

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C.C36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PARTICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (COLLECTIVELY, THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

**FACTUM OF THE APPELLANT /MOVING PARTY,
THE FOREIGN REPRESENTATIVE OF URBANCORP INC.**

PART I – OVERVIEW

1. The moving party, Guy Gissin in his capacity as Foreign Representative (the "**Foreign Representative**") of Urbancorp Inc. ("**UCI**"), seeks a stay pending its motion for leave to appeal the order (the "**Sale Process Order**") of the Honourable Chief Justice Morawetz (the "**Motion Judge**") authorizing the sale of a 51% interest in a real estate development project owned by Urbancorp Downsview Park Development Inc. ("**UDPDI**"), a wholly owned subsidiary of UCI.
2. Mattamy Homes Limited ("**Mattamy**") owns the other 49% of the Project and is also the lender to UDPDI under a debtor-in-possession facility (the "**DHI Facility**"). The DHI Facility

has matured and Mattamy has threatened to commence default proceedings and to take UDPDI's 51% interest in the Project in satisfaction of the DHI Facility unless a sale process is held for UDPDI's interest (the "**Sale Process**"), which the Motion Judge authorized to proceed pursuant to the Sale Process Order. The problem with this state of affairs, and the reason for this motion and the underlying motion for leave to appeal, is significant: the value of UDPDI's interest in the Project is largely dependent upon the outcome of an arbitration that the Motion Judge ordered to proceed at the same time as he made the Sale Process Order (the "**Arbitration Order**").

3. Specifically, there is a dispute between the Foreign Representative and Mattamy regarding an alleged second payment that Mattamy asserts it is entitled to receive before any revenues from the Project are distributed between UDPDI and Mattamy. The Foreign Representative's position is that Mattamy has already received this amount through the repayment of a shareholder loan. This issue, as well as a dispute regarding the quantum of management fees received by Mattamy in relation to the Project, will be arbitrated in accordance with the Arbitration Order. The Foreign Representative has commenced the arbitration and has proposed a schedule that will see the arbitration heard in early October 2021.

4. Mattamy refused the Foreign Representative's efforts to engage in this very arbitration ahead of the maturity date of the DHI Facility. The Monitor, after initially telling the Foreign Representative to move forward, changed its position and refused to let the Foreign Representative move forward with the arbitration as well (resulting in the need for the motion leading to the Arbitration Order).

5. The outcome of the arbitration will have a material impact on the value of UDPDI's interest in the Project: if Mattamy is indeed entitled to the second payment, UDPDI's

interest is essentially worthless; if Mattamy is not so entitled, then UDPDI's interest is worth millions of dollars, even after the DHI Facility is repaid. This uncertainty creates a significant risk of a "chilling effect" on the Sale Process if it proceeds now, as potential purchasers may be dissuaded from conducting due diligence or from submitting their best offer. The Sale Process may fail entirely, which would allow Mattamy to take ownership of UDPDI's interest in the Project before either party knows what that interest is worth. Either outcome would result in irreparable harm to UDPDI and UCI. The logical solution to this problem is to first determine Mattamy's entitlement to this additional payment and any management fees, and then to proceed with the Sale Process in a fair and transparent manner, thereby eliminating material uncertainty for potential bidders.

6. Accordingly, the Foreign Representative has sought leave to appeal the Sale Process Order and, if successful, will seek an order on appeal delaying the Sale Process until the question is resolved through arbitration. Through this motion, it seeks a stay of the Sale Process Order pending the outcome of the motion for leave to appeal, and if leave is granted, the appeal proceedings.

7. The appeal raises serious issues to be tried, and the balance of convenience favours the stay being granted: if the Sale Process proceeds now, UDPDI and UCI will suffer irreparable harm (for the reasons noted above), whereas no harm will result to Mattamy if the Sale Process is temporarily halted pending the motion for leave to appeal. The stay should be granted.

