order is appropriate in the circumstances.

3. The Receiver has determined it will require funding of at least $173,000 to carry out an orderly wind-down of RGC's business. The proceeds of liquidation are estimated to be sufficient to repay in full any funding advanced over the course of these proceedings.

4. Pursuant to the terms of the Receivership Order, the wind-down amount can be funded by Paul, Rana or Paul and Rana equally. The Receiver advised Paul and Rana that subject to Court approval, the Receiver was proposing to borrow the wind-down amount under the Operations Charge at an 18% annual interest rate. The Receiver requested that Paul and Rana each confirm their agreement to fund 50% of the requested amount on the foregoing terms by May 30, 2021 at 4:00 p.m.

5. Paul and Rana have advised the Receiver that they are both prepared to fund the wind down on the terms set out herein.

6. The Receiver is proposing to increase the Operations Charge from $50,000 to $250,000 at this time in the event additional liquidity is required. This will avoid the cost of another Court attendance for the sole purpose of increasing the quantum of the Operations Charge. The Receivership Order will continue to govern and if either party is unwilling to fund any amount over the $173,000, the Receiver will be entitled to borrow from the other party (or a third party) on terms negotiated with such lender. The requested amount includes amounts that will be used to pay the Receiver's and its counsel's fees. Under the Receivership Order, the Receiver can borrow from Rana and Paul under the Funding Charge. To simplify this process, the Receiver proposes to borrow only under the Operations Charge at this time.

7. The Receiver recommends that the Court issue an order approving the terms of the Operations Charge for the following reasons:

   a) it will provide the Receiver with liquidity to fund these proceedings and avoid the expense of returning to Court at a later date for this purpose;

   b) the Receiver requires the funding to continue the proceedings. Although the interest rate is substantial, there are no fees or other costs attached to the borrowings. Due to the small size of the borrowings, it would be difficult to attract other potential lenders and the total interest cost over a three-month period will not exceed $11,250 if the entire amount under the Operations Charge is drawn; and

   c) if the Court approves the terms of the Operations Charge, the Receiver does not intend to solicit other financing proposals. Given the small size of the facility, the fees incurred running such a process would exceed the savings, if any, achieved by that process.

3.0 Motion

1. In the receivership application materials, Paul requested that the Receiver investigate whether a portion of ASR's business was diverted to Motion. The Receivership Order authorizes the Receiver to investigate the potential diversion of business to Motion.

2. Pursuant to Paragraph 6(r) of the Receivership Order, the Receiver is authorized and empowered to:

   "enter any premises owned or controlled by Motion and to take any steps the Receiver deems necessary to examine and preserve any and all of Motion's information, documents, records and electronic data, including but not limited to information relating to Motion's accounts or finance activities at any financial institution, with any trade creditor or with any other party."

3. On the date of the Receivership Order, May 26, 2021, Cassels Brock & Blackwell LLP ("Cassels"), counsel to the Receiver, wrote a letter to Bridge Law Professional Corporation ("Bridge Law"), counsel to Motion, requesting access to Motion's premises on May 27 or 28, 2021 to image the server. A copy of Cassels' letter is attached as Appendix "A".

4. On May 28, 2021, Bridge Law emailed Cassels to advise that Motion had discontinued operations and a representative could drop off boxes with the business records of Motion next week. The Receiver advised Bridge Law that it needed to know the location of the server as it required immediate access to the server to image it. On May 31, 2021, Bridge Law emailed the Receiver "that there weren't any servers but there may have been a laptop". A copy of the email chain is attached as Appendix "B". Attached as Appendix "C" is the Responding Motion Record of Motion dated January 18, 2021 (the "Record"). The Record includes several digitally generated reports created by Motion, including an income statement, balance sheet, sale report, accounts receivable and accounts payable listing. The Receiver requires the computers, server and other electronic data used to generate these reports.

5. The Receiver has obtained from Paul, a report from the Ministry of Transportation of Ontario ("Ministry") dated May 12, 2021 (the "May 2021 Report") detailing the vehicles owned by Motion. The May 2021 Report reflects that Motion still owns at least six vehicles, including four trucks and two trailers. A copy of the May 2021 Report is attached as Appendix "D".

6. The original application by Paul to appoint an inspector commenced in July 2020. The Receiver compared the May 2021 Report to a Ministry report dated June 24, 2020 (the "June 2020 Report") and understands that Motion has sold or transferred twelve vehicles since the June 2020 Report. A copy of the June 2020 Report with a comparison to the May 2021 Report is attached as Appendix "E".

7. In order to perform the Investigation Mandate, the Receiver is seeking an order requiring Motion to, *inter alia*, disclose the location of any electronic records, including any servers, computers or other devices that may house such data. The Receiver is of the view that this request is contemplated by Paragraph 6(r) of the Receivership Order and, accordingly, Motion is in violation of the Receivership Order by not responding to the Receiver's request in this regard.

