File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

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

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

MOTION BRIEF OF THE RECEIVER
(SALE PROCESS AND RECORDS ACCESS)

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MOTION BRIEF OF THE RECEIVER (SALE PROCESS AND RECORDS ACCESS)

I. LIST OF DOCUMENTS

1. Notice of Motion of the Receiver, filed April 17, 2020, with attached draft forms of Sale Approval Order, Documents and Electronic Files Access Order and General Order;

2. First Report of the Receiver, dated April 20, 2020.

II. LIST OF AUTHORITIES

Tab

1. *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750;

2. *West End Motors v 189 Dundas Street West Inc.,* 2019 ONSC 5124;

3. *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107;

4. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc.*, 2019 ONSC 1305;

5. Liquidation Consulting Agreement Approval Order of Justice Morawetz, *Payless ShoeSource Canada Inc. et al.*, ONSC File No. CV-19-00614629-00C

6. Sale Approval Order of Justice Hainey, *Forever XXI ULC*, October 7, 2019, ONSC File No. CV-19-00628233-00CL

7. *Target Canada Co., Re*, CarswellOnt 4303;

8. Frank Bennett, *Bennett on Bankruptcy,* 19th ed (Toronto: LexisNexis Canada Inc. 2017);

9. *Battery Plus Inc., Re*, [2002] OJ No 261 at para 16 (Ont SCJ [Commercial List]);

10. *SA Capital Growth Corp. v Mander Estate*, 2012 ONCA 681;

11. Section 77, *The Court of Queen's Bench Act,* C.C.S.M. c 280; and

12. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties of the Respondents, Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd. ("**NEL**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership ("**NIP**") (collectively, the "**Nygard Group**" or the "**Debtors**") pursuant to an Order (the "**Receivership Order**") of this Honourable Court. The Receivership Order was made upon the application of White Oak Commercial Finance, LLC (**"White Oak**"), in its capacity as administrative and collateral agent under the Credit Agreement dated as of December 30, 2019 (the "**Credit Agreement**") by and among White Oak and Second Avenue Capital Partners, LLC (together with White Oak, the **"Lenders**"), and the Debtors.

2. The Receiver has now filed the First Report of the Receiver dated April 20, 2020 (the "**First Report**"). Among other things, the First Report provides this Honourable Court with an update as to the status of this proceeding and related proceedings in the United States Bankruptcy Court for the Southern District of New York, and the actions and activities of the Receiver since the granting of the Receivership Order. In addition, the First Report contains certain recommendations of the Receiver as to Orders that are sought from this Honourable Court, and the evidentiary basis for same. In particular, the Receiver is seeking the following orders:

(a) an Order (the "**Sale Approval Order**"):

i. approving a certain Consulting and Marketing Services Agreement between a contractual joint venture comprised of Merchant Retail Solutions, ULC, Hilco Appraisal Services Co., Hilco Receivables Canada, ULC, Hilco Merchant Resources, LLC, Hilco IP Services, LLC d/b/a Hilco Streambank and Hilco Receivables, LLC (collectively, the "**Consultant**"), the Receiver and the Applicant (the "**Consulting Agreement**") dated as of April 11, 2020 attached as Appendix "T" to the First Report, and the transactions contemplated thereunder;

ii. approving the sale guidelines (the "**Sale Guidelines**") attached to and forming part of the Consulting Agreement, to be attached as Schedule "A" to the Sale Approval Order; and

iii. authorizing the Consultant, with the assistance of the Receiver, to conduct a sale process in accordance with the Consulting Agreement, the Sale Guidelines and the Sale Approval Order;

(b) an Order (the "**Documents and Electronic Files Access Order**") establishing and setting out a process allowing for access, on certain conditions, including the payment of the costs of the process by the person or entity seeking such access, to physical and electronic records in or subject to the possession and/or control of the Receiver, by existing or former directors, officers or employees of the Debtors no longer having

access to such records, and also by certain Non-Debtor entities that are not Respondents in this proceeding, and for the production of records as more particularly described in the said Order; and

(c) an Order, *inter alia*:

i. abridging the time for service of the Notice of Motion of the Receiver and the materials filed in support thereof, such that the motion is properly returnable on the stated hearing date, and dispending with further service thereof;

ii. approving the First Report and the conduct, activities and accounts of the Receiver described therein; and

iii. sealing the Confidential Appendices to the First Report of the Receiver, dated April 20, 2020 (the "**General Order**").

3. This Brief is being filed on behalf of the Receiver so as to outline the legal basis and authorities for certain of the items of relief sought by the Receiver.

Approval of Sale Process and Sale Guidelines

4. In reviewing a proposed sale process, a Court must assess the reasonableness and adequacy of the proposed sale process in light of the factors to be taken into account when considering the approval of a proposed sale. In *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750 [*CCM*] [Tab 1], Brown J. noted, at paragraph 6:

> …Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp*.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> > (i) the fairness, transparency and integrity of the proposed process;
> >
> > (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
> >
> > (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

The three factors provided by the Court in *CCM* have been consistently applied by courts in determining whether to approve a proposed sale process.

CCM, supra at para. 6 [Tab 1]

West End Motors v. 189 Dundas Street West Inc., 2019 ONSC 5124 at paras 13 and 14 [Tab 2]

Walter Energy Canada Holdings, Inc., Re, 2016 BCSC 107, at paras 20 and 21 [Tab 3]

5. Additionally, in considering the approval of a sale process proposed by a Court-appointed receiver in *West End Motors v 189 Dundas Street West Inc.,* 2019 ONSC 5124, the Court also stated the following:

> Further, I adopt the reasoning of Justice Newbould with respect to the deference to be afforded to a receiver respecting its proposed sale process as set out in *Bank of Montreal v. Dedicated National Pharmacies Inc*., 2011 ONSC 4634 (Ont. S.C.J. [Commercial List]) at para. 43:
>
> > Where a receiver or manager has acted reasonably, prudently and not arbitrarily, as is the case here, a court ought not to sit in appeal from a receiver or manager's decision or review in every detail every element of the

> procedure by which the receiver or manager made its decision. To do so would be futile, duplicative and would neutralize the role of the receiver or manager.

West End Motors, supra at para 18 [Tab 2]

6. In several insolvency proceedings involving retail chain businesses in recent years, Courts have approved agreements with consultants specializing in the liquidation of large quantities of retail inventory at multiple leased locations. In connection with the approval of such agreements, Courts have also approved the sales process contemplated under those agreements and forms of "sale guidelines" setting out the rules and procedures for liquidation sales involving premises leased by a retailer debtor.

Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc., 2019 ONSC 1305 [Tab 4]

Liquidation Consulting Agreement Approval Order of Justice Morawetz, *Payless ShoeSource Canada Inc. et al.*, February 21, 2019, ONSC File No. CV-19-00614629-00CL [Tab 5]

Sale Approval Order of Justice Hainey, *Forever XXI ULC*, October 7, 2019, ONSC File No. CV-19-00628233-00CL [Tab 6]

Target Canada Co., Re (2015), 251 ACWS (3d) 193 (Ont SCJ [Commercial List] [Tab 7]

7. Pursuant to paragraph 5(b) the Receivership Order, the Receiver was authorized and directed to market and pursue all offers for sales of the Business or Property (as those terms are defined in the Receivership Order), in whole or in part, including, *inter alia*, soliciting proposals from third party liquidators.

8. While the Receiver has made efforts to obtain a sale of the Business or certain parcels of it, these efforts have not yielded any tangible results to date. In the circumstances, the Receiver would normally be focused at this point on conducting with a liquidation sale on an expedited basis. However, it is not presently possible to conduct a liquidation sale at the retail store locations leased by the Nygard Group as a result of

the COVID-19 pandemic. Nevertheless, given the Receiver's continuing concerns about the ability to sell the Business, or any substantial portion of it, the Receiver has also pursued negotiations with the Consultant, resulting in the Consulting Agreement. As no executable transaction for an *en bloc* purchase of the Business (or any portion of it) has emerged to date, the Receiver believes it is important to seek the approval of the Consulting Agreement on an urgent basis.

First Report, para 136, 137, Appendix T

9. The Consulting Agreement is subject to the approval of this Honourable Court. The terms of the Consulting Agreement include the following:

(a) the Consultant will assist in conducting a store closing or similar themed liquidation sale of all inventory located in the Nygard Group's retail stores (the "**Liquidation Sale**"):

(b) given the current restrictions due to the COVID-19 pandemic, the Liquidation Sale will commence (the "**Sale Commencement Date**") and terminate on dates to be determined;

(c) the conduct of the Liquidation Sale will be governed by the Sale Guidelines, attached as Exhibit "B" to the Consulting Agreement (and which will also be attached to the Sale Approval Order). In the Receiver's view, the Sale Guidelines are in a form consistent with recent Canadian retail liquidations completed within the context of other court supervised insolvency

proceedings (as reflected in the authorities and forms of Orders cited at paragraph 6 above);

(d) in consideration for providing the retail liquidation services, the Consultant will earn a fee of 1.75% of the gross proceeds (net of applicable sales taxes) from the sale of inventory located in the Nygard Group's retail stores on the Sale Commencement Date as well as certain inventory located in the Nygard Group's distribution centres (or in transit) that is sold as part of the Liquidation Sale; and

(e) the Consultant will also assist in selling any owned furniture, fixtures and equipment ("**FF&E**") located at the Nygard Group's retail stores or distribution centres. The Consultant will earn a fee of 17.5% of the gross proceeds (net of applicable sales taxes) from the sale of Nygard Group's FF&E;

(f) should the Receiver elect, and White Oak consent, the Consultant will also assist in the collection, settlement or other resolution of the Nygard Group's outstanding trade accounts receivable, in consideration for which the Consultant will earn a fee of 4% of the gross proceeds (net of any applicable sales taxes) from the collection or other disposition of such receivables, excluding receivables owing from Costco or Walmart;

(g) should the Receiver elect, and White Oak consent, the Consultant will also assist in the realization of the Nygard Group's wholesale inventory located

at the Nygard Group's distribution centres, in consideration for which the Consultant will earn a fee of 5% of the gross proceeds (net of any applicable sales taxes) from the sale or other disposition of such wholesale inventory; and

(h) should the Receiver elect, and White Oak consent, the Consultant will also assist in the realization of the Nygard Group's intellectual property assets, in consideration for which the Consultant will earn a fee of 15% of the gross proceeds (net of any applicable sales taxes) from the sale or disposition of the intellectual property assets.

First Report, para 137, Appendix T

10. As set out in the First Report, the COVID-19 pandemic has served to exacerbate the preexisting issues associated with the Nygard Group's business. The Debtors' business activities have largely ceased and the loss of what may be significant portions of the spring / summer retail selling seasons will likely create a glut of seasonal inventory in the marketplace that will either need to be warehoused until next year's selling season or liquidated (when circumstances permit). Given the current economic climate, the Receiver is of the view the Consulting Agreement should be approved on an expedited basis so as to permit flexibility for a Liquidation Sale and other services to be commenced as soon as circumstances permit which may, for example, be timed differently in different regions.

First Report, paras 138, 139

11. The Consultant was selected in consultation with the Lenders, based on the combination of services offered by the Consultant, the Consultant's extensive retail experience and the Consultant's familiarity with not only the Nygard Group's retail and wholesale businesses, but also with certain of the Nygard Group's wholesale customers and landlords. The fees negotiated with the Consultant were also committed to by the Consultant prior to the full onset of the COVID-19 pandemic, the impact of which may be to significantly increase demand for the services of the Consultant and other professional liquidators.

First Report, para 139, 140

12. The Receiver recommends that this Court approve the retainer of the Consultant and the Consulting Agreement (and the transactions contemplated thereunder, and the Sale Guidelines) for the following reasons:

(a) the Consultant has extensive experience providing strategic and actionable advice and guidance in monetizing assets, particularly in the retail sector, which may prove helpful to the Receiver in its ongoing discussions with parties that may be interested in purchasing parcels of the Property or Business *en bloc*;

(b) there is likely no benefit to further marketing the Business or Nygard Group Property as the market of potentially interested parties has been extensively canvassed and all likely bidders were provided with an opportunity to bid for

the Business or the Nygard Group Property, with no potential transaction appearing to be available;

(c) the realization process contemplated by the Consulting Agreement provides for a fair, efficient and timely method of realizing upon the Nygard Group's Property as the Liquidation Sale will only occur if the efforts to sell the Business or parcels of the Nygard Group Property *en bloc* do not result in a transaction that will realize amounts greater than estimated liquidation values. The Receiver notes that no such transaction has materialized to date;

(d) the Debtors' illiquidity and uncertain future have adversely impacted the Business. Absent the continued indulgence and funding provided by the Lenders for the purposes of the Receivership Proceedings, the Debtors would be without funds to maintain the Property and pursue alternatives;

(e) the Lenders support the retention of the Consultant and the terms of the Consulting Agreement; and

(f) the financial terms of the Consulting Agreement are, in the Receiver's view, commercially fair and reasonable, and comparable to the fees payable for similar services in the marketplace.

First Report, para 141

13. In all the circumstances, the Receiver submits that the proposed sale procedures contemplated pursuant to the Consulting Agreement:

(a) are fair, transparent and have integrity, and are consistent with other Court-supervised sale procedures used in other Canadian retail insolvencies;

(b) have commercial efficacy and are reasonable in light of the specific circumstances faced by the Receiver in this case; and

(c) reasonably optimize the chances of securing the best possible price for the assets which will be the subject of the sale procedures.

14. Accordingly, the Receiver submits that this Honourable Court should grant the Sale Approval Order, substantially in the form attached as Schedule “A” to the Receiver’s Notice of Motion.

Establishment of a Process for Records Access and Review

13. The duty of a court-appointed receiver is a duty to the court as an officer to discharge the receiver’s powers honestly and in good faith. The duty is also that of a fiduciary to all interested parties involving the debtor’s assets, property, and undertaking.

Frank Bennett, *Bennett on Bankruptcy,* 19th ed (Toronto: LexisNexis Canada Inc. 2017) at 746 [Tab 8]

14. As a fiduciary, the receiver owes a duty to make disclosure of information to interested persons and has an obligation to respond to reasonable requests for information consistent with the position of the person making the request. If the cost of

responding to the request is excessive, the receiver may fix a fee for that cost, or apply to the court for direction.

Battery Plus Inc., Re, [2002] OJ No 261 at paras 16 and 19 (Ont SCJ [Commercial List]) [Tab 9]

15. The duty of the receiver to make disclosure of information, which may involve the production of documents at the request of a third-party, only applies where the person requesting the information is an “interested person”. The phrase “interested person” has been held “to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek the production of documents that do not ‘relate to a specific purpose’ concerning the receivership itself.”

SA Capital Growth Corp. v Mander Estate, 2012 ONCA 681 at para 8 [Tab 10]

16. While an interested party has a right to access certain relevant documents and information, the documents must relate to a specific purpose and the request must be consistent with the position of the party making the request. It is unreasonable for a person requesting access to documents to demand and expect access to every document in the receiver’s possession. The right of an interested party to access certain relevant documents does not permit an interested party to go on a fishing expedition.

Battery Plus, supra at paras 17-19 [Tab 9]

17. Pursuant to the provisions of the Receivership Order and in accordance with its mandate, the Receiver has taken, or has the power and authority to take, possession and/or control of physical and electronic records located at various premises

that were occupied and controlled by the Debtors (or any one of them) as at the date of the Receivership Order, or contained within the Debtors' computers, servers, systems and networks (collectively, the "**Systems**"), including "Records" as that term is defined in the Receivership Order, and other documents and electronic records.