PART II – FACTS

Parties and Background Facts

8. The Project is located at Downsview Park and involves an ongoing two-phase construction of approximately 1,100 townhouses, semi-detached homes and condominium and rental units. The Project is beneficially owned by Downsview Homes Inc. (“**DHI**”), which is in turn owned by UDPDI (51%) and Mattamy (49%). UDPDI is a wholly owned subsidiary of UCI.

Affidavit of Guy Gissin affirmed December 14, 2020 at para. 5 (“**Gissin December 14, 2020 Affidavit**”), Exhibit “A” to Affidavit of Guy Gissin affirmed January 24, 2021 (“**Gissin January 24, 2021 Affidavit**”), Motion Record, Tab 6A, p. 69.

Supplement to the Forty-Fourth Report of KSV Restructuring Inc. dated March 8, 2021 (the “**First Supplement Report**”) at s. 2.1, para. 1, Motion Record, Tab 9, p. 222.

9. UCI was incorporated on June 19, 2015 to raise debt in the Israeli public market to support the Urbancorp Group’s development projects. In December 2015, UCI raised approximately CA\$64,000,000 in debentures, and subsequently loaned approximately \$10 million of those proceeds to UDPDI to repay certain obligations related to the Project. This loan has not been repaid, with the result that UCI is UDPDI’s only unsecured creditor.

Gissin December 14, 2020 Affidavit at para. 10, Motion Record, Tab 6A, p. 70.

Affidavit of Guy Gissin, affirmed March 1, 2021 (“**Gissin March 1, 2021 Affidavit**”), at para. 15, Motion Record, Tab 7, p. 121.

10. In April 2016, the Foreign Representative was granted various powers in relation to UCI by the District Court of Tel Aviv-Jaffa in Israel. The Foreign Representative’s appointment was subsequently recognized by the Superior Court of Justice (Commercial List) pursuant to an order dated May 18, 2016 issued in the ongoing CCAA proceedings involving certain companies in the

Urbancorp Group (including UDPDI). KSV Restructuring Inc. is the court-appointed monitor in the CCAA proceedings (the “**Monitor**”).

Forty-Fourth Report of KSV Restructuring Inc. dated February 11, 2021 (the “**Forty-Fourth Report**”) at s. 1.2, paras. 1-2, Motion Record, Tab 8, p. 158.

11. In addition to being a co-owner of the Project, Mattamy is also the lender to UDPDI in relation to the court-approved DHI Facility, which currently stands at over \$9 million. The DHI Facility matured on February 3, 2021, and UDPDI did not repay it. Mattamy threatened to appoint a receiver over the Project unless the Monitor commenced the Sale Process to sell UDPDI’s interest in the Project.

Endorsement of Chief Justice Morawetz dated June 30, 2021 in *Urbancorp Toronto Management Inc.*, 2021 ONSC 4262 [Motion Judge’s Decision] at paras. 14-16, Motion Record, Tab 4, p. 37.

12. The Foreign Representative, Mattamy and the Monitor were previously involved in an arbitration held in 2019 before the Honourable Justice Newbould regarding certain issues relating to the Project. This arbitration resulted in a reduction of approximately \$5.9 million to the DHI Facility.

Gissin March 1, 2021 Affidavit at para. 20, Motion Record, Tab 7, p. 125.

The Issues in Dispute

13. A dispute currently exists between the Foreign Representative and Mattamy regarding the priority of how revenues generated from the Project are to be allocated between Mattamy and UDPDI:

- (a) Mattamy contends that it is entitled to receive an additional priority payment of _____ (the “**Mattamy Co-Ownership Payment**”)

pursuant to a July 30, 2013 co-ownership agreement it entered into with UDPDI, DHI and other parties (the “**Co-Ownership Agreement**”) before any revenues are distributed to UDPDI.