8. The Receiver is also seeking an order to examine under oath the current and former contractors, employees, directors and officers of Motion so that it can understand whether assets were improperly transferred to Motion and what has transpired with Motion's business. The Receiver believes it requires this power to carry out the Investigation Mandate that was contemplated by Justice Koehnen in the Decision (a copy of which is attached to the First Report).

4.0 Conclusion and Recommendation

1. Based on the foregoing, the Receiver respectfully recommends that this Honourable Court make an order in the form sought by the Receiver at the Comeback Motion.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.,
SOLELY IN ITS CAPACITY AS RECEIVER AND MANAGER OF
RGC
AND NOT IN ITS PERSONAL OR IN ANY OTHER CAPACITY

Appendix “F”

Court File No. CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MISTER	)	FRIDAY, THE 4th
	)	
JUSTICE KOEHNEN	)	DAY OF JUNE, 2021

SWINDERPAL SINGH RANDHAWA

Applicant

- and -

RANA PARTAP SINGH RANDHAWA, PROEX LOGISTICS INC., GURU LOGISTICS INC., 1542300 ONTARIO INC. (OPERATED AS ASR TRANSPORTATION), 2221589 ONTARIO INC., 2435963 ONTARIO INC., NOOR RANDHAWA CORP., SUPERSTAR TRANSPORT LTD., R.S. INTERNATIONAL CARRIERS INC., SUBEET CARRIERS INC., SUPERSTAR LOGISTICS INC., CONTINENTAL TRUCK SERVICES INC., and ASR TRANSPORTATION INC.

Respondents

ORDER
(re: Motion Transport Ltd.)

THIS MOTION made by KSV Restructuring Inc. ("**KSV**"), in its capacity as receiver and manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of Respondent corporate entities (collectively, "**RGC**") acquired for, or used in relation to a business carried on by RGC, was heard by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 crisis;

ON READING the Receiver's Supplemental Motion Record dated May 31, 2021 (the "**Receiver's Supplemental Motion Record**"), including the Supplement to the First Report of the Receiver dated May 31, 2021, and the Affidavit of Service of Benjamin

Goodis sworn June 1, 2021, and on hearing the submissions of counsel for KSV and counsel for Motion Transport Ltd. ("**Motion**"):

SERVICE

1. THIS COURT ORDERS that the time for service of the Receiver's Supplemental Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

PRODUCTION AND DISCLOSURE

2. THIS COURT ORDERS that by no later than 9:00 a.m. (Toronto time) on June 7, 2021, Motion disclose to the Receiver the location of any and all electronic records, including any servers, computers or other devices where electronic records may be stored (the "**Electronic Records**") and assist the Receiver to access, locate, decode and decrypt any and all Electronic Records and any information contained therein.

3. THIS COURT ORDERS that by no later than 9:00 a.m. (Toronto time) on June 7, 2021, Motion deliver all hard copy documents to the Receiver.

EXAMINATIONS UNDER OATH

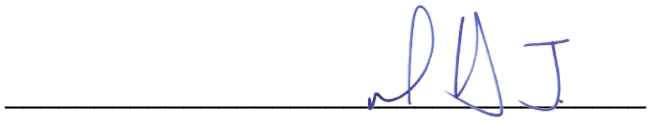
4. THIS COURT ORDERS that Baldev Dhindsa, and any current or former directors, officers, employees, and contractors of Motion, and any other persons that the Receiver reasonably believes may have knowledge of Motion's affairs, attend at an examination under oath before an Official Examiner in Toronto, on a date to be agreed upon or selected by the Receiver, with a minimum of 10 days notice, notice to include a copy of this Order, and answer questions propounded to them by counsel for the Receiver and provide testimony with respect to the matters set out in this Order and the Order (Appointing Receiver) dated May 26, 2021, as amended and restated from time to time (the "**Receivership Order**"), including any matters that the Receiver reasonably believes will assist the Receiver in carrying out the Investigation Mandate described within the Receivership Order.

GENERAL

5. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

6. 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 Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

7. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.



SWINDERPAL SINGH RANDHAWA Applicant	and	**RANA PARTAP SINGH RANDHAWA, et al.** Respondents	Court File No.: CV-18-593636-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER
(RE: MOTION TRANSPORT LTD.)

CASSELS BROCK & BLACKWELL LLP
Scotia Plaza, Suite 2100
40 King Street West
Toronto, Ontario M5H 3C2

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
Fax: 416.640.3207
nlevine@cassels.com

Ben Goodis LSO #: 70303H
Tel: 416.869.5312
Fax: 416.640.3199
Email: bgoodis@cassels.com

Lawyers for KSV Restructuring Inc. in its capacity as Receiver