18. Beginning on or about March 19, 2019, counsel for Mr. Nygard made a request on behalf of Mr. Nygard personally (with a view to the likely requirement for access by other former directors, officer or employees who no longer had access to records) on the basis that there were documents and electronic records that were personal to or privileged in favour of Mr. Nygard, or were required by him in relation to litigation in respect of which he is a party. There were various telephone discussions and email communications between counsel for the Receiver and counsel for Mr. Nygard that followed.

First Report, paras 123

19. On March 31, 2020, a request was also made on behalf of certain Non-Debtor parties, for access to certain books and records of those Non-Debtors (notwithstanding that such records were located at premises occupied and controlled by the Debtors as at the date of the Receivership Order). Counsel for the Non-Debtor parties also indicated that other documents and files may be requested by Non-Debtors, and that there are "many" other Non-Debtors involved.

First Report, paras 124, 125

20. It is the Receiver's view that the matter of access to and production of documents and electronic records in this matter is extraordinarily complex, and requires a form of Court Order as a result of the following factors:

(a) the scope of the physical records stored in various locations;

(b) the huge volume of electronic records, including 200 terabytes of data on 213 servers, as noted above;

(c) the integration and complexity of the Systems involving approximately 30 companies involved in the overall Nygard organization;

(d) the need to deal with matters relating to a Grand Jury Subpoena issued to one of the Respondents in this proceeding, Nygard Inc., in connection with criminal proceedings in the United States District Court for the Southern District of New York;

(e) the number of litigation actions in progress, including those in which both Debtors and Mr. Nygard (and perhaps Non-Debtors) are parties, requiring the production of documents and/or requests for documents from Mr. Nygard;

(f) the logistics of the variety of storage locations and the interruption in normal business activity arising from the COVID-19 pandemic;

(g) the very substantial expected costs of document access, searching, identification, copying and production; and

(h) the need to balance the interests of various stakeholders.

First Report, para 126

21. The Receiver and its counsel have been responsive to the requests for access, and there have been many telephone discussions, conference calls and emails in an effort to address the matters of documents and electronic files access and production. Various forms of the Documents and Electronic Files Access Order have been circulated, reviewed and discussed.

First Report, para 127

22. The Receiver recognizes a duty to provide disclosure and access to records in response to reasonable requests. That duty, however, is not unlimited. The Receiver considers that the proposed form of Documents and Electronic Files Access Order that is attached to the Notice of Motion reasonably discharges the duties of the Receiver, addresses the complexity and challenges faced in respect of this matter, provides workable processes for access and production, properly allocates costs to the “requesting parties”, and fairly balances the interests of stakeholders.

First Report, para 128

23. Accordingly, the Receiver submits this Court should issue the Documents and Electronic Files Access Order in the form attached as Schedule "B" to the Receiver's Notice of Motion.

Sealing Order

24. Subsection 77(1) of *The Court of Queen's Bench Act,* C.C.S.M. c C280 authorizes the Court to seal as confidential documents filing in a proceeding:

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

Section 77, *The Court of Queen' Bench Act,* C.C.S.M. c C280 [Tab 11]

25. In *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, the Supreme Court of Canada established a two-part test for determining when a court ought to deny the public access to a document filed in a court proceeding. The sealing of documents filed with a court may be ordered where:

> (a) it is necessary to prevent a real and substantial risk to the administration of justice because reasonably available alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the right and interests of the parties and the public.

Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53 [*Sierra Club*] [Tab 12].

26. In the insolvency context, Courts have adopted a practice of sealing certain materials that are filed in support of motions dealing with the approval of sales or a proposed sale process where the information sought to be sealed is of a sensitive

commercial nature and its public disclosure might undermine the integrity and negatively impact the ultimate results of a sale process. On the basis of the principles in *Sierra Club*, Courts have recognized that there is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

West End Motors, supra, at paras 3, 4, 22, 23 [Tab 3]

27. Based on the authorities referenced, the Receiver submits that a sealing Order ought to be granted in respect of the Confidential Appendices as they contain sensitive commercial information. There is no reasonable alternative to a sealing Order for the protection of the information requested.

Scope of Receivership Order

28. Before closing this Brief, the Receiver also notes that one of the issues raised by Mr. Nygard and the Debtors in connection with a Notice of Motion filed on their behalf on April 8, 2020 relates to the scope of the Receivership Order, particularly as it relates to the Debtors NEL and NPL.

29. Pursuant to the Credit Agreement (found as Exhibit "D" to the Affidavit of Robert Dean affirmed in this proceeding on March 9, 2020 – the "**March 9 Dean Affidavit**"), NEL and NPL are described as "Limited Recourse Guarantors". To that end, Section 11.05 of the Credit Agreement indicates that recourse against NPL pursuant to "Mortgages and Owned Real Estate" of NPL shall be limited to a realized value after all costs and expenses, including enforcement costs, of $20,000,000. Section 11.09 of the Credit Agreement also describes that recourse with respect to NEL and NPL is limited to

assets of NPL encumbered by a certain Debenture (as defined in the Credit Agreement) and assets pledged by each of NPL and NEL pursuant to a certain Canadian Pledge Agreement (as defined in the Credit Agreement), copies of which are attached as Exhibits "H", "I" and "F" to the March 9 Dean Affidavit.

First Report, para 22

30. Pursuant to the Debenture (a copy of which is found at Appendix "E" to the First Report), NPL mortgaged certain "Owned Real Property" in Winnipeg and Toronto and "Leased Real Property" and, among other things, granted a security interest in "… all of its undertaking, property and assets, real and personal, movable and immovable (including, without limitation, all goods, intangibles, instruments, investment property, documents of title, chattel paper and money) located at, or used in conjunction with the Owned Real Property or Leased Real Property, including, without limitation, all inventories, and good-will, now owned or hereafter acquired by the Corporation of whatsoever nature, kind or description and wherever situate …"

First Report, para 23, Appendix E

31. In addition, NEL and NPL provided the Lenders with a "Perfection Certificate" (a copy of which is found at Appendix "F" to the First Report) in connection with the transaction relating to the Credit Agreement. As to NEL and NPL, the only assets described in the Perfection Certificate are assets secured to the lenders by means of the Debenture and Canadian Pledge Agreement. The Receiver is not aware of any undertaking, property or assets of NPL or NEL that is not the subject of the security interest granted under the Debenture and the Canadian Pledge Agreement.

First Report, para 24, Appendix F

32. Pursuant to the Receivership Order, the Receiver is appointed in respect of the assets, undertakings and properties generally of the Debtors, including NPL and NEL. Counsel for Mr. Nygard has asserted that the Receivership Order should be amended so as to reference limited recourse to assets of NPL and NEL. The Receiver has inquired on numerous occasions as to what, if any, assets NPL and NEL have that are not secured to the Lenders. However, no response has been provided in respect of other assets, and counsel for Mr. Nygard continues to simply assert that the Receivership Order should be amended.

First Report, para 25

33. The motion filed on behalf of Mr. Nygard and the Debtors in relation to the scope of the Receivership Order seeks an amendment limiting the scope of the appointment in relation to NPL to certain specific real property. Given that the wording of the Debenture referenced in paragraph 41 above clearly extends the security of the Lenders beyond the specific real property described in the Debenture, and in the absence of any evidence that NPL or NEL have additional assets that are not secured to the

Lenders, the Receiver respectfully submits that the Receivership Order does not require the amendment suggested by counsel for Mr. Nygard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: _____

G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous
Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — followed

Graceway Canada Co., Re (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687, 85 C.B.R. (5th) 252 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial

List]) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 74, 2009 CarswellOnt 4839 (Ont. S.C.J. [Commercial List]) — referred to

Parlay Entertainment Inc., Re (2011), 81 C.B.R. (5th) 58, 2011 ONSC 3492, 2011 CarswellOnt 5929 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4382, 2010 CarswellQue 9720 (C.S. Que.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243(6) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the

> requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

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2019 ONSC 5124
Ontario Superior Court of Justice

West End Motors v. 189 Dundas Street West Inc.

2019 CarswellOnt 16118, 2019 ONSC 5124, 311 A.C.W.S. (3d) 406

WEST END MOTORS AND TRAILER PARK LIMITED (Applicant) and 189 DUNDAS STREET WEST INC. (Respondent)

Dietrich J.

Heard: July 30, 2019
Judgment: September 4, 2019
Docket: CV-18-601159-00CL

Counsel: Eric Golden, for Applicant
Chris Reed, for Respondent
Lisa S. Corne, for Receiver
George Corsianos, for Second Mortgagees
D.J. Miller, for Helmsbridge Holdings ULC and Plazacorp Investments Limited

Subject: Contracts; Corporate and Commercial; Property

Headnote

Real property --- Sale of land — Judicial sale — Sale — Conditions of sale — Miscellaneous
Debtor was registered owner of undeveloped land and premises (property) with first mortgage in principal amount of approximately $9 million and second mortgage in amount of $5,700,000 — Receiver was appointed and was granted broad discretion to market and sell property — Receiver brought motion for order approving marketing and sale of property by tender and for order approving receiver's activities as set out in first report, and for order sealing confidential appendix to first report pending sale of debtor's assets by receiver — Debtor brought motion for order directing receiver to accept offer from purchaser as well as sealing order in respect of confidential affidavit pending sale of debtor's assets by receiver — Motion by receiver granted; motion by debtor granted in part — Receiver had put forward persuasive rationale for its decision not to accept purchaser's offer and for preferring its proposal to list and market property — Receiver's proposed marketing and sales process was fair and transparent as property would be marketed by tender to potential buyers through advertising and receiver's internal database in conjunction with advice and marketing efforts of experienced commercial real estate agent — Proposed marketing and sales process was commercially efficient as receiver had chosen to use tender process to avoid paying potentially significant commission to listing broker and had already received expressions of interest from prospective buyers — Proposed process would optimize chances of securing best sale for property in circumstances as it would expose property to market for extended duration that would allow maximum number of interested purchasers to undertake due diligence and submit competitive offers — Debtor's motion was dismissed except for its request for sealing order.

Real property --- Sale of land — Judicial sale — Sale — Bids — Who may bid
Respondent debtor was registered owner of undeveloped land and premises (property) with first mortgage in principal amount of approximately $9 million and second mortgage in amount of $5,700,000 — Receiver was appointed and was granted broad discretion to market and sell property — Receiver brought motion for order approving marketing and sale of property by tender as detailed in its first report, for order approving receiver's activities as set out in first report and order sealing confidential appendix to first report pending sale of debtor's assets by receiver — Debtor brought motion for order directing Receiver to accept offer from purchaser as well

as sealing order in respect of confidential affidavit pending sale of debtor's assets by Receiver — Motion by receiver granted; motion by debtor granted in part — Debtor's motion was dismissed except for its request for sealing order — Debtor had not established that purchaser's offer would likely maximize realization for benefit of all stakeholders and preserve possibility that debtor and unsecured creditors might realize some equity in property — Debtor had not made any attack on fairness, transparency and integrity of sale process proposed by receiver, nor had debtor advanced any attack on efficacy of proposed process or on expectation that it would optimize chances of securing best possible price under these circumstances.

Table of Authorities

Cases considered by *Dietrich J.*:

Bank of Montreal v. Dedicated National Pharmacies Inc. (2011), 2011 ONSC 4634, 2011 CarswellOnt 7972, 83 C.B.R. (5th) 155 (Ont. S.C.J. [Commercial List]) — followed

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

MOTIONS by receiver for order approving sale of property and sealing order and by debtor for sealing order.

***Dietrich J.*:**

Overview

1 The subject matter of this dispute is undeveloped valuable land and premises municipally known as 189 Dundas Street West in the City of Mississauga (the "Property"). The Property is encumbered by a valid first mortgage in the principal amount of approximately $9,000,000. The second mortgage, in the principal amount of $5,700,000, is presently the subject of litigation between the second mortgagees and the Respondent mortgagor (the "Debtor"), who is the registered owner of the Property.

2 This court appointed Rosen Goldberg Inc. (the "Receiver") as receiver of the Property by order of Justice McEwen dated May 3, 2019. In the same Order, the Receiver was granted a broad discretion to market and sell the Property.

3 The Receiver brings this motion for an order approving the marketing and sale of the Property by tender, with the assistance of an experienced real estate broker, as detailed in its First Report of the Receiver dated July 11, 2019 (the "First Report"). It also seeks an order approving the activities of the Receiver set out in the First Report and an order sealing a Confidential Appendix to the First Report pending the sale of the Debtor's assets by the Receiver.

4 The Debtor brings its own motion. It seeks an order directing the Receiver to accept an offer, dated July 18, 2019, made by its financial backer, Helmsbridge Holdings ULC and Plazacorp Investments Limited (collectively, the "Purchaser"), and to effectively abandon its plan to market and sell the Property by tender. It also seeks a sealing order in respect of a confidential affidavit and all exhibits attached thereto, including the Purchaser's offer, pending the sale of the Debtor's assets by the Receiver.

5 For the reasons that follow, I decline to grant the Debtor's request to order the Receiver to accept the Purchaser's offer and I approve the marketing and sale process proposed by the Receiver in the First Report. I

will grant both sealing orders.

Positions of the Parties

6 The Debtor asserts that if the Purchaser's offer is accepted, it will likely maximize the realization for the benefit of all stakeholders and preserve the possibility that the Debtor and the unsecured creditors may receive some of the equity in the Property.

7 Specifically, the Debtor asserts that if the Purchaser's offer exceeds the appraised value of the Property, as obtained by the Receiver, then it would be in the best interests of all stakeholders with an interest in the receivership to accept the Purchaser's offer. The Debtor has not seen the latest appraisal obtained by the Receiver (set out in the Confidential Appendix to the First Report). However, the Debtor asserts that the Purchaser's offer will exceed the appraised value obtained by the Receiver if the Purchaser's offer includes a per square foot buildable rate that is higher than the per square foot buildable rate set out in the Receiver's appraisal.

8 The Receiver asserts that even if the Purchaser's offer includes a per square foot buildable rate that is higher than the rate set out in the appraisal, the Purchaser's offer would not be in the best interests of the stakeholders once the risks associated with the Purchaser's offer are factored into the analysis. For example, the Purchaser's offer includes a significant mortgage against the Property, which would not be discharged until density approvals were obtained, which would confirm the buildable square feet of gross floor area. The Receiver further asserts that the inevitable delay in obtaining density approvals, and the mortgage, carry considerable risk to the stakeholders that would have to be factored into the sale process in determining the best interests of all stakeholders.

9 Further, the Receiver asserts that the Purchaser's offer, which provides a minimum upfront payment based on the minimum potential density, and a potential bonus based on additional approved density, is an atypical offer. It submits that the offer is favourable to the Purchaser as it postpones any payment for any density above the minimum density expected. Accordingly, the stakeholders would await payment of their full entitlement for an indeterminate period while density approvals were negotiated and determined. The Receiver argues that if the Property were exposed to the market, as part of the process it proposes, any potential purchaser would consider a density higher than the minimum expected. The Receiver submits that its appraisal is based on the assumption that offers received following a listing and marketing of the Property would not include a bonus payment for density (as the Purchaser's does) and would be based on an all cash payment to the vendor. Accordingly, the appraisal cannot be compared meaningfully to the Purchaser's offer, which is not an all-cash offer and includes a bonus payment for density.

10 The Receiver also submits that the Property should be exposed to the market and that the sales and marketing process set out in its First Report is fair, reasonable and transparent and allows for competitive bids. Therefore, it asserts, there is nothing preventing the Purchaser from making its offer as part of that process, the same as any other interested party.