- (b) Conversely, the Foreign Representative asserts that Mattamy has already received this payment through the repayment of a shareholder loan (the “**Mattamy Shareholder Loan**”) that was made pursuant to a June 3, 2015 shareholders’ agreement in relation to DHI (the “**Shareholder Agreement**”). If Mattamy is also paid the Mattamy Co-Ownership Payment, it will receive a windfall of at the expense of UDPDI (and, therefore, UCI).

14. There is also a dispute between the parties regarding the quantum of management fees that was received by Mattamy in relation to Phase 1 of the Project. Whereas Mattamy had previously acknowledged receiving , it delivered a revised payment waterfall schedule that asserts Mattamy received

. This recalculation is reflective of the ongoing concerns expressed by both the Foreign Representative and the Monitor regarding the quality, accuracy and consistency of financial information Mattamy provides, as Mattamy controls all of the accounting and holds all of the books and records for the Project.

Confidential waterfall prepared by the Foreign Representative dated February 28, 2021, Exhibit “F” to Gissin March 1, 2021 Affidavit, Motion Record, Tab 2F.

Confidential Appendices 1-3, First Supplement Report.

Gissin March 1, 2021 Affidavit at paras. 12 and 16, Motion Record, Tab 7, pp. 120-121.

15. The outcome of these disputes – in particular, the question of whether Mattamy is entitled to a second payment – will materially impact the value of UDPDI’s interest in the Project. If Mattamy is entitled to this payment, UDPDI’s interest may be worthless; if the

Foreign Representative's position is correct and Mattamy has already received the payments it is entitled to, UDPDI's interest may be worth (after the DHI Facility is repaid).

Confidential waterfall prepared by the Foreign Representative dated February 28, 2021, Exhibit "F" to Gissin March 1, 2021 Affidavit, Motion Record, Tab 2F.

Confidential Appendices 1-3, First Supplement Report.

16. In the absence of certainty about the value of UDPDI's interest, there is a significant risk that prospective purchasers may be dissuaded from participating in the Sale Process, spending the time and cost to conduct the significant due diligence that will be required, or from making their highest and best bids for UDPDI's interest. This is especially so given the complexity of the proposed Sale Process, which contemplates bidders making two offers: one that assumes Mattamy is entitled to the second payment, and one that assumes it is not.

Gissin March 1, 2021 Affidavit at paras. 6 and 27, Motion Record, Tab 7, pp. 118-119 and 127.

Forty-Fourth Report at s. 2.0, para. 15, Motion Record, Tab 8, p. 162.

17. The Sale Process also contemplates that Mattamy must pre-approve all potential bidders, and that if no expressions of interest are received within six weeks of the Sale Process commencing, it can be terminated and Mattamy can foreclose on UDPDI's interest in the Project in satisfaction of the DHI Facility. As a result, it is possible that the Sale Process could fail as a result of the current uncertainty, and Mattamy could end up taking ownership of UDPDI's interest before the issues to be arbitrated are determined, thus depriving UDPDI and UCI of the opportunity to realize value from the Project. If this were to occur, it would be virtually impossible to later determine whether and which bidders had been deterred from participating in the Sale Process and submitting offers as a result of the uncertainty.

Gissin March 1, 2021 Affidavit at paras. 28-29, Motion Record, Tab 7, p. 128.

Forty-Fourth Report at s. 2.1, para. 1(c), Motion Record, Tab 8, p. 162.

18. The Monitor's position that bidders who choose to participate in the Sale Process will be sufficiently sophisticated to address the uncertainty associated with the value of UDPDI's interest in the Project was accorded significant weight by the Motion Judge. However, the Monitor has also acknowledged that it has never run a sale process with issues identical to those in the within case, and that it did not seek any independent advice in designing the Sale Process.

Motion Judge's Decision at paras. 55 and 60, Motion Record, Tab 4, pp. 42-43.

Second Supplement to the Forty-Fourth Report of the Monitor dated March 22, 2021 at pages 2-3, Motion Record, Tab 10, pp. 307-308.