11 The second mortgagees, a group of corporations who provide bridge financing to other corporations undertaking real estate development in the Province of Ontario, support the Receiver's motion and oppose the Debtor's motion. They assert that if the court were to order the Receiver to accept the Purchaser's offer, there would be a substantial shortfall to them. The second mortgagees are of the view that the sales process presented by the Receiver in its First Report will result in a higher sale price than that offered by the Purchaser and has a better chance of generating more value for the second mortgagees.

Issue

12 The issue in this matter is whether the sale process recommended by the Receiver is a fair and commercially reasonable process that ought to be followed in the circumstances, or the Receiver should be

ordered to accept the offer made by the Purchaser.

Law and Analysis

13 A court-appointed Receiver derives its authority from the order by which it is appointed. In this case, Justice McEwen's Order appointing the Receiver, at para. 3(m), expressly authorizes the Receiver "with court approval, to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate."

14 In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 6, Justice Brown, as he then was, having considered the test set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)], identified three factors to be considered on a motion to approve a proposed sale and marketing process for the assets of an insolvent debtor: a) the fairness, transparency and integrity of the proposed process; b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

15 I find that the proposed marketing and sale process is fair and transparent. The Receiver proposes to employ a process whereby the Property will be marketed by tender to potential buyers through advertising and the Receiver's internal database in conjunction with the advice and marketing efforts of an experienced commercial real estate agent. The Purchaser is no way precluded from this process, which permits offers from any interested buyer and access to a data room containing a detailed description of the Property. There is no stalking horse offer.

16 I also find that the proposed marketing and sale process is commercially efficient in light of the circumstances. The Receiver has chosen to use a tender process to avoid paying a potentially significant commission to a listing broker. The record shows that the Receiver is experienced in selling real property by tender and has already received expressions of interest from prospective buyers.

17 I also find that the proposed process will optimize the chances of securing the best sale price for the Property under the circumstances. The process will expose the Property to the market for an extended duration that will allow the maximum number of interested purchasers to undertake due diligence and submit competitive offers. Again, the Purchaser is invited to make its offer, which has a chance of succeeding against competing offers in the proposed process.

18 Further, I adopt the reasoning of Justice Newbould with respect to the deference to be afforded to a receiver respecting its proposed sale process as set out in *Bank of Montreal v. Dedicated National Pharmacies Inc.*, 2011 ONSC 4634 (Ont. S.C.J. [Commercial List]) at para. 43:

> Where a receiver or manager has acted reasonably, prudently and not arbitrarily, as is the case here, a court ought not to sit in appeal from a receiver or manager's decision or review in every detail every element of the procedure by which the receiver or manager made its decision. To do so would be futile, duplicative and would neutralize the role of the receiver or manager.

19 The Receiver has put forward persuasive rationale for its decision not to accept the Purchaser's offer and for preferring its proposal to list and market the property in accordance with the process articulated in its First Report. I accept that the Purchaser's offer cannot be compared meaningfully to the appraisal obtained by the Receiver as the Receiver's appraisal is based on an all-cash offer that does not require the stakeholders to await payment or assume any risk relating to density approvals. It is appropriate and commercially reasonable that the Property be exposed to the market, which can test the fair market value of the Property and optimize the chances of securing the best possible price under the circumstances for all the stakeholders.

20 The Debtor has not persuaded me that the Purchaser's offer will likely maximize realization for the benefit of all stakeholders and preserve the possibility that the Debtor and the unsecured creditors may realize some of the equity in the Property. The evidence of the second mortgagees is that the Purchaser's offer, if accepted, would result in a shortfall in the amount owing to the second mortgagees irrespective of the outcome of the litigation between the Debtor and the second mortgagees. Further, the Purchaser's offer has not been tested in the open market and therefore cannot be said to be one that will likely maximize realization.

21 Both the first mortgagee and the second mortgagees support the Receiver's proposed sale process. The Debtor has not made any attack on the fairness, transparency and integrity of the sale process proposed by the Receiver. Similarly, the Debtor had not advanced any attack on the commercial efficacy of the proposed process or the expectation that it will optimize the chances of securing the best possible price under the circumstances. In my view, the Receiver is acting reasonably, prudently and not arbitrarily regarding the proposed sale process.

Disposition

22 The Receiver has succeeded in its motion and an order shall issue: i) approving the marketing and sale process for the assets under the Receiver's administration, as proposed in the First Report; ii) approving the activities of the Receiver set out in the First Report; and iii) sealing Confidential Appendix 1 to the First Report pending the completion of the sale of the Property by the Receiver.

23 The Debtor's motion is dismissed except for its request for a sealing order. An order shall issue sealing the Confidential Affidavit of Paul Goldfischer sworn on July 23, 2019, together with all exhibits to that affidavit, pending the completion of the sale of the Property by the Receiver.

Motion by receiver granted; motion by debtor granted in part.

End of Document

2016 BCSC 107
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc., Re

2016 CarswellBC 158, 2016 BCSC 107, [2016] B.C.W.L.D. 844, 23 C.C.P.B. (2nd) 201, 263 A.C.W.S. (3d) 300, 33 C.B.R. (6th) 60

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as Amended

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Fitzpatrick J.

Heard: January 5, 2016
Judgment: January 5, 2016
Written reasons: January 26, 2016
Docket: Vancouver S1510120

Counsel: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz, for Petitioners
John Sandrelli, Tevia Jeffries, for United Mine Workers of America 1974 Pension Plan and Trust
Matthew Nied, for Steering Committee of First Lien Creditors of Walter Energy, Inc.
Aaron Welch, for Her Majesty the Queen in Right of the Province of British Columbia
Kathryn Esaw, for Morgan Stanley Senior Funding, Inc.
Peter Reardon, Wael Rostom, Caitlin Fell, for KPMG Inc., Monitor
Neva Beckie, for Canada Revenue Agency
Stephanie Drake, for United States Steel Workers, Local 1-424

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Insolvent corporations ("petitioners") were granted initial order under Companies' Creditors Arrangement Act — Petitioners were on path towards equity or debt restructuring, or sale and liquidation of their assets — Petitioners brought application for approval of sale and solicitation process, appointment of professionals to manage that process, key employee retention plan, and extension of stay — Application granted — Proposed sale and investment solicitation process represented best opportunity to restructure as going concern, was reasonable, was not opposed by any stakeholders, and was approved — It was appropriate to appoint chief restructuring officer (CRO) and financial advisor, as they were necessary for successful restructuring — Petitioners' assets and operations were significantly complex so as to justify appointments and proposed compensation and charges — Recommendations for financial advisor and CRO were accepted as being most qualified candidates — Key employee retention plan was approved, even in light of earlier salary raise and pension plan's objections, as employee was most senior remaining executive — Loss of this person's expertise now or during process would be extremely detrimental to chances of successful restructuring — Stay that was granted under initial order was extended in order to provide sufficient time to solicit letters of intent — Union was not entitled to proceed with its claims as it was not imperative that they be determined now.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — followed

Forest & Marine Financial Corp., Re (2009), 2009 BCCA 319, 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, 96 B.C.L.R. (4th) 77, 273 B.C.A.C. 271, 461 W.A.C. 271 (B.C. C.A.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39, *(*sub nom. *Bricore Land Group Ltd., Re)* 296 Sask. R. 64 (Sask. Q.B.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2840, 2012 CarswellOnt 5922, 94 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — referred to

Sahlin v. Nature Trust of British Columbia Inc. (2010), 2010 BCCA 516, 2010 CarswellBC 3510, 296 B.C.A.C. 126, 503 W.A.C. 126 (B.C. C.A. [In Chambers]) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465, 20 C.B.R. (6th) 116 (Ont. S.C.J.) — considered

Yukon Zinc Corp., Re (2015), 2015 BCSC 1961, 2015 CarswellBC 3121, 5 P.P.S.A.C. (4th) 9 (B.C. S.C.) — followed

8440522 Canada Inc., Re (2013), 2013 ONSC 6167, 2013 CarswellOnt 13921, 8 C.B.R. (6th) 86 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

Employee Retirement Income Security Act, 1974, Pub.L 93-406; 88 Stat. 829; 29 U.S.C. 18
Generally — referred to

s. 1001 — referred to

Labour Relations Code, R.S.B.C. 1996, c. 244
Generally — referred to

s. 54 — considered

APPLICATION by insolvent corporations for extension of stay of proceedings and other relief to lead to potential restructuring.

***Fitzpatrick J.*:**

Introduction and Background

1 On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

2 The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

3 The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]); *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 21.

4 The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

5 From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will

discuss below.

6 The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

7 This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

8 As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

9 The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

10 For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

11 The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

12 Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

13 The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

14 The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

15 It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to

assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

16 Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

17 At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

18 The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

19 It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

20 Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
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> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

21 Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2840 (Ont. S.C.J. [Commercial List]) at paras. 17-19.

22 In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

23 The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

24 No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

25 The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

26 The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

27 In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

28 A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

29 The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

30 Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

31 In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

32 The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

33 In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *8440522 Canada Inc., Re*, 2013 ONSC 6167 (Ont. S.C.J. [Commercial List]) at para. 17). No question arises as to his extensive qualifications to fulfil this role.

34 The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from

the 1974 Pension Plan as to the appropriateness of his involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

35 The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.) at para. 19.

36 The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

37 PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

38 At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

39 To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

40 The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
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> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
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> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

41 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

42 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

> (a) the size and complexity of the businesses being restructured;
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> (b) the proposed role of the beneficiaries of the charge;
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> (c) whether there is an unwarranted duplication of roles;
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> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
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> (e) the position of the secured creditors likely to be affected by the charge; and
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> (f) the position of the Monitor.

43 I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

44 The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

45 Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

46 The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

47 Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

48 In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

49 The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

50 The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

51 I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para. 53; *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]) at para. 6. A sealing order was granted on January 5, 2016.

52 The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

53 The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

54 The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus ... were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

55 I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

56 The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

57 As noted by the court in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

58 Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]); and *U.S. Steel Canada* at paras. 28-33.

59 I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

60 In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

61 What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

62 Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

63 On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

64 The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

65 Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

66 No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

67 In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

68 In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

69 Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

70 As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

71 Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

72 The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of

s. 54 of the *Labour Relations Code*, R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

73 The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corp., Re*, 2015 BCSC 1961 (B.C. S.C.). There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

[26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:

a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;

b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;

c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;

d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;

e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and

f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

74 I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to

Wolverine LP. While this may be so, proceeding with these matters will inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

75 In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

76 In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

77 Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

Application granted.

End of Document

2019 ONSC 1305
Ontario Superior Court of Justice [Commercial List]

Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc.

2019 CarswellOnt 3055, 2019 ONSC 1305, 303 A.C.W.S. (3d) 19

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

G.B. Morawetz R.S.J.

Heard: February 21, 2019
Judgment: February 25, 2019
Docket: CV-19-00614629-00CL

Counsel: J. Dietrich, M. Sassi, for Applicants
D. Chochla, for Ad Hoc Group of Term Lenders
S. Zweig, A. Nelms, for Monitor, FTI Consulting Canada Inc.
T. Reyes, for ABL Agent, Wells Fargo
D. Bish, for Cadillac Fairview
S. Kour, for Term Loan Agent, Cortland Products Corp.
A. Taylor, for Tiger Group LLC and Great American Group LLC
C. Prophet, for Ivanhoe Cambridge
S.M. Citak, for Oxford & Crombie
L. Galessiere, for various landlords

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Initial order was granted in Companies' Creditors Arrangement Act (CCAA) proceedings — Applicants brought motion for order approving transactions contemplated under liquidation consulting agreement — Motion granted — Subsequent to granting of initial order, materials were served on various landlords and constructive discussions were held which resulted in motion proceeding unopposed — Monitor was supportive of liquidation consulting agreement and transactions contemplated therein — It was appropriate to approve liquidation consulting agreement and accompanying sale guidelines.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re) (2019), 2019 ONSC 1215, 2019 CarswellOnt 3056 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION by applicants for order approving transactions contemplated under liquidation consulting agreement.

***G.B. Morawetz R.S.J.*:**

1 This motion was heard on February 21, 2019. At the conclusion of the hearing, the record was endorsed as follows:

The requested relief was not opposed. Motion granted. Order signed. Brief endorsement to follow.

2 These are the Reasons.

3 The Applicants brought this motion for an order approving transactions contemplated under the liquidation consulting agreement entered into between Payless Holdings, LLC ("Merchant") and Payless ShoeSource Canada LP ("Canadian Merchant"), Great American Group, LLC and Tiger Capital Group, LLC (together with their respective Canadian assignees, the "Consultant") dated as of February 12, 2019 (the "Liquidation Consulting Agreement") and the sale guidelines attached as a schedule to the Liquidation Approval Order (the "Sale Guidelines").

4 The Initial Order in these CCAA proceedings was granted on February 19, 2019 [2019 CarswellOnt 3056 (Ont. S.C.J. [Commercial List])]. Subsequent to the granting of the Initial Order, materials were served on various landlords, some of whom were represented at this hearing.

5 Counsel to the Applicants advised that since the materials were served, constructive discussions were held with various landlords which resulted in this motion proceeding unopposed. In addition, a negotiated form of order has been proposed.

6 Payless engaged Malfitano Advisors, LLC ("Maltifano Advisors") to assist as asset disposition advisor and conducted a solicitation and bidding process for liquidators.

7 Two proposals were received from two bidders. After extensive evaluation, the Liquidation Consultant was selected and the Merchant and Canadian Merchant entered into the Liquidation Consulting Agreement with the Liquidation Consultant on February 12, 2019.

8 The Monitor is supportive of the Liquidation Consulting Agreement and the transactions contemplated therein.

9 I am satisfied that it is appropriate to approve the Liquidation Consulting Agreement and the accompanying Sale Guidelines.

10 During the course of the hearing, Ms. Galessiere raised an issue relating to a theoretical surplus and whether any such surplus could be the subject of a cash sweep involving the U.S. Debtors. Assurances were provided by the Monitor that there would be no cash sweep effected until at least March 22, 2019. Given that the stay extension date is March 21, 2019, it seems to me that if this issue becomes real, as opposed to theoretical, it can be addressed at the hearing to extend the Stay Extension Date, which is now scheduled for March 20, 2019.

Motion granted.

Court File No. CV-19-00614629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 21ST
REGIONAL SENIOR JUSTICE MORAWETZ	)	DAY OF FEBRUARY, 2019

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

(the "**Applicants**")

LIQUIDATION CONSULTING AGREEMENT APPROVAL ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order, among other things, approving the consulting agreement entered into between, on the one hand, Payless Holdings, LLC and Payless ShoeSource Canada LP, and on the other hand, Great American Group, LLC and Tiger Capital Group, LLC (collectively with their respective Canadian affiliate assignees, the "**Consultant**") dated as of February 12, 2019 (the "**Consulting Agreement**") and other related relief was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Stephen Marotta sworn February 18, 2019 and the Exhibits thereto, and the pre-filing report of FTI Consulting Canada Inc. in its capacity as proposed monitor dated February 19, 2019 (the "**Pre-Filing Report**") and the First Report of FTI Consulting Canada Inc. in its capacity as monitor dated February 20, 2019 and on hearing the submissions of counsel for the Applicants and Payless ShoeSource Canada LP (each a "**Payless Canada Entity**" and

collectively, the "**Payless Canada Entities**"), FTI Consulting Canada Inc. in its capacity as court-appointed monitor (the "**Monitor**"), Wells Fargo Bank, National Association (the "**ABL Agent**"), Cortland Products Corp. (the "**Term Loan Agent**"), the Consultant, counsel for The Cadillac Fairview Corporation Limited, ~~counsel for Bentall Kennedy (Canada) LP, Quadreal Property Group,~~ counsel for Ivanhoe Cambridge, counsel for Cushman Wakefield Asset Services, Morguard Investments Limited, Smart REIT (SmartCentres), RioCan REIT, Cominar REIT, Triovest Realty Advisors Inc. and Blackwood Partners Management Corporation, counsel for the Oxford Properties Group and Crombie REIT, and no one appearing for any other person on the service list, although properly served as appears from the affidavit of Monique Sassi sworn on February 19, 2019.

counsel for the Consultant, counsel to the ad hoc group of lenders under the Term Loan Credit Facility (as defined in the Marotta Affidavit)

Service

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

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein, shall have the meaning ascribed thereto in the Initial Order, the Consulting Agreement, or the Sale Guidelines (defined below), as applicable.

Approval of the Consulting Agreement

3. **THIS COURT ORDERS** that the Consulting Agreement, including the Sale Guidelines attached hereto as Schedule "**A**" (the "**Sale Guidelines**"), and the transactions contemplated under the Consulting Agreement including the Sale Guidelines, are hereby approved with such minor amendments to the Consulting Agreement (but not the Sale Guidelines) as the Payless Canada Entities, with the consent of the Monitor, and the Consultant may deem necessary and agree to in writing. Subject to the provisions of this Order, the Payless Canada Entities are hereby

authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable to implement the Consulting Agreement and the Sale Guidelines and the transactions contemplated therein.

The Sale

4. **THIS COURT ORDERS** that each of the Payless Canada Entities, with the assistance of the Consultant, is authorized and directed to conduct the Sale in accordance with this Order, the Consulting Agreement and the Sale Guidelines and to advertise and promote the Sale within the Stores, all in accordance with the Sale Guidelines. If there is a conflict between this Order, the Consulting Agreement and the Sale Guidelines, the order of priority of documents to resolve each conflict is as follows: (1) this Order; (2) the Sale Guidelines; and (3) the Consulting Agreement.

5. **THIS COURT ORDERS** that each of the Payless Canada Entities, with the assistance of the Consultant, is authorized to market and sell the Merchandise, Additional Merchant Goods and, subject to the Initial Order and paragraph 11 of the Sale Guidelines, the Offered FF&E, free and clear of all liens, claims, encumbrances, security interests, hypothecs, prior claims, mortgages, charges, trusts, deemed trusts, executions, levies, financial, monetary or other claims, whether or not such claims have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims arose or came into existence prior to the date of this Order or arise or come into existence following the date of this Order (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise) (all of the foregoing, collectively "**Claims**"), including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Initial Order and any other charges hereinafter granted by this Court in these proceedings; and (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the "**Encumbrances**"), which

Claims will attach instead to the proceeds received from the Merchandise, Additional Merchant Goods, and the Offered FF&E, other than amounts due and payable to the Consultant by any of the Payless Canada Entities under the Consulting Agreement, in the same order and priority as the Claims existed as at the date hereof.

6. **THIS COURT ORDERS** that, subject to the terms of this Order and the Sale Guidelines, the Consultant shall have the right to use the Stores and all related store services, furniture, trade fixtures and equipment, including the FF&E, located at the Stores, and other assets of any of the Payless Canada Entities as designated under the Consulting Agreement for the purpose of conducting the Sale, and for such purposes, the Consultant shall be entitled to the benefit of the Payless Canada Entities' stay of proceedings provided pursuant to the Initial Order, as applicable and as such stay may be extended from time to time.

7. **THIS COURT ORDERS** that until the Sale Termination Date which, for greater certainty, shall be the earlier of April 30, 2019 and the effective date of a disclaimer in accordance with the CCAA, the Consultant shall have access to the Stores in accordance with the applicable leases and the Sale Guidelines on the basis that the Consultant is assisting the Payless Canada Entities and each of the Payless Canada Entities has granted the right of access to the applicable Store to the Consultant. To the extent that the terms of the applicable leases are in conflict with any term of this Order or the Sale Guidelines, the terms of this Order and the Sale Guidelines shall govern.

8. **THIS COURT ORDERS** that nothing in this Order shall amend or vary, or be deemed to amend or vary, the terms of the leases for the Stores. Nothing contained in this Order or the Sale Guidelines shall be construed to create or impose upon any of the Payless Canada Entities or the Consultant any additional restrictions not contained in the applicable lease.

9. **THIS COURT ORDERS** that nothing herein is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or to grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

10. **THIS COURT ORDERS** that until the Sale Termination Date, the Consultant shall have the right to use, without interference by any intellectual property licensor, the Payless Canada Entities' trademarks, trade names and logos, customer/marketing lists, website and social media accounts as well as all licenses and rights granted to any of the Payless Canada Entities to use the trade names, and logos of third parties, relating to and used in connection with the operation of the Stores solely for the purpose of advertising and conducting the Sale in accordance with the terms of the Consulting Agreement, the Sale Guidelines and this Order.

Consultant Liability

11. **THIS COURT ORDERS** that the Consultant shall act solely as an independent consultant to each of the Payless Canada Entities and that it shall not be liable for any claims against any of the Payless Canada Entities other than as expressly provided in the Consulting Agreement or the Sale Guidelines. More specifically:

(a) The Consultant shall not be deemed to be an owner or in possession, care, control or management of the Stores or the assets located therein or associated therewith or of the Payless Canada Entities' employees located at the Stores or any other property of any of the Payless Canada Entities;

(b) The Consultant shall not be deemed to be an employer, or a joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or other statute, regulation or rule of law or equity for any

purpose whatsoever, and shall not incur any successorship liabilities whatsoever; and

(c) The Payless Canada Entities shall bear all responsibility for any liability whatsoever (including without limitation losses, costs, damages, fines, or awards) relating to claims of customers, employees and any other persons arising from events and closings occurring at the Stores during and after the term of the Consulting Agreement, except to the extent that such claims are the result of events or circumstances caused or contributed to by the gross negligence or wilful misconduct of the Consultant, its employees, agents or other representatives, or otherwise in accordance with the Consulting Agreement.

12. **THIS COURT ORDERS** to the extent any of the Payless Canada Entities' landlords may have a claim against any of the Payless Canada Entities arising solely out of the conduct of the Consultant in conducting the Sale for which any of the Payless Canada Entities have claims against the Consultant under the Consulting Agreement, the Payless Canada Entity(ies) shall be deemed to have assigned free and clear such claims to the applicable landlord (the "**Assigned Landlord Rights**"); provided that each such landlord shall only be permitted to advance each such claims against the Consultant if written notice, including the reasonable details of such claims, is provided by such Landlord to the Consultant, the Payless Canada Entities and the Monitor during the period from the Sale Commencement Date to the date that is thirty (30) days following the Sale Termination Date.

Consultant as Unaffected Creditor

13. **THIS COURT ORDERS** that, in accordance with the CCAA and the Initial Order, and subject only to paragraph 6 of this Order, the Consultant shall not be affected by the stay of proceedings in respect of the Payless Canada Entities and shall be entitled to exercise its

remedies under the Consulting Agreement in respect of claims of the Consultant pursuant to the Consulting Agreement (collectively, the "**Consultant's Claims**"), the Consultant shall be treated as an unaffected creditor in the context of the present proceedings.

14. **THIS COURT ORDERS** that notwithstanding the terms of any order issued by this Court in the context of the present proceedings or the terms of the CCAA, none of the Payless Canada Entities shall be entitled to repudiate, disclaim or resiliate the Consulting Agreement or any of the agreements, contracts or arrangements in relation thereto entered into with the Consultant nor shall any claim in favour of the Consultant Agreement or related agreements, contracts or arrangements be compromised pursuant to any plan of compromise or arrangement.

15. **THIS COURT ORDERS** that each of the Payless Canada Entities is hereby authorized and directed to remit, in accordance with the Consulting Agreement, or any other agreement contract or arrangement in relation thereto, all amounts that become due to the Consultant thereunder.

16. **THIS COURT ORDERS** that no Claims shall attach to any amounts payable by any of the Payless Canada Entities to the Consultant pursuant to the Consulting Agreement, including any amounts that must be reimbursed by any of the Payless Canada Entities to the Consultant, and the Payless Canada Entity(ies) shall pay any such amounts to the Consultant free and clear of all Claims, notwithstanding any enforcement or other process, all in accordance with the Consulting Agreement.

17. **THIS COURT ORDERS** that notwithstanding (a) the pendency of these proceedings; (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") in respect of any of the Payless Canada Entities or any bankruptcy order made pursuant to any such applications; (c) any assignment in bankruptcy made in respect of any of the Payless Canada Entities; (d) the provisions of any federal or provincial statute; or (e) any

negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other document or agreement (collectively, the "**Agreement**") which binds any of the Payless Canada Entities:

(a) the Consulting Agreement and the transactions and actions provided for and contemplated therein (including the Sale Guidelines), including, without limitation, the payment of amounts due to the Consultant; and

(b) the Assigned Landlord Rights,

shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Payless Canada Entities and shall not be void or voidable by any Person (as defined in the BIA), including any creditor of any of the Payless Canada Entities, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

18. **THIS COURT ORDERS** that notwithstanding (a) the pendency of these proceedings; (b) any application for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of any of the Payless Canada Entities or any bankruptcy order made pursuant to any such applications; (c) any assignment in bankruptcy made in respect of any of the Payless Canada Entities; (d) the provisions of any federal or provincial statute; or (e) any Agreement which binds any of the Payless Canada Entities, any obligation to clean up or repair any of the leased premises contained in this Order or the Sale Guidelines, shall be binding on any trustee in bankruptcy that may be appointed in respect to the Payless Canada Entities and shall not be void or voidable by any Person (as defined in the BIA), including any creditor of any of the Payless Canada Entities, nor shall they, or any of them, constitute or be deemed to be a preference,

fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

Gift Cards, Returns and Coupons

19. **THIS COURT ORDERS** that for a period of thirty days (30) following the granting of the Initial Order, the Payless Canada Entities will honour gift cards that were issued by the Payless Canada Entities prior to the Sale Commencement Date in accordance with the Payless Canada Entities' customer gift card policies and procedures as they existed as of the date of the Initial Order.

20. **THIS COURT ORDERS** that the Payless Canada Entities shall continue to honour returns and exchanges of Merchandise sold prior to the Sale Commencement Date for a period of thirty days (30) following the granting of the Initial Order in compliance with the Payless Canada Entities' return policies in effect as of the date such item was purchased and any Merchandise sold after the Sale Commencement Date will not be subject to return or exchange.

21. **THIS COURT ORDERS** that upon entry of this Order, the Payless Canada Entities shall cease to honour coupons issued under any promotional programs.

General

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

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada, the United States of America or elsewhere, to give effect to this Order and to assist the Payless Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and

administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Payless Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Payless Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that any interested party (including any of the Payless Canada Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

FEB 2 1 2019

PER / PAR:

Schedule "A"

SALE GUIDELINES

The following procedures shall apply to the Sale to be conducted at the Stores of Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc. and Payless ShoeSource Canada LP (collectively, the "**Merchant**"). All terms not herein defined shall have the meaning set forth in the Consulting Agreement by and between a joint venture comprised of Great American Group, LLC and Tiger Capital Group, LLC (collectively with their respective Canadian affiliate assignees, the "**Consultant**"), Payless Holdings, LLC and the Merchant dated as of February 12, 2019 (the "**Consulting Agreement**").

1. Except as otherwise expressly set out herein, and subject to: (i) the Initial Order in these proceedings dated February 19, 2019, (the "**Initial Order**") or any further Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"); or (ii) any subsequent written agreement between the Merchant and the applicable landlord(s) (individually, a "**Landlord**" and, collectively, the "**Landlords**") and approved by the Consultant in writing, or (iii) as otherwise set forth herein, the Sale shall be conducted in accordance with the terms of the applicable leases/or other occupancy agreements to which the affected Landlords are privy for each of the affected Stores (individually, a "**Lease**" and, collectively, the "**Leases**"). However, nothing contained herein shall be construed to create or impose upon the Merchant or the Consultant any additional restrictions not contained in the applicable Lease or other occupancy agreement.

2. The Sale shall be conducted so that each of the Stores remains open during its normal hours of operation provided for in its respective Lease until the respective Sale Termination Date for such Store. The Sale at the Stores shall end by no later than the Sale Termination Date. Rent payable under the respective Leases shall be paid in accordance with the terms of the Initial Order.

3. The Sale shall be conducted in accordance with applicable federal, provincial and municipal laws and regulations, unless otherwise set out herein or otherwise ordered by the Court.

4. All display and hanging signs used by the Consultant in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. Notwithstanding anything to the contrary contained in the Leases, the Consultant may advertise the Sale at the Stores as an "everything on sale", an "everything must go", a "store closing" or similar theme sale at the Stores (provided however that no signs shall advertise the Sale as a "bankruptcy", a "going out of business" or a "liquidation" sale it being understood that the French equivalent of "clearance" is "liquidation" and is permitted to be used). Forthwith upon request from a Landlord, the Landlord's counsel, the Merchant or the Monitor, the Consultant shall provide the proposed signage packages along with the proposed dimensions and number of signs (as approved by the Merchant pursuant to the Consulting Agreement) by e-mail or facsimile to the applicable Landlords or to their counsel of record. Where the provisions of the Lease conflict with these Sale Guidelines, these Sale Guidelines shall govern. The Consultant shall not use neon or day-glow or handwritten signage (unless otherwise contained in the sign package, including "you pay" or "topper" signs). In addition, the Consultant shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Stores with a separate entrance from the exterior of the enclosed mall, provided, however, that where such

banners are not explicitly permitted by the applicable Lease and the Landlord requests in writing that the banners are not to be used, no banners shall be used absent further Order of the Court, which may be sought on an expedited basis on notice to the service list in the CCAA proceeding (the "**Service List**"). Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the façade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Consultant. If a Landlord is concerned with "store closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, the Consultant and the Landlord will discuss the Landlord's concerns and work to resolve the dispute.

5. The Consultant shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.

6. The Consultant shall not make any alterations to interior or exterior Store lighting, except as authorized pursuant to the applicable Lease. The hanging of exterior banners or other signage, where permitted in accordance with the terms of these guidelines, shall not constitute an alteration to a Store.

7. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final".

8. The Consultant shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on any Landlord's property, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, the Consultant may solicit customers in the Stores themselves. The Consultant shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as permitted under the applicable Lease, or agreed to by the Landlord, and no advertising trucks shall be used on a Landlord property or mall ring roads, except as explicitly permitted under the applicable Lease or agreed to by the Landlord.

9. At the conclusion of the Sale in each Store, the Consultant shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than FF&E which for clarity is owned by the Merchant) may be removed without the applicable Landlord's written consent unless otherwise provided by the applicable Lease. Any fixtures or personal property left in a Store after the Sale Termination Date in respect of which the applicable Lease has been disclaimed by the Merchant shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the Landlord chooses, without any liability whatsoever on the part of the Landlord.

10. Subject to the terms of paragraph 9 above, the Consultant may sell Offered FF&E which is located in the Stores during the Sale. The Merchant and the Consultant may advertise the sale of Offered FF&E consistent with these guidelines on the understanding that any applicable Landlord may require that such signs be placed in discreet locations

acceptable to the applicable Landlord, acting reasonably. Additionally, the purchasers of any Offered FF&E sold during the Sale shall only be permitted to remove the Offered FF&E either through the back shipping areas designated by the applicable Landlord, or through other areas after regular store business hours, or through the front door of the Store during store business hours if the Offered FF&E can fit in a shopping bag, with applicable Landlord's supervision as required by the applicable Landlord. The Consultant shall repair any damage to the Stores resulting from the removal of any Offered FF&E by Consultant or by third party purchasers of Offered FF&E from Consultant.