The Motion Judge's Decision

19. Since late 2020, the Foreign Representative has repeatedly tried to have the issues relating to the second payment and management fee calculations resolved by way of arbitration. At every turn, it has been met with resistance by both Mattamy and the Monitor. Accordingly, on January 25, 2021, the Foreign Representative brought a motion seeking an order directing the Monitor to arbitrate these issues with Mattamy, or to allow the Foreign Representative to do so (the "**Arbitration Motion**"). In response, the Monitor brought a motion seeking an order approving the Sale Process (the "**Sale Process Motion**").

Gissin January 24, 2021 Affidavit at paras. 7-17, Motion Record, Tab 6, pp. 60-63.

Gissin March 1, 2021 Affidavit at paras. 4-6 and 25-26, Motion Record, Tab 7, pp. 118-119 and 126-127.

20. The motions were heard together on April 13, 2021. The Foreign Representative argued that if the Arbitration Motion was granted, the Sale Process should be adjourned until after the

completion of the arbitration so as to avoid a “chilling effect” on the process in light of the uncertainty regarding the value of UDPDI’s interest.

Motion Judge’s Decision at paras. 27-28 and 40, Motion Record, Tab 4, pp. 38-40.

21. In his reasons released on June 30, 2021, the Motion Judge substantively granted the relief sought on the Arbitration Motion and directed the Monitor to either commence arbitration or assign the right to do so to the Foreign Representative. However, the Motion Judge also granted the Sale Process Order and permitted the Sale Process to proceed instead of adjourning it until the arbitration was resolved.

Motion Judge’s Decision at paras. 38 and 60-61, Motion Record, Tab 4, pp. 39 and 42-43.

22. On July 21, 2021, the Foreign Representative commenced a motion for leave to appeal the Motion Judge’s decision regarding the Sale Process Order. It has also commenced arbitration with Mattamy pursuant to the Motion Judge’s direction, and has proposed a schedule that would see the arbitration hearing held on October 4-6, 2021.

Notice of Motion for Leave to Appeal dated July 21, 2021, Motion Record, Tab 2.

Affidavit of Hylton Levy sworn August 4, 2021 (“**Levy Affidavit**”) at para. 6, Motion Record, Tab 5, p. 48.

23. The Monitor has indicated that it intends to proceed with the Sale Process and will begin soliciting public bids shortly. The Monitor has also confirmed that it will not pause the Sale Process unless the Motion Judge’s decision is stayed. Accordingly, the Foreign Representative has brought this motion seeking the required stay. The Monitor has agreed that it will not initiate the public solicitation of bids until this motion has been determined.

Levy Affidavit at paras. 4-5, Motion Record, Tab 5, p. 48.

Sealing Order Required for Confidential Appendices

24. In the context of the Arbitration Motion and the Sale Process Motion, the Monitor prepared a Forty-Fourth Report dated February 11, 2021 (the “**Report**”) and a first Supplement to the Report dated March 8, 2021 (the “**Supplement**”). Each of the Report and the Supplement contained certain confidential information regarding the parties’ estimates of UDPDI’s interest in the Project, Mattamy’s projected distribution of proceeds from the sale of that interest, various calculations regarding the waterfall of revenue distributions from the Project, and certain materials regarding a prior arbitration held in September 2019 (together, the “**Confidential Appendices**”).

Motion Judge’s Decision at para. 62, Motion Record, Tab 4, pp. 43-44.

25. On the underlying motions, the Monitor sought an order sealing the Confidential Appendices. This order was granted by the Motion Judge (the “**Sealing Order**”) on the basis of his review of the factors set out in *Sherman Estate v. Donovan*, 2021 SCC 25. The Foreign Representative seeks a similar order sealing the Confidential Appendices in the context of this proceeding.

Motion Judge’s Decision at paras. 63-64, Motion Record, Tab 4, pp. 44-45.