11. The Merchant hereby provides notice to the Landlords of the Merchant and the Consultant's intention to sell and remove Offered FF&E from the Stores. The Consultant will arrange a walk through with each Landlord that requests a walk through with the Consultant to identify the Offered FF&E subject to the sale. The relevant Landlord shall be entitled to have a representative present in the Store to observe such removal. If the Landlord disputes the Consultant's entitlement to sell or remove any FF&E under the provisions of the Lease, such FF&E shall remain on the premises and shall be dealt with as agreed between the Merchant, the Consultant and such Landlord, or by further Order of the Court upon application by the Merchant on at least two (2) days' notice to such Landlord. If the Merchant has disclaimed or resiliated the Lease governing such Store in accordance with the CCAA and the Initial Order, it shall not be required to pay rent under such Lease pending resolution of any such dispute (other than rent payable for the notice period provided for in the CCAA and the Initial Order, and the disclaimer or resiliation of the Lease) shall be without prejudice to the Merchant's or Consultant's claim to the FF&E in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to the CCAA and the Initial Order to a Landlord while the Sale is ongoing and the Store in question has not yet been vacated, then: (a) during the notice period prior to the effective time of the disclaimer or resiliation, the applicable Landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Merchant and the Consultant 24 hours' prior written notice; and (b) at the effective time of the disclaimer or resiliation, the relevant Landlord shall be entitled to take possession of any such Store without waiver of or prejudice to any claims or rights such Landlord may have against the Merchant in respect of such Lease or Store, provided that nothing herein shall relieve such Landlord of its obligation to mitigate any damages claimed in connection therewith.

13. The Consultant and its agents and representatives shall have the same access rights to the Stores as the Merchant under the terms of the applicable Lease, and the applicable Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).

14. The Merchant and the Consultant shall not conduct any auctions of Merchandise, Additional Merchant Goods, or Offered FF&E at any of the Stores.

15. The Consultant shall be entitled, as agent for the Merchant to include in the Sale the Additional Merchant Goods to the extent such are on-order goods from the Merchant's existing vendors provided that: (i) the Additional Merchant Goods sold as part of the Sale will not exceed $ 5 million at cost in the aggregate; and (ii) the Additional Merchandise Goods will be distributed among Stores such that no Store will receive more than 2% of the Additional Merchant Goods.

16. The Consultant shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact person for the Consultant shall be Ashley Taylor who may be reached by phone at 416-869-5236 or email at ataylor@stikeman.com. If the parties are unable to resolve the dispute between themselves, the Landlord or Merchant shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, during which time the Consultant shall cease all activity in dispute other than activity expressly permitted herein, pending the determination of the matter by the Court; provided, for greater certainty, that if a banner has been hung in accordance with these Sale Guidelines and is thereafter the subject of a dispute, the Consultant shall not be required to take any such banner down pending determination of the dispute.

17. Nothing herein is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or to grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

18. These Sale Guidelines may be amended by written agreement between the Merchant, the Consultant and any applicable Landlord (provided that such amended Sale Guidelines shall not affect or bind any other Landlord not privy thereto without further Order of the Court approving the amended Sale Guidelines).

Court File No. CV-19-00614629-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

LIQUIDATION CONSULTING AGREEMENT APPROVAL ORDER

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Court File No. CV-19-00628233-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 7TH
	)	
JUSTICE HAINEY	)	DAY OF OCTOBER, 2019

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FOREVER XXI ULC

Applicant

SALE APPROVAL ORDER

THIS MOTION, made by Forever XXI ULC ("**F21 Canada**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, among other things, approving the transactions contemplated under a consulting agreement between a contractual joint venture comprised of Gordon Brothers Canada ULC and Merchant Retail Solutions, ULC (collectively, the "**Consultant**") and F21 Canada dated as of September 27, 2019 (the "**Consulting Agreement**") and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of F21 Canada, the Affidavit of Bradley H. Sell sworn on October 3, 2019 including the exhibits thereto (the "**Sale Approval Affidavit**"), the First Report of PricewaterhouseCoopers Inc., in its capacity as Monitor (the "**Monitor**"), and on hearing the submissions of respective counsel for F21 Canada, the Monitor, the Consultant, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Waleed Malik affirmed October 3, 2019 and the Affidavit of Service of Ana Chalupa sworn October 4, 2019, both filed:

SERVICE AND DEFINITIONS

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

2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Initial Order in these proceedings dated September 29, 2019 (the "**Initial Order**"), the Sale Guidelines (as defined below), and the Consulting Agreement (attached as Exhibit "C" to the Sale Approval Affidavit), as applicable.

THE CONSULTING AGREEMENT

3. THIS COURT ORDERS that the Consulting Agreement, including the sale guidelines attached hereto as Schedule "A" (the "**Sale Guidelines**"), and the transactions contemplated thereunder are hereby approved, authorized and ratified and that the execution of the Consulting Agreement by F21 Canada is hereby approved, authorized, and ratified with such minor amendments (to the Consulting Agreement, but not the Sale Guidelines) as F21 Canada (with the consent of the Monitor) and the Consultant may agree to in writing. Subject to the provisions of this Order and the Initial Order, F21 Canada is hereby authorized and directed to take any and all actions as may be necessary or desirable to implement the Consulting Agreement and each of the transactions contemplated therein. Without limiting the foregoing, F21 Canada is authorized to execute any other agreement, contract, deed or any other document, or take any other action, which could be required or be useful to give full and complete effect to the Consulting Agreement.

THE SALE

4. THIS COURT ORDERS that F21 Canada, with the assistance of the Consultant, is authorized to conduct the Sale (as defined in the Consulting Agreement) in accordance with this Order, the Consulting Agreement and the Sale Guidelines and to advertise and promote the Sale within the Stores (as defined in the Consulting Agreement) in accordance with the Sale Guidelines. If there is a conflict between this Order, the Consulting Agreement and the Sale Guidelines, the order of priority of documents to resolve such conflicts is as follows: (1) this Order; (2) the Sale Guidelines; and (3) the Consulting Agreement.

5. THIS COURT ORDERS that, subject to paragraph 12 of the Initial Order, F21 Canada, with the assistance of the Consultant, is authorized to market and sell the Merchandise and F21 Canada FF&E (as such terms are defined in the Consulting Agreement) in accordance with the Sale Guidelines, free and clear of all liens, claims, encumbrances, security interests, mortgages, charges, trusts, deemed trusts, executions, levies, financial, monetary or other claims, whether or not such claims have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims arose or came into existence prior to the date of this Order or came into existence following the date of this Order, (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise) (all of the foregoing, collectively "Claims"), including, without limitation the Administration Charge and the Directors' Charge (as such terms are defined in the Initial Order) and any other charges hereafter granted by this Court in these proceedings (collectively, the "**CCAA Charges**"), and all Claims, charges, security interests or liens evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), *Personal Property Security Act* (Alberta), *Personal Property Security Act* (British Columbia), or any other personal or movable property registration system (all of such Claims, charges (including the CCAA Charges), security interests and liens collectively referred to herein as "**Encumbrances**"), which Encumbrances will attach instead to the proceeds of the Sale (other than amounts specified in paragraph 15 of this Order) in the same order and priority as they existed immediately prior to such Sale.

6. THIS COURT ORDERS that subject to the terms of this Order, the Initial Order and the Sale Guidelines, or any greater restrictions in the Consulting Agreement or the Sale Guidelines, the Consultant shall have the right to enter and use the Stores and all related store services and all facilities and all furniture, trade fixtures and equipment, including the F21 Canada FF&E, located at the Stores, and other assets of F21 Canada as designated under the Consulting Agreement, for the purpose of conducting the Sale and for such purposes, the Consultant shall be entitled to the benefit of the F21 Canada stay of proceedings provided under the Initial Order, as such stay of proceedings may be extended by further Order of the Court.

7. THIS COURT ORDERS that until the Sale Termination Date (as defined in the Consulting Agreement) for each Store (which shall in no event be later than November 30, 2019), the Consultant shall have access to the Stores in accordance with the applicable Leases (as such term

is defined in the Sale Guidelines) and the Sale Guidelines on the basis that the Consultant is assisting F21 Canada and F21 Canada has granted the right of access to the Store to the Consultant. To the extent that the terms of the applicable Leases are in conflict with any term of this Order or the Sale Guidelines, it is agreed that the terms of this Order and the Sale Guidelines shall govern.

8. THIS COURT ORDERS that nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of the Leases. Nothing contained in this Order or the Sale Guidelines shall be construed to create or impose upon F21 Canada or the Consultant any additional restrictions not contained in the applicable Lease or other occupancy agreement.

9. THIS COURT ORDERS that, subject to and in accordance with the Consulting Agreement, the Sale Guidelines and this Order, the Consultant is authorized to advertise and promote the Sale, without further consent of any Person (as defined in the Initial Order) other than F21 Canada and the Monitor as provided under the Consulting Agreement or a Landlord (as defined in the Sale Guidelines) as provided under the Sale Guidelines.

10. THIS COURT ORDERS that until the Sale Termination Date, the Consultant shall have the right to use, without interference by any intellectual property licensor, any F21 Canada trade names, trademarks and logos relating to and used in connection with the operation of the Stores, as well as all licenses and rights granted to F21 Canada to use the trade names, trademarks, and logos of third parties, solely for the purpose of advertising and conducting the Sale in accordance with the terms of the Consulting Agreement, the Sale Guidelines, and this Order.

CONSULTANT LIABILITY

11. THIS COURT ORDERS that the Consultant shall act solely as an independent consultant to F21 Canada and that it shall not be liable for any claims against F21 Canada other than as expressly provided in the Consulting Agreement (including the Consultant's indemnity obligations thereunder) or the Sale Guidelines and, for greater certainty:

(a) the Consultant shall not be deemed to be an owner or in possession, care, control or management of the Stores, of the assets located therein or associated therewith or of F21 Canada's employees located at the Stores or any other property of F21 Canada;

(b) the Consultant shall not be deemed to be an employer, or a joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or other statute, regulation or rule of law or equity for any purpose whatsoever, and shall not incur any successorship liabilities whatsoever; and

(c) F21 Canada shall bear all responsibility for any liability whatsoever (including without limitation losses, costs, damages, fines, or awards) relating to claims of customers, employees and any other persons arising from events occurring at the Stores during and after the term of the Sale, or otherwise in connection with the Sale, except to the extent that such claims are the result of events or circumstances caused or contributed to by the gross negligence or wilful misconduct of the Consultant, its employees, agents or other representatives, or otherwise in accordance with the Consulting Agreement.

12. To the extent any Landlord may have a claim against F21 Canada arising solely out of the conduct of the Consultant in conducting the Sale for which F21 Canada has claims against the Consultant under the Consulting Agreement, F21 Canada shall be deemed to have assigned such claims free and clear to the applicable Landlord (the "**Assigned Landlord Rights**"); provided that each such Landlord shall only be permitted to advance each such claims against the Consultant if written notice, including the reasonable details of such claims, is provided by such Landlord to the Consultant, F21 Canada and the Monitor during the period from the Sale Commencement Date to the date that is thirty (30) days following the Sale Termination Date, provided however that the Landlords shall be provided with access to the Stores to inspect the Stores within fifteen (15) days following the Sale Termination Date.

CONSULTANT AN UNAFFECTED CREDITOR

13. THIS COURT ORDERS that the Consulting Agreement shall not be repudiated, resiliated or disclaimed by F21 Canada nor shall the claims of the Consultant pursuant to the Consulting Agreement be compromised or arranged pursuant to any plan of arrangement or compromise among F21 Canada and its creditors (a "**Plan**") and, for greater certainty, the Consultant shall be treated as an unaffected creditor in these proceedings and under any Plan.

14. THIS COURT ORDERS that F21 Canada is hereby authorized and directed, in accordance with the Consulting Agreement, to remit all amounts that become due to the Consultant thereunder.

15. THIS COURT ORDERS that no Encumbrances shall attach to any amounts payable or to be credited or reimbursed to, or retained by, the Consultant pursuant to the Consulting Agreement, including, without limitation, any amounts to be reimbursed by F21 Canada to the Consultant pursuant to the Consulting Agreement, and at all times the Consultant will retain such amounts, free and clear of all Encumbrances, notwithstanding any enforcement or other process or Claims, all in accordance with the Consulting Agreement.

16. THIS COURT ORDERS that notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") in respect of F21 Canada, or any bankruptcy order made pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of F21 Canada;

(d) the provisions of any federal or provincial statute; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other document or agreement to which F21 Canada is a party;

the Consulting Agreement and the transactions and actions provided for and contemplated therein, including without limitation, the payment of amounts due to the Consultant and the Assigned Landlord Rights shall be binding on any trustee in bankruptcy that may be appointed in respect of F21 Canada and shall not be void or voidable by any Person, including any creditor of F21 Canada, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

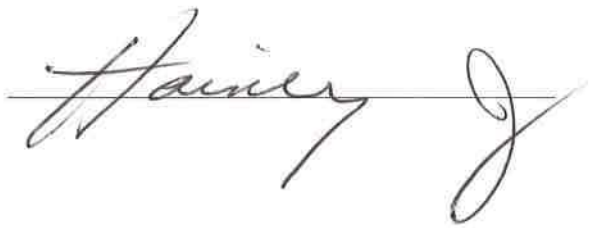
OTHER

17. THIS COURT ORDERS that F21 Canada is authorized and permitted to transfer to the Consultant personal information in F21 Canada's custody and control solely for the purposes of assisting with and conducting the Sale and only to the extent necessary for such purposes.

GENERAL

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

19. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist F21 Canada, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to F21 Canada and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist F21 Canada and the Monitor and their respective agents in carrying out the terms of this Order.



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SCHEDULE "A"
SALE GUIDELINES

(See attached)

SALE GUIDELINES

The following procedures shall apply to any Sales to be held at Forever XXI, ULC ("**F21 Canada**") retail stores (the "**Stores**"). Terms capitalized but not defined in these Sale Guidelines have the meanings ascribed to them in the Consulting Agreement (as defined below).

1. Except as otherwise expressly set out herein, and subject to: (i) the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated October 7, 2019 approving the Consulting Agreement between a contractual joint venture comprised of Gordon Brothers Canada ULC and Merchant Retail Solutions, ULC (the "**Consultant**") and F21 Canada dated September 27, 2019 (the "**Consulting Agreement**") and the transactions contemplated thereunder (the "**Approval Order**"); or (ii) any further Order of the Court; or (iii) any subsequent written agreement between F21 Canada and its applicable landlord(s) (individually, a "**Landlord**" and, collectively, the "**Landlords**") and approved by the Consultant, the Sale shall be conducted in accordance with the terms of the applicable leases/or other occupancy agreements for each of the affected Stores (individually, a "**Lease**" and, collectively, the "**Leases**"). However, nothing contained herein shall be construed to create or impose upon F21 Canada or the Consultant any additional restrictions not contained in the applicable Lease or other occupancy agreement.

2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Leases for the Stores until the applicable premises vacate date for each Store under the Consulting Agreement (the "**Vacate Date**"), and in all cases no later than November 30, 2019. Rent payable under the respective Leases shall be paid as provided in the Initial Order of the Court dated September 29, 2019 (the "**Initial Order**").

3. The Sale shall be conducted in accordance with applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.

4. All display and hanging signs used by the Consultant in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. Notwithstanding anything to the contrary contained in the Leases, the Consultant may advertise the Sale at the Stores as a "everything on sale", "everything must go", "store closing" or similar theme sale at the Stores (provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is "liquidation" and is permitted to be used). Forthwith upon request, the Consultant shall provide the proposed signage packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify the Consultant of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sale Guidelines and where the provisions of the Lease conflicts with these Sale Guidelines, these Sale Guidelines shall govern. The Consultant shall not use neon or day-glow signs or any handwritten signage (save that handwritten "you pay" or "topper" signs may be used). If a Landlord is concerned with "Store Closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, F21 Canada, the Consultant and the Landlord will work together to resolve the dispute. Furthermore, with respect to enclosed mall Store locations without a separate entrance from the exterior of the

enclosed mall, no exterior signs or signs in common areas of a mall shall be used unless explicitly permitted by the applicable Lease. In addition, the Consultant shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that: (i) no signage in any other common areas of a mall shall be used; and (ii) where such banners are not explicitly permitted by the applicable Lease and the Landlord requests in writing that banners are not to be used, no banners shall be used absent further Order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the facade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Consultant. The Consultant shall not utilize any commercial trucks to advertise the Sale on the Landlord's property or mall ring roads.

5. The Consultant shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.

6. The Consultant shall be entitled to include additional merchandise in the Sale; provided that (a) the additional merchandise is currently in the possession of the Applicant (including in its distribution centre located in Ontario) or has previously been ordered by or on behalf of the Applicant and is currently in transit to the Applicant; and (b) the additional merchandise is of like kind and category and no lessor quality to the Merchandise, and consistent with any restriction on usage of the Stores set out in the applicable Leases.

7. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints are to call F21 Canada's hotline number.

8. The Consultant shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless explicitly permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, the Consultant may solicit customers in the Stores themselves. The Consultant shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as explicitly permitted under the applicable Lease or agreed to by the Landlord.

9. At the conclusion of the Sale in each Store, the Consultant and F21 Canada shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than F21 Canada FF&E (as defined below) for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Initial Order and the Approval Order. Any trade fixtures or personal property left in a Store after the applicable Vacate Date in respect of which the applicable Lease has been disclaimed by F21 Canada shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the

Landlord chooses, without any liability whatsoever on the part of the Landlord. Nothing in this paragraph shall derogate from the Consultant's obligations under the Consulting Agreement.

10. Subject to the terms of paragraph 8 above, the Consultant shall sell furniture, fixtures and equipment owned by F21 Canada ("**F21 Canada FF&E**") and located in the Stores during the Sale. For greater certainty, F21 Canada FF&E does not include any portion of the Stores' HVAC, sprinkler, fire suppression, or fire alarm systems. F21 Canada and the Consultant may advertise the sale of F21 Canada FF&E consistent with these Sale Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any F21 Canada FF&E sold during the Sale shall only be permitted to remove the F21 Canada FF&E either through the back shipping areas designated by the Landlord or through other areas after regular Store business hours or, through the front door of the Store during Store business hours if the F21 Canada FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Initial Order and the Approval Order. The Consultant shall repair any damage to the Stores resulting from the removal of any F21 Canada FF&E by Consultant or by third party purchasers of F21 Canada FF&E from Consultant.

11. The Consultant shall not make any alterations to interior or exterior Store lighting, except as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage, where permitted in accordance with the terms of these Sale Guidelines, shall not constitute an alteration to a Store.

12. F21 Canada hereby provides notice to the Landlords of F21 Canada and the Consultant's intention to sell and remove F21 Canada FF&E from the Stores. The Consultant shall make commercially reasonable efforts to arrange with each Landlord represented by counsel on the Service List and with any other Landlord that so requests, a walk-through with the Consultant to identify the F21 Canada FF&E subject to the Sale. The relevant Landlord shall be entitled to have a representative present in the applicable Stores to observe such removal. If the Landlord disputes the Consultant's entitlement to sell or remove any F21 Canada FF&E under the provisions of the Lease, such F21 Canada FF&E shall remain on the premises and shall be dealt with as agreed between F21 Canada, the Consultant and such Landlord, or by further Order of the Court upon application by F21 Canada on at least two (2) days' notice to such Landlord and the Monitor. If F21 Canada has disclaimed or resiliated the Lease governing such Store in accordance with the CCAA and the Initial Order, it shall not be required to pay rent under such Lease pending resolution of any such dispute (other than rent payable for the notice period provided for in the CCAA and the Initial Order), and the disclaimer or resiliation of the Lease shall be without prejudice to F21 Canada's or the Consultant's claim to the F21 Canada FF&E in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to the CCAA and the Initial Order to a Landlord while the Sale is ongoing and the Store in question has not yet been vacated, then: (a) during the notice period prior to the effective time of the disclaimer or resiliation, the Landlord may show the affected leased premises to prospective tenants during normal business hours, on giving F21 Canada, the Monitor and the Consultant 24 hours' prior written notice; and (b) at the effective time of the disclaimer or resiliation, the relevant Landlord shall be entitled to take possession of any such Store without waiver of or

prejudice to any claims or rights such Landlord may have against F21 Canada in respect of such Lease or Store, provided that nothing herein shall relieve such Landlord of any obligation to mitigate any damages claimed in connection therewith.

14. The Consultant and its agents and representatives shall have the same access rights to the Stores as F21 Canada under the terms of the applicable Lease, and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).

15. F21 Canada and the Consultant shall not conduct any auctions of Merchandise or F21 Canada FF&E at any of the Stores.

16. The Consultant shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact person for Consultant shall be Jane Dietrich of Cassels Brock & Blackwell LLP who may be reached by phone at 416-860-5223 or email at jdietrich@casselsbrock.com. If the parties are unable to resolve the dispute between themselves, the Landlord or F21 Canada shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, during which time the Consultant shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, subject to paragraph 4 of these Sale Guidelines, if a banner has been hung in accordance with these Sale Guidelines and is the subject of a dispute, the Consultant shall not be required to take any such banner down pending determination of any dispute.

17. Nothing herein or in the Consulting Agreement is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

18. These Sale Guidelines may be amended by written agreement between the Consultant, F21 Canada and the applicable Landlord.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **FOREVER XXI ULC**

Court File No: CV-19-00628233-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

SALE APPROVAL ORDER

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Lawyers for the Applicant

2015 CarswellOnt 4303
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 4303, 251 A.C.W.S. (3d) 193

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

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

Morawetz R.S.J.

Judgment: February 4, 2015
Docket: CV-15-10832-00CL

Counsel: Counsel — not provided

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Court approval of agreement authorizing agent to sell merchandise, furniture and fixtures — Debtor companies brought application under Companies' Creditors Arrangement Act for order approving transactions contemplated under agency agreement — Application granted — Agency agreement was approved — Agreement Agents had right to use Target's trade-mark and logos until sale termination date — Agents were not liable for any claims against Target Canada — Agents were to be treated as unaffected creditor in proceedings and under any plan — No person was to take any action, including any collection or enforcement steps, with respect to amounts deposited into designated deposit accounts pursuant to agency agreement — Agents were granted charge on all merchandise, proceeds, FF&E proceeds and proceeds of designated company consignment goods.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

APPLICATION by debtor companies for order approving transactions contemplated under agency agreement.

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

1 THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "*CCAA*") for an order, *inter alia*, approving: (i) the transactions contemplated under the *Agency Agreement* entered into between Target Canada Co., Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. (collectively, "*Target Canada*") and a contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "*Agent*") on January 29, 2015 (the "*Agency Agreement*") and certain related relief; and (ii) the granting of the Agent's Charge and Security Interest (as defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

2 ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on January 29, 2015 including the exhibits thereto (the "*Wong Affidavit*"), and the First Report (the "*Monitor's First Report*") of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "*Monitor*") filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, Target Corporation, the Agent, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Robert Carson sworn January 30, 2015 filed:

SERVICE AND DEFINITIONS

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

2. THIS COURT ORDERS that any capitalized term used and not defined herein and/or in Schedule D appended hereto, shall have the meaning ascribed thereto in the Initial Order in these proceedings dated January 15, 2015, the Sales Guidelines and, with regard to paragraphs 10-26 of this Order, any capitalized term used and not defined therein shall have the meaning ascribed thereto in the Initial Order or in the Agency Agreement, as applicable.

APPROVAL OF THE AGENCY AGREEMENT

AGENCY AGREEMENT

3. THIS COURT ORDERS that the Agency Agreement, including the Sales Guidelines attached hereto as Schedule "B" (the "**Sales Guidelines**"), and the transactions contemplated thereunder are hereby approved, authorized and ratified and that the execution of the Agency Agreement by Target Canada is hereby approved, authorized, and ratified with such minor amendments as Target Canada (with the consent of the Monitor) and the Agent may agree to in writing. Subject to the provisions of this Order and the Initial Order, Target Canada is hereby authorized and directed to take any and all actions as may be necessary or desirable to implement the Agency Agreement and each of the transactions contemplated therein. Without limiting the foregoing, Target Canada is authorized to execute any other agreement, contract, deed or any other document, or take any other action, which could be required or be useful to give full and complete effect to the Agency Agreement.

THE SALE

4. THIS COURT ORDERS that subject to receipt of the Agent L/C by Target Canada, the Agent is authorized to conduct the Sale in accordance with this Order, the Agency Agreement and the Sales Guidelines and to advertise and promote the Sale within the Stores in accordance with the Sales Guidelines. If there is a conflict between this Order, the Agency Agreement and the Sales Guidelines, the order of priority of documents to resolve such conflicts is as follows: (1) the Order; (2) the Sales

Guidelines; and (3) the Agency Agreement.

5. THIS COURT ORDERS that, the Agent, in its capacity as agent of Target Canada, is authorized to market and sell the Merchandise, Designated Company Consignment Goods and FF&E, free and clear of all liens, claims, encumbrances, security interests, mortgages, charges, trusts, deemed trusts, executions, levies, financial, monetary or other claims, whether or not such claims have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims arose or came into existence prior to the date of this Order or came into existence following the date of this Order, (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise) (all of the foregoing, collectively "*Claims*"), including, without limitation the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, and the DIP Lender's Charge, as such terms are defined in the Initial Order, and any other charges hereafter granted by this Court in these proceedings (collectively, the "**CCAA Charges**"), and (ii) all Claims, charges, security interests or liens evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal or removable property registration system (all of such Claims, charges (including the CCAA Charges), security interests and liens collectively referred to herein as "**Encumbrances**"), which Encumbrances, subject to this Order, will attach instead to the Guaranteed Amount and any other amounts received or to be received by Target Canada under the Agency Agreement, in the same order and priority as they existed on the Sale Commencement Date.

6. THIS COURT ORDERS that subject to the terms of this Order, the Initial Order and the Sales Guidelines, or any greater restrictions in the Agency Agreement, the Agent shall have the right to enter and use the Locations and all related store services and all facilities and all furniture, trade fixtures and equipment, including the FF&E, located at the Locations, and other assets of Target Canada as designated under the Agency Agreement, for the purpose of conducting the Sale and for such purposes, the Agent shall be entitled to the benefit of the Target Canada Entities' stay of proceedings provided under the Initial Order, as such stay of proceedings may be extended by further Order of the Court.

7. THIS COURT ORDERS that until the applicable Vacate Date for each Store (which shall in no event be later than May 15, 2015), the Agent shall have access to the Locations in accordance with the applicable leases and the Sales Guidelines on the basis that the Agent is an agent of Target Canada and Target Canada has granted the right of access to the Location to the Agent. To the extent that the terms of the applicable leases are in conflict with any term of this Order or the Sales Guidelines, it is agreed that the terms of this Order and the Sales Guidelines shall govern.

8. THIS COURT ORDERS that nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of the leases for Target Canada's leased locations. Nothing contained in this Order or the Sales Guidelines shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable lease or other occupancy agreement.

9. THIS COURT ORDERS that except as provided for in Section 4 hereof in respect of the advertising and promotion of the Sale within the Stores, subject to, and in accordance with this Order, the Agency Agreement and the Sales Guidelines, the Agent, as agent for Target Canada, is authorized to advertise and promote the Sale, without further consent of any Person other than Target Canada and the Monitor as provided under the Agency Agreement or a Landlord as provided under the Sales Guidelines.

10. THIS COURT ORDERS that until the Sale Termination Date, the Agent shall have the right to use the Company's trademarks and logos relating to and used in connection with the operation of the Locations solely for the purpose of advertising and conducting the Sale in accordance with the terms of the Agency Agreement, the Sales Guidelines, and this Order.

11. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Agent substantially in the form attached as Schedule "C" hereto, (the "**Monitor's Certificate**") and subject to payment in full by the Agent to Target Canada of the Guaranteed Amount, the Expenses, any Company Sharing Recovery

Amount, and all other amounts due to Target Canada under the Agency Agreement, all of Target Canada's right, title and interest in and to any Remaining Merchandise and Remaining FF&E, shall vest absolutely in the Agent, free and clear of and from any and all Claims, including without limiting the generality of the foregoing, the Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Remaining Merchandise or the Remaining FF&E shall be expunged and discharged as against the Remaining Merchandise or the Remaining FF&E upon the delivery of the Monitor's Certificate to the Agent; provided however that nothing herein shall discharge the obligations of the Agent pursuant to the Agency Agreement, or the rights or claims of Target Canada in respect thereof, including without limitation, the obligations of the Agent to account for and remit the proceeds of sale of the Remaining Merchandise and the Remaining FF&E (less the FF&E Commission) to the Designated Deposit Accounts. The Agent shall comply with paragraph 14 of the Initial Order and the Sales Guidelines regarding the removal and/or sale of any FF&E or any Remaining FF&E.

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

AGENT LIABILITY

13. THIS COURT ORDERS that the Agent shall act solely as an agent to Target Canada and that it shall not be liable for any claims against Target Canada other than as expressly provided in the Agency Agreement (including the Agent's indemnity obligations thereunder) or the Sales Guidelines. More specifically:

(a) the Agent shall not be deemed to be an owner or in possession, care, control or management of the Stores, of the assets located therein or associated therewith or of Target Canada's employees (including the Retained Employees) located at the Stores or any other property of Target Canada;

(b) the Agent shall not be deemed to be an employer, or a joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or other statute, regulation or rule of law or equity for any purpose whatsoever, and shall not incur any successorship liabilities whatsoever;

(c) Target Canada shall bear all responsibility for any liability whatsoever (including without limitation losses, costs, damages, fines, or awards) relating to claims of customers, employees and any other persons arising from events occurring at the Stores and at the Distribution Centers during and after the term of the Agency Agreement, or otherwise in connection with the Sale, except in accordance with the Agency Agreement. To the extent the Landlords (or any of them) have claims against Target Canada arising solely out of the conduct of the Agent in conducting the Sale for which Target Canada has claims against the Agent under the Agency Agreement, Target Canada hereby assigns free and clear such claims to the applicable Landlord (the "**Assigned Landlord Rights**").

AGENT AN UNAFFECTED CREDITOR

14. THIS COURT ORDERS that the Agency Agreement shall not be repudiated, resiliated or disclaimed by Target Canada nor shall the claims of the Agent pursuant to the Agency Agreement and under the Agent's Charge and Security Interest (as defined in this Order) be compromised or arranged pursuant to any plan of arrangement or compromise among Target Canada and their creditors (a "**Plan**"). The Agent shall be treated as an unaffected creditor in these proceedings and under any Plan.

15. THIS COURT ORDERS that Target Canada is hereby authorized and directed, in accordance with the Agency Agreement, to remit all amounts that become due to the Agent thereunder.