PART III – THE ISSUES

26. The issues before this Honourable Court are:
- (a) Should the Motion Judge’s decision granting the Sale Process Order be stayed pending the outcome of the Foreign Representative’s motion for leave to appeal (and, if leave is granted, the appeal)?
 - (b) Should the appeal proceeding be expedited?
 - (c) Should the Confidential Appendices be sealed?

PART IV – LAW AND ARGUMENT

27. An interlocutory or final order may be stayed on such terms as are just by an order of a judge of the court to which an appeal has been taken. In *Circuit World Corp. v. Lesperance*, this court held that the test for staying an order is the same as the test for an interlocutory injunction, and that generally the court must decide whether the interests of justice call for a stay.

Rules of Civil Procedure, RRO 1990, Reg 194 [Rules], r. 63.02(1)(b), Schedule “B”.

[*Circuit World Corp. v. Lesperance*](#), 1997 CanLII 1385 (ON CA), 1997 CarswellOnt 1840 [*Circuit World*] at para. 8, Moving Party’s Book of Authorities, Tab 2.

28. The three-part test for staying an order pending an appeal is set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* (“**RJR-Macdonald**”) and requires the party seeking a stay to show: (i) a serious issue to be tried; (ii) irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

[*Circuit World*](#), *supra* at para. 8, Moving Party’s Book of Authorities, Tab 2.

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 SCR 311, 1994 CarswellQue 120 [*RJR*] at para. 48, Moving Party's Book of Authorities, Tab 3.

29. The elements of this test are applied in a flexible fashion depending on the circumstances of the case. As this court has confirmed, the three criteria in *RJR-MacDonald* are not “watertight compartments” and the “strength of one may compensate for the weakness of another.” In general, “the court must decide whether the interests of justice call for a stay.”

Circuit World, *supra* at para. 8, Moving Party's Book of Authorities, Tab 2.

There are Serious Issues to be Tried

30. The Supreme Court of Canada has held that in order to satisfy this element of the test, the moving parties need only establish that the action is neither vexatious nor frivolous. In general, on a motion for a stay, the court should not extensively review the merits of the appeal. The appellants must show only that the appeal raises a serious issue. This is a low threshold.

Circuit World, *supra* at para. 9, Moving Party's Book of Authorities, Tab 2.

RJR-MacDonald, *supra* at paras. 54-55, Moving Party's Book of Authorities, Tab 3.

31. As set out in the Foreign Representative's Notice of Motion for Leave to Appeal, the proposed appeal raises a number of serious issues that are of importance to both the parties and the CCAA process as a whole. These issues include (i) what level of deference, if any, should be accorded by the court to a “Super Monitor” that has displaced a debtor and designed its own sale process for the debtor's assets; (ii) in such circumstances, the extent to which a Super Monitor needs to obtain independent evidence to support the fairness and viability of its proposed sale process; (iii) whether the evidentiary onus regarding the fairness and viability of the sale process rests with the Super Monitor or shifts to the objecting party; and (iv) the extent to which the

court can rely upon or refer to another court's decision that is released after the hearing without providing the parties an opportunity to address that decision's impact on their case.

Notice of Motion for Leave to Appeal dated July 21, 2021 at paras. 36-44,
Motion Record, Tab 2, pp. 23-25.

32. It is also notable that in granting the relief sought on the Arbitration Motion, the Motion Judge recognized that the facts raised in the Foreign Representative's Notice to Arbitrate "are such that there is threshold merit to the proceeding and that the proceeding could benefit the creditors of [UDPDI]." This finding supports a conclusion that the Foreign Representative's appeal raises serious issues, as it seeks to have the Sale Process stayed until the arbitration is concluded and potential bidders have certainty on the issues to be arbitrated.

Motion Judge's Decision at para. 39, Motion Record, Tab 4, p. 39.

Moving Party will Suffer Irreparable Harm if Stay is Not Granted

33. The Supreme Court of Canada described "irreparable harm" as "the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." The Court further characterized the issue as "whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."