16. THIS COURT ORDERS that no Encumbrances shall attach to any amounts payable or to be credited or reimbursed to, or retained by, the Agent pursuant to the Agency Agreement, including, without limitation, any amounts to be reimbursed by Target Canada to the Agent pursuant to the Agency

Agreement, and Target Canada will pay such amounts to the Agent within two (2) Business Days after the Agent's written request for such reimbursement, and at all times the Agent will retain such amounts, free and clear of all Encumbrances, notwithstanding any enforcement or other process or Claims, all in accordance with the Agency Agreement.

DESIGNATED DEPOSIT ACCOUNTS

17. THIS COURT ORDERS that no Person shall take any action, including any collection or enforcement steps, with respect to amounts deposited into the Designated Deposit Accounts pursuant to the Agency Agreement, including any collection or enforcement steps, in relation to any Proceeds or FF&E Proceeds, that are payable to the Agent or in relation to which the Agent has a right of reimbursement or payment under the Agency Agreement.

18. THIS COURT ORDERS that amounts deposited in the Designated Deposit Accounts by or on behalf of the Agent or Target Canada pursuant to the Agency Agreement including Proceeds and FF&E Proceeds shall be and be deemed to be held in trust for Target Canada and the Agent, as the case may be, and, for clarity, no Person shall have any claim, ownership interest or other entitlement in or against such amounts, including, without limitation, by reason of any claims, disputes, rights of offset, set-off, or claims for contribution or indemnity that it may have against or relating to Target Canada.

AGENT'S CHARGE AND SECURITY INTEREST

19. THIS COURT ORDERS that subject to the receipt by Target Canada of the Agent L/C, the Agent be and is hereby granted a charge (the "**Agent's Charge and Security Interest**") on all of the Merchandise, Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and, if any, the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to Agent with respect thereto) (and, for greater certainty, the Agent's Charge and Security Interest shall not extend to other Property of the Target Canada Entities as defined in paragraph 5 of the Initial Order) as security for all of the obligations of Target Canada to the Agent under the Agency Agreement, including, without limitation, all amounts owing or payable to the Agent from time to time under or in connection with the Agency Agreement, which charge shall rank in priority to all Encumbrances; provided, however, that the Agent's Charge and Security Interest shall be junior and subordinate to all Encumbrances, but solely to the extent of any unpaid portion of the Unpaid Company's Entitlements due to Target Canada under the Agency Agreement (the "**Subordinated Amount**").

PRIORITY OF CHARGES

20. THIS COURT ORDERS that the priorities of the Agent's Charge and Security Interest, the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge and the DIP Lender's Charge, as among them, shall be as follows:

> First - The Agent's Charge and Security Interest (but only in respect of the Merchandise, the Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and, if any, the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto)) each as defined in the Agency Agreement, (but not in respect of any other Property as defined in paragraph 5 of the Initial Order); provided, however, that the Subordinated Amount, as defined in paragraph 19 hereof shall be subordinated in accordance with that paragraph;
>
> Second — Administration Charge (to the maximum amount of $6.75 million);
>
> Third — KERP Charge (to the maximum amount of $6.5 million);
>
> Fourth — Directors' Charge (to the maximum amount of $64 million);
>
> Fifth — Financial Advisor Subordinated Charge (to the maximum amount of $3 million); and

Sixth — DIP Lender's Charge.

21. THIS COURT ORDERS that the filing, registration, recording or perfection of the Agent's Charge and Security Interest shall not be required; and the Agent's Charge and Security Interest shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected prior or subsequent to the Agent's Charge and Security Interest coming into existence, notwithstanding any failure to file, register or perfect any such Agent's Charge and Security Interest. Absent the Agent's written consent or further Order of this Court (on notice to the Agent), Target Canada shall not grant or suffer to exist any Encumbrances over any Merchandise, Proceeds, FF&E Proceeds (to the extent of the FF&E Commission) and, if any, proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto) that rank in priority to, or *pari passu* with the Agent's Charge and Security Interest. For clarity, no Encumbrances shall attach to the Agent Additional Goods or proceeds relating thereto (net of the Additional Agent Goods Fee).

22. THIS COURT ORDERS that the Agent's Charge and Security Interest shall constitute a mortgage, hypothec, security interest, assignment by way of security and charge over the Merchandise, the Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto) and, if any, other than in relation to the Subordinated Amount, shall rank in priority to all other Encumbrances of or in favour of any Person.

23. THIS COURT ORDERS that notwithstanding (a) the pendency of these proceedings; (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") in respect of Target Canada or any of the Applicants, or any bankruptcy order made pursuant to any such applications; (c) any assignment in bankruptcy made in respect of Target Canada or any of the Applicants; (d) the provisions of any federal or provincial statute; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other document or agreement (collectively "**Agreement**") which binds Target Canada:

(i) the Agency Agreement and the transactions and actions provided for and contemplated therein, including without limitation, the payment of amounts due to the Agent thereunder and any transfer of Remaining Merchandise and Remaining FF&E,

(ii) the Agent's Charge and Security Interest, and

(iii) Assigned Landlord Rights,

shall be binding on any trustee in bankruptcy that may be appointed in respect to Target Canada or any of the Applicants and shall not be void or voidable by any Person, including any creditor of Target Canada or any of the Applicants, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

BULK SALES ACT AND OTHER LEGISLATION

24. THIS COURT ORDERS AND DECLARES that the transactions contemplated under the Agency Agreement and any transfer of Remaining Merchandise or Remaining FF&E shall be exempt from the application of any applicable *Bulk Sales Act* and any other equivalent federal or provincial legislation.

25. THIS COURT ORDERS that Target Canada is authorized and permitted to transfer to the Agent personal information in Target Canada's custody and control, and Agent is permitted to use and disclose

such personal information subject to and in accordance with the terms of the Agency Agreement.

GENERAL

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

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

Schedule "A" — Partnerships

Target Canada Pharmacy Franchising LP
Target Canada Mobile LP
Target Canada Property LP

Schedule "B" — Sales Guidelines

The following procedures shall apply to any Sales to be held at Target Canada's retail stores (the "Stores").

1. Except as otherwise expressly set out herein, and subject to: (i) the Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated February 4, 2015 approving the Agency Agreement between a contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "Agent") and Target Canada Co., Target Canada Pharmacy Corp., and Target Canada Pharmacy (Ontario) Corp. ("Target Canada") dated January 29, 2015 ("Agency Agreement") and the transactions contemplated thereunder (the "Approval Order"); or (ii) any further Order of the Court; or (iii) any subsequent written agreement between Target Canada and the applicable landlord(s) (individually, a "Landlord" and, collectively, the "Landlords") and approved by Agent, the Sale shall be conducted in accordance with the terms of the applicable leases/or other occupancy agreements for each of the affected Stores (individually, a "Lease" and, collectively, the "Leases"). However, nothing contained herein shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable Lease or other occupancy agreement.

2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Leases for the Stores until the respective Vacate Date of each Store. The Sale at the Stores shall end by no later than May 15, 2015. Rent payable under the respective Leases shall be paid as provided in the Initial Order of the Court dated January 15, 2015 (the "Initial Order").

3. The Sale shall be conducted in accordance with applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.

4. All display and hanging signs used by the Agent in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. The Agent may advertise the Sale at the Stores as a "everything on sale", everything must go", "store closing" or similar theme sale at the Stores (provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is "liquidation" and is permitted to be used). Forthwith upon request, the Agent shall provide the proposed signage

packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify the Agent of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sales Guidelines and where the provisions of the Lease conflicts with these Sales Guidelines, these Sales Guidelines shall govern. The Agent shall not use neon or day-glo signs or handwritten signage other than "you pay" or "topper" signs. If a Landlord is concerned with "Store Closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, Target Canada, the Agent and the Landlord will work together to resolve the dispute. Furthermore, with respect to enclosed mall Store locations without a separate entrance from the exterior of the enclosed mall, no exterior signs or signs in common areas of a mall shall be used unless permitted by the applicable Lease. Nothing contained herein shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable Leases. In addition, the Agent shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that where such banners are not permitted by the applicable Lease and the Landlord requests in writing that the banners are not to be used, no banners shall be used absent further Order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the façade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Agent.

5. The Agent shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.

6. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints shall call Target Canada's hotline number.

7. The Agent shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, the Agent may solicit customers in the Stores themselves. The Agent shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as permitted under the applicable Lease or agreed to by the Landlord.

8. At the conclusion of the Sale in each Store, the Agent and Target Canada shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than FF&E for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Initial Order and the Approval Order. Nothing in this paragraph shall derogate from or expand upon the Agent's obligations under the Agency Agreement.

9. Subject to the terms of paragraph 8 above, the Agent may sell furniture, fixtures and equipment ("FF&E") owned by Target Canada and located in the Stores during the Sale. Target Canada and the Agent may advertise the sale of FF&E consistent with these Sales Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any FF&E sold during the Sale shall only be permitted to remove the FF&E either through the back shipping areas designated by the Landlord or through other areas after a given Store has closed and, after regular Store business hours or, through the front door of the Store during Store business hours if the FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Initial Order and the Approval Order. The Agent shall repair any damage to the Stores resulting from the removal of any FF&E by Agent or by third party purchasers of FF&E from Agent. Notwithstanding section 5.1(h) of the Agency Agreement, Target Canada shall ensure that all Remaining FF&E will be removed from the Stores and that such removal will be in compliance

with paragraph 14 of the Initial Order and the Agency Agreement.

10. The Agent shall not make any alterations to interior or exterior Store lighting, except as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage shall not constitute an alteration to a Store.

11. The Agent and its agents and representatives shall have the same access rights to the Stores as Target Canada under the terms of the applicable Lease, and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).

12. Target Canada and the Agent shall not conduct any auctions of Merchandise or FF&E at any of the Stores.

13. The Agent shall be entitled to include in the Sale the Additional Agent Goods provided that: (a) the value of the Additional Agent Goods will not exceed the lesser of (i) $25 million; or (ii) 5% of the aggregate Cost Value of the Merchandise; (b) the Additional Agent Goods will be distributed amongst the Stores such that no Store receives more than 5% of the aggregate Cost Value of Merchandise sold at such Store during the Sale; (c) the Additional Agent Goods are purchased from Target Canada's existing suppliers; and (d) the Additional Agent Goods shall be of like kind and category and no lesser quality to the Merchandise.

14. The Agent shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact person for Agent shall be Jane Dietrich who may be reached by phone at 416-860-5223 or email at jdietrich@casselsbrock.com. If the parties are unable to resolve the dispute between themselves, the Landlord or Target Canada shall have the right to schedule a "status hearing" before the Court on no less than *two (2) days* written notice to the other party or parties, during which time the Agent shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, if a banner has been hung and is the subject of a dispute, the Agent shall not be required to take any such banner down pending determination of any dispute.

15. Nothing herein or in the Agency Agreement is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

16. These Sales Guidelines may be amended by written agreement between the Agent, Target Canada and the applicable Landlord.

Schedule "C"

Court File No. CV-15-10832-00CL
ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended and In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (collectively the "Applicants")

Monitor's Certificate

Recitals

All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Agency Agreement entered into between Target Canada Co., Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. (collectively, "Target Canada") and the contractual joint venture composed of Merchant Retail

Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "*Agent*") on January 29, 2015, a copy of which is attached as Exhibit D to the Affidavit of Mark Wong dated January 29, 2015.

Pursuant to an Order of the Court dated February 4th, 2015, the Court ordered that all of the Remaining Merchandise and the Remaining FF&E shall vest absolutely in the Agent, free and clear of and from any and all claims and encumbrances, upon the delivery by the Monitor to the Agent of a certificate certifying that (i) the Sale has ended, and (ii) the Guaranteed Amount, the Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement have been paid in full to the Company.

ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor in the *Companies' Creditors Arrangement Act* proceedings of Target Canada Co., *et al* certifies that it has been informed by the Agent and Target Canada that:

> The Sale has ended.
>
> The Guaranteed Amount, the Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement have been paid in full to the Company.
>
> The Remaining Merchandise includes the Merchandise listed on Appendix "A" hereto.
>
> The Remaining FF&E includes the FF&E listed on Appendix "B" hereto.

DATED as of this • day of •, 2015.

ALVAREZ & MARSAL CANADA INC., In its capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal capacity

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Application granted.

Appendix "A"

List of Remaining Merchandise

Appendix "B"

List of Remaining FF&E

Schedule "D" — Glossary

"*Additional Agent Goods*" means the additional goods procured by Agent which supplement the Merchandise in the Sale, which additional goods are of like kind, and no lesser quality to the Merchandise in the Sale;

"*Designated Company Consignment Goods*" means if the Company elects at the beginning of the Sale Term to have the Agent sell some or all of the Excluded Goods, such Excluded Goods which shall be accepted by the Agent (including Company Consignment Goods for which the Company has obtained all necessary approvals from third parties, or authorizations as may be required), as may be designated by the Company to be sold as part of the Sale at prices and through sales channels mutually acceptable to the Company and Agent;

"*FF&E*" means all (i) furnishings, and (ii) removable trade fixtures, equipment and improvements to real immovable property which are located in the Locations and owned by the Company, including all artwork located at the Corporate Office, but excluding the Excluded FF&E;

"*Guaranteed Amount*" means as a guaranty of Agent's performance under the Agency Agreement, the seventy four percent (74%) of the aggregate Cost Value of the Merchandise that the Agent guarantees the Company shall receive;

"*Locations*" means collectively, the Stores, the Corporate Office and the Distribution Centers;

"*Merchandise*" means all finished goods inventory, saleable in the ordinary course of business, that are owned by the Company, and located at the Locations, on the Sale Commencement Date including Unscheduled Drugs, merchandise subject to Gross Rings and On Order Merchandise, Distribution Center Merchandise and Defective Merchandise, but, in each case, expressly excluding Excluded Goods;

"*Remaining FF&E*" means any FF&E that is not sold by the Agent prior to the FF&E Removal Deadline;

"*Sale*" means the sale by the Agent of the Merchandise, the FF&E (including if the Company so elects pursuant to Section 5.1(i) of the Agency Agreement, the DC FF&E), the Designated Company Consignment Goods (if

the Company so elects pursuant to Section 4.4 of the Agency Agreement) and, if procured by Agent, Additional Agent Goods during the Sale Term in accordance with the Agency Agreement;

"*Sale Commencement Date*" means the date that is one (1) calendar day after the making of the Approval Order or such other date as the parties may mutually agree in writing;

"*Stores*" means all of the Company's retail store locations as described in Schedule "B" of the Agency Agreement; and

"*Vacate Date*" means the date that the Agent shall be entitled to surrender vacant possession of each such Location, as applicable.

Capitalized terms not otherwise defined in this Glossary have the meaning ascribed to them in the Agency Agreement.

End of Document

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L.S.M., LL.M.

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creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

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

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

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

(S.C. 1992, c. 27, s. 89(1).)

Section 248

Powers of the Court

The court has broad powers under this section to regulate the conduct of the secured creditor, receiver, or insolvent person. The court may order the performance of a duty or restrain the secured creditor or receiver from realizing or otherwise disposing of the insolvent person's property until that duty has been performed. This power is akin and supplementary to the power of the court under provincial legislation granting a party an injunction pending the completion of a proceeding or some other event.[97]

Duties of a Court-Appointed Receiver

The duty of a court-appointed receiver and manager is a duty to the court as an officer to discharge his or her powers honestly and in good faith. His or her duty is also that of a fiduciary to all interested parties involving the debtor's assets, property, and undertaking.[98]

---

[97] See, for example, section 101 of the Ontario **Courts of Justice Act**.

[98] See, for example, **Re Philip's Manufacturing Ltd.** (1992), 12 C.B.R. (3d) 149 (B.C.C.A.).