[RJR-MacDonald](#), *supra* at paras. 63-64, Moving Party's Book of Authorities,
Tab 3.

34. According to Justice Sharpe in *Injunctions and Specific Enforcement*: "It has been held that the courts should avoid taking a narrow view of irreparable harm." Courts have concluded

that where a failure to grant a stay would render any subsequent appeal moot, the resulting denial of appeal rights may constitute irreparable harm in and of itself.

Robert J. Sharpe, *Injunctions and Specific Performance* (loose-leaf) (Toronto: Thomson Reuters Canada Limited, 2019) at para. 2.411, Moving Party's Book of Authorities, Tab 4.

Thomson v. Alberta (Transportation and Safety Board), 2003 ABCA 322 (CanLII) at paras. 19-21, Moving Party's Book of Authorities, Tab 5.

35. As noted above, the Foreign Representative and Mattamy are diametrically opposed on whether Mattamy is entitled to a second payment. This is a very material amount that will have a significant impact on the value of UDPDI's interest in the Project and the ability of the Monitor to market it: if Mattamy is right, it is without value; if the Foreign Representative is right, it is worth , even after the DHI Facility is repaid.

36. In the face of such uncertainty, it will be practically impossible for any interested party to properly conduct due diligence or assess the risks associated with submitting a bid in the Sale Process. It is thus very likely that some prospective purchasers will choose not to spend the time and funds required to prepare and submit a bid. It is equally likely that purchasers who do choose to participate, as a result of not knowing the value of the asset that they are seeking to purchase, will submit materially lower bids than they would otherwise.

Gissin March 1, 2021 Affidavit at paras. 6 and 9, Motion Record, Tab 7, pp. 118-120.

37. If a stay is not granted, and if the Sale Process is allowed to proceed before the within appeal is resolved, the resulting chilling effect on both the potential field of bidders and the quantum of bids submitted will have a detrimental impact on the fairness and efficacy of the Sale Process and the consequential value realized by UDPDI for its interest in the Project. This harm

to UDPDI and UCI would be irreparable: the Sale Process cannot be redone, and it would be virtually impossible for the Foreign Representative to determine the impact that the uncertainty in value had on participation or the eventual sale price – doing so would require examinations of each prospective purchaser as to why they did (or did not) submit a bid and how they arrived at their bid values.

38. Given this uncertainty and Mattamy's degree of control over the field of potential bidders, it is also possible that no bids will be submitted at all and that the Sale Process will fail. Such an outcome would also result in irreparable harm to UDPDI and UCI, as Mattamy would be free to take ownership of UDPDI's interest in the Project in satisfaction of the DHI Facility without any determination of what that interest is actually worth. As noted above, if the Foreign Representative is correct and Mattamy is not entitled to the second payment it seeks, then UDPDI's interest has material value which Mattamy would receive as a windfall without any recourse to UDPDI or UCI. If a stay is not granted, this could occur before there is a decision on the leave to appeal motion, let alone the appeal if leave was granted. This would render any appeal proceeding moot, which would also constitute irreparable harm.

39. It is critically important to the parties, the integrity of the underlying CCAA process and the ongoing Israeli restructuring process of UCI that a proper and transparent sale process is conducted to encourage participants to submit properly valued bids, rather than discourages them from doing so.

Balance of Convenience Favours the Moving Party

40. The third element to be applied in a motion for a stay pending an appeal is a determination of which of the two parties will suffer the greater harm for the granting or refusal of the stay, pending a decision on the merits. According to the Court of Appeal for Ontario, “in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.” The balance of convenience analysis is ultimately a contextual inquiry.

Circuit World, *supra* at para. 8, Moving Party’s Book of Authorities, Tab 2.

RJR-MacDonald, *supra* at para. 67, Moving Party’s Book of Authorities, Tab 3.

41. There is no question that in the circumstances of this case, the balance of convenience favours the stay being granted. For the reasons set out above, UDPDI and UCI will suffer irreparable harm if the stay is refused and the Sale Process is allowed to proceed, either as a result of the Sale Process not attracting the maximum number of bidders and highest valued bids, or because the Sale Process fails outright and Mattamy forecloses on UDPDI’s interest in the Project.

42. In contrast, if the stay is granted, neither Mattamy nor the Monitor will suffer any harm. The Sale Process will proceed once the appeal is resolved – or, if the Foreign Representative is successful, following the outcome of the arbitration which is expected to be heard in October 2021. In the interim, the DHI Facility will continue to accrue interest which Mattamy will be entitled to collect at the conclusion of the Sale Process. The only potential harm posed is to UDPDI and UCI, as the value of UDPDI’s equity decreases as interest continues to accrue on the

DHI Facility, which underpins the Foreign Representative's request to expedite the process of both the motion for leave to appeal and, if leave is granted, the appeal.

Sealing Order Should be Granted

43. As noted above, as part of his decision in the underlying motion, the Motion Judge granted the Sealing Order in respect of the Confidential Appendices on the basis of the factors enumerated by the Supreme Court of Canada in *Sherman Estate v. Donovan*. Specifically, the Motion Judge found that the Sealing Order was justified on the basis that there was a public interest in ensuring the integrity of the Sale Process and the arbitration to be held between the Foreign Representative and Mattamy; that there was no reasonable alternative measure to do so; and that the benefits of the Sealing Order outweighed its negative effects.

[*Sherman Estate v. Donovan*](#), 2021 SCC 25 at paras. 37-38, Moving Party's Book of Authorities, Tab 4.

Motion Judge's Decision at para. 64, Motion Record, Tab 4, p. 45.

44. The same considerations apply to the within appeal proceeding, and a similar sealing order should be granted to preserve the integrity of the Sale Process and the pending arbitration.

PART V – RELIEF REQUESTED

45. For the foregoing reasons, the Foreign Representative respectfully requests:

- (a) an order staying the Sale Process Order and an expedited leave to appeal hearing (and, if leave is granted, an expedited appeal);
- (b) in the alternative, an expedited leave to appeal hearing and appeal;

- (c) an order sealing the Confidential Appendices pending further order of this Court;
and
- (d) such further and other relief as this Honourable Court may deem just.

46. Counsel for the Foreign Representative expect that their oral argument on this motion will not exceed 30 minutes, excluding reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August, 2021.



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Schedule “A” – Table of Cases

1. [*Circuit World Corp. v. Lesperance*](#), 1997 CanLII 1385 (ON CA), 1997 CarswellOnt 1840
2. [*RJR-MacDonald Inc. v. Canada \(Attorney General\)*](#), [1994] 1 SCR 311, 1994 CarswellQue 120 (SCC)
3. Robert J. Sharpe, *Injunctions and Specific Performance* (loose-leaf) (Toronto: Thomson Reuters Canada Limited, 2019)
4. [*Sherman Estate v. Donovan*](#), 2021 SCC 25
5. [*Thomson v. Alberta \(Transportation and Safety Board\)*](#), 2003 ABCA 322

Schedule “B” – Statutory Provisions

Rules of Civil Procedure, RRO 1990, Reg 194

Stay By Order

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg. 465/93, s. 8.

Expiry of Trial Court Stay

(2) A stay granted under clause (1) (a) expires if no notice of motion for leave to appeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired. O. Reg. 534/95, s. 7.

Setting aside or Varying Stay

(3) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken. O. Reg. 465/93, s. 8.

Support Order

(4) A party who obtains a stay of a support order shall obtain a certificate of stay under subrule 63.03 (4) and file it forthwith in the office of the Director of the Family Responsibility Office. O. Reg. 292/98, s. 2.

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE APPELLANT / MOVING PARTY, THE FOREIGN REPRESENTATIVE

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