In **Parsons et al. v. Sovereign Bank of Canada,**[99] the Court stated:

> A receiver and manager appointed, is agent neither of the debenture-holders whose credit he cannot pledge, nor the company, which cannot control him. He is an officer of the Court put into discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.

The receiver and manager is appointed by the court notwithstanding that the motion is initiated by the secured creditor. The receiver, as a court officer, is therefore neither an agent of the secured creditor nor that of the debtor company. His or her duty is essentially to comply with the powers provided in the order not only to the court but also to all interested parties. The receiver has a fiduciary duty to all interested parties.[100]

In view of the fiduciary relationship of the court-appointed receiver to the debtor and to the creditors, the receiver has a duty to exercise such reasonable care and control of the debtor's property as an ordinary person would give to his or her own. If the court-appointed receiver fails to provide that high standard of care, the receiver may be liable for negligence.[101]

This common law duty to act in good faith is codified in section 247 of the Act.[102] It provides:

> A receiver shall
>
> (a) act honestly and in good faith; and
>
> (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

The order appointing the receiver and manager usually contains the following powers:

(a) to take possession of the assets;

(b) to require the debtor to deliver up the assets;

(c) to manage, operate, and generally carry on the business including the power to sell assets in the debtor's ordinary course;

(d) to institute and prosecute all lawsuits for the protection of the assets as well as power to defend; and

(e) to sell, lease, or mortgage the debtor's assets with approval of the court.

In addition, and subject to the circumstances of each case, the receiver and manager may also be given power to purchase supplies and services, lease property, and borrow moneys. As the receiver and manager's authority originates from the court order, the receiver cannot act without jurisdiction or

---

[99] [1913] A.C. 160 at 167 (P.C.).

[100] See **Shawano-Wapunong Building Inc. v. Sowind Air-Ltd.** (2011), 78 C.B.R. (5th) 122 (Man. M.C.), 2011 MBQB 86 where the court held that a successful purchaser from a receiver could be an "interested party" in the receivership when the sale failed to close.

[101] **Plisson v. Duncan** (1905), 36 S.C.R. 647.

[102] S.C. 1992, c. 27, subsection 89(1).

exceed his or her authority. If the receiver does so, he or she may be liable to the debtor and others. It is therefore necessary to review the proposed order carefully before it is entered.

Once the court appoints the receiver, the receiver must comply with the order and Part XI of the **BIA** with respect to provisions concerning notice and reporting.[103] The receiver must report to all creditors of the appointment within 10 days of the appointment,[104] and must send a preliminary statement, interim reports, and final reports to the Superintendent of Bankruptcy, the debtor, or the trustee and on request to others.[105] The preliminary statement upon being appointed shall contain the following information:

- the name of each creditor, the amount owing, and the total;
- the list of assets and their book value; and
- the intended plan of action of the receiver.

The receiver must then prepare an interim report every six months. It will contain the following:

- an interim statement of receipts and disbursements;
- a statement of property that has not been disposed; and
- any other significant information about the receivership.

Lastly, the receiver must prepare a final report and statement of accounts containing:

- a final statement of receipts and disbursements;
- details of the manner of distribution of the proceeds realized from the property;
- details of the disposition of property not accounted for; and
- any other significant information about the receivership.

As referred to above, while a receiver must act honestly and in good faith and deal with the debtor's property in a commercially reasonable manner, the receiver's position appears well protected in the event of mistake.[106] If the receiver breaches any duty, there is provision to force compliance.

Sale of Debtor's Assets

The order appointing the receiver and manager usually gives the receiver authority to sell the assets in the ordinary course of business. Where the assets are to be sold *en bloc* or major assets are to be sold, the receiver will seek court approval of the method of sale and ultimately court approval of the sale of the

---

[103] Subsection 243(3).
[104] Subsection 245(3).
[105] Section 246 and Rules 125 to 127.
[106] Sections 251 and 252.

assets, especially if there is no judgment. The appointment of the receiver does not vest title in the name of the receiver or in the name of the secured creditor. The appointment merely revokes the licence of the debtor to deal with the property in the ordinary course of business and authorizes the receiver to exercise the power of sale in realizing the property. The exercise of the judicial sale cuts out the equity of redemption in contrast to the situation where the secured creditor seeks foreclosure or an order retaining the property for itself.

The receiver prepares a report setting out his or her investigation with respect to the nature of the assets and recommends the type of sale that ought to be conducted. The court usually approves the method and manner of sale and then the receiver entertains offers.

Ultimately, the receiver brings a motion for an order approving the sale and a vesting order in favour of the purchaser. The order vests all the right, title, and interest of the property of the debtor in the name of the purchaser. All subsequent encumbrancers are notified so that they may be heard as to why the court ought not to approve the sale and foreclose their rights.

In practice, it is not usual to add lien holders and subsequent encumbrancers as party defendants at the commencement of an action unless there are a few in number. However, they should be made parties defendant at a subsequent stage and given an opportunity to claim priority or otherwise redeem the security.

In a court-appointed receivership, the order generally provides that the receiver can carry on the business of the debtor and where applicable the receiver has power to sell, lease, or otherwise dispose of the assets in the ordinary course of business. In most cases, the receiver is not authorized to sell capital or fixed assets without court approval. Paragraph 243(1)(*c*) is very broad and gives the court the power to "take any other action that the court considers advisable".[107]

With respect to a private receivership, the security instrument usually contains terms authorizing the secured creditor and the receiver to take possession, collect, and sell the assets. In the absence of a contractual power of sale clause, it is necessary for the holder to commence judicial sale proceedings unless the legislation governing the security gives the secured creditor the right to sell.[108]

The receiver sells, whether appointed by the court or privately, by way of private sale, tender, or auction. In a court appointment, the debtor and other interested parties are given an opportunity to contest the method of sale as well as the proposed sale price. In a private appointment, the secured creditor and receiver are not immune from attack and must act honestly and in good faith and attempt to obtain the true market value of the assets.

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[107] However, the extent of the power does not give the court power to dispense with notice to condominium owners and override the provisions of the provincial **Condominium Act: Re Railside Developments Ltd.** (2010), 62 C.B.R. (5th) 193 (N.S.S.C.).

[108] For example, if a mortgage fails to provide a power of sale clause, the mortgagee may resort to the implied power of sale in Part II of the **Mortgages Act**.

In dealing with court approval, the duties of the court are as follows:

> (I) It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> ...
>
> (II) The court should consider the interests of all parties, plaintiffs and defendants alike.
>
> ...
>
> (III) The court must consider the efficacy and integrity of the process by which the offers are obtained.
>
> ...
>
> (IV) The court should consider whether there has been unfairness in the working out of the process.[109]

In situations where debt recovery is not in issue, the court must consider special factors unique to the situation. In the case of non-profit co-operative social housing, the court reviews in the context of the **Soundair** principles the following, among other factors:

(i) the continued viability of the project in the existing form;

(ii) the statutory rights of co-operative members under the **Co-operative Corporations Act** to participate in management and to have greater security of tenure;

(iii) the particular impact of legislative or other strictures on the value of the property in question; and

(iv) the need to preserve the availability of social public housing, whatever the form that vehicle might take.[110]

The court should consider whether there has been unfairness in the working out of the process.[111]

If the receiver is proceeding to sell the insolvent person's assets in a commercially unreasonable manner, the court can redirect the receiver to advertise in a national newspaper and trade magazine and to prepare a reasonable information package together with a marketing plan.[112]

Review of Receiver's Accounts

Within six months of the receiver's filing its accounts with the Superintendent, the Superintendent, the insolvent person, or, in the case of a bankrupt, the trustee or a creditor may apply to the court for a review of the

---

[109] See **Crown Trust Co. v. Rosenberg** (1986), 60 O.R. (2d) 87, where the court reviewed its duties on such a hearing; applied and approved in **Royal Bank v. Soundair Corp.** (1991), 7 C.B.R. (3d) 1 (Ont. C.A.); **Re Regal Constellation Hotel Ltd.** (2004), 50 C.B.R. (4th) 258, 71 O.R. (3d) 355 (Ont. C.A.); **Fifth Third Bank v. MPI Packaging Inc.** (2010), 62 C.B.R. (5th) 215 (Ont. S.C.J.), appeal dismissed (2010), 68 C.B.R. (5th) 110 (Ont. C.A.).

[110] **York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.** (2010), 68 C.B.R. (5th) 73 (Ont. C.A.), leave to the S.C.C. refused December 23, 2010.

[111] **Crown Trust Co. v. Rosenberg** (1986), 60 O.R. (2d) 87 at 92–94.

[112] **Sullivan v. Letnik** (2002), 38 C.B.R. (4th) 284 (Ont. S.C.J.).

2002 CarswellOnt 230
Ontario Superior Court of Justice [Commercial List]

Battery Plus Inc., Re

2002 CarswellOnt 230, [2002] O.J. No. 261, [2002] O.T.C. 55, 111 A.C.W.S. (3d) 213, 31 C.B.R. (4th) 196

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as Amended

In the Matter of Battery Plus Inc. and 1271273 Ontario Inc.

Application under the Bankruptcy and Insolvency Act, R.S.C. c.B-3. Section 47.1

Greer J.

Heard: January 14, 2001
Judgment: January 23, 2002
Docket: 01-CL-4319

Counsel: *Melvyn L. Solmon*, for Battery Plus Inc., 1271273 Ontario Inc.
Harvey Chaiton, for Interim Receiver, Deloitte & Touche Inc.
Katherine McEachern, for Laurentian Bank
Bryan Skolnik, for Domenick Bellisario, secured creditor

Subject: Insolvency; Corporate and Commercial

Headnote

Receivers --- Conduct and liability of receiver — Duties
B owned all shares of numbered company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for copies of personal e-mails, voice mails and companies' computer records to be produced by receiver — Receiver ordered to produce B's personal documents, e-mail and voice mail and copies of offers for purchase of companies — B was required to provide receiver with list, description and relevance of specific documents which he required — At no time did B specify exactly which documents he required — Receiver did not owe duty to owner of shares of business in receivership to copy everything in receiver's possession — Interested party had right to documents relating to specific purpose — As B was in best position to know how companies were operated, he was not acting in good faith by not preparing reasonable list of specific documents as opposed to broad sweeping categories.

Corporations --- Directors and officers — Fiduciary duties — Effect of receivership or winding-up
B owned all shares of number company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies — Motion dismissed — Directors of company in receivership had continuous obligation to shareholders and unsecured creditors to act honestly and in best interests of debtors to attain best possible price for assets — Difficult to say that as director B was acting in best interest of companies and debtors by subpoenaing representatives of prospective purchasers as witnesses — Abuse of process in receivership to subject non-parties with no knowledge about receivership, other than terms of offer being made by company they worked for, to have to attend on discovery — Order for witnesses to appear was refused.

Table of Authorities

Cases considered by *Greer J.*:

Alberta Treasury Branches v. Hat Development Ltd., *(*sub nom. *Hat Development Ltd., Re)* 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264, 1988 CarswellAlta 313 (Alta. Q.B.) — considered

Nash v. CIBC Trust Corp., *(*sub nom. *Nash v. C.I.B.C. Trust Corp.)* 6 O.T.C. 368, 1996 CarswellOnt 2185 (Ont. Gen. Div.) — considered

Royal Bank v. Vista Homes Ltd., 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590 (B.C. S.C.) — considered

SLP Resources Inc. v. Sorrel Resources Ltd., 65 C.B.R. (N.S.) 288, 1987 CarswellAlta 317 (Alta. Q.B.) — considered

MOTION by shareholder for production of documents by interim receiver and for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies.

***Greer J.*:**

1 Battery Plus Inc. (”Battery”) and 1271273 Ontario Inc. (”127”) move, together with Antoine Chahine Badr (”Badr”), the owner of all the shares of 127, which in turn owns all the shares of Battery, requiring Deloitte & Touche Inc. as Interim Receiver (”Deloitte” or the “Interim Receiver”) of Battery and 127 to provide access to any and all of the documents and books and records of the two companies to November 15, 2001, the date on which Deloitte was appointed the Interim Receiver. Deloitte’s was, in August 2001, appointed a Monitor of the companies, and this later became an Interim Receivership at the behest of the major secured creditor, the Laurentian Bank. (”Laurentian”). Laurentian is owed approximately $6,660,000 by Battery. Battery and 127 also ask for copies of its own E-mails and voice mails for Badr that continued to come to the companies after the appointment. They also want all computer records and data on the companies’ hard drives. They further asks the Court to order Deloitte to produce time dockets for all its employees who have worked on behalf of Deloitte as Monitor and Interim Receiver and all accounts rendered by it during the period to today’s date. Badr asks the Court to personally let him be in attendance with his counsel or another representative of the law firm acting for him, when the examination of all such records takes place. He further wants to be able to take copies of any and all such documents.

2 Aside from the question of how documentary evidence is to be treated and what rights these companies and their owner have in this interim receivership, the companies want Deloitte held in breach of the Order of Mr. Justice Spence made January 3, 2002. Lastly, they ask the Court for leave to examine five persons as witnesses with respect to the documentation and information which the Interim Receiver has made available to Laurentian and to prospective purchasers of Battery and 127, but not to the two companies in the interim receivership.

Some background facts

3 It is clear from the tenor of the documents before me, on behalf of Battery and 127, and from the scope of the relief they are asking the Court to make, that they and Badr are unhappy about the interim receivership. They do not want Deloitte’s to sell the companies, although I am told by Deloitte’s that it shortly hopes to move before the Court for approval of the sale of the companies.

4 On December 19, 2001, the parties appeared before Mr. Justice Spence on a 9:30 a.m. appointment. He

allowed them to schedule a Motion for directions for the first available date in January, 2002. In that Endorsement, Mr. Justice Spence said the following:

> Mr. Chaiton will seek to sort out the computer copies and information access matters with the Interim Receiver so that Mr. Solmon receives what he should have.

6 Later, on January 3, 2002, Mr. Justice Spence made a further Endorsement, which reads in part:

> 1. As to documents, BPI should advise the IR promptly which of the documents copied pre Dec. 19 are required for the affidavit for the motion to remove the power of sale, and IR is to release such of those documents as it approves for that purpose promptly. BPI may move for further release of documents.

7 There were documents, referenced in this part of the Endorsement, which were copied by Badr's assistant, Williams, in the presence of a representative of Deloitte's when the interim receivership took place. Such an examination of the documents, followed by the copying of them, I am told, took the better part of a day. For the reasons set out in the various affidavits filed, Badr never received these copies and claims only to have received his personal papers. He claims that he cannot produce proper affidavits in the various Motions he and his companies intend to bring on against the Interim Receiver, including a Motion to ask the Court to remove the power of sale given to the Interim Receiver in its appointment, without this documentation. At no time, however, has Badr ever specified in writing exactly what documents he requires for the period prior to November 15, 2001.

8 It is the position of Battery and 127 that they have not been provided with copies of any such documents, nor is there a list of which had been so copied. They say that Deloitte's has not co-operated in the least, in providing them with what they need. On the other hand, these companies insist that they are entitled to examine everything and basically have copies of whatever they want. It appears, on the surface of their Motion, that they are simply on a "fishing expedition" to see everything and create problems for the Interim Receiver.

The Interim Receiver's position

9 Despite the companies' position that they are not indebted to Laurentian and that they want an order discharging Laurentian's security, and despite all the Motions that they intend to bring before the Court, it must be remembered that the Interim Receiver is appointed by the Court on evidence provided by the secured creditor. Such appointments are not made lightly. Further, the Interim Receiver is an officer of the Court and, as such, must regularly report to the Court. Those Interim Reports set out all expenses of the Interim Receiver, steps taken by it to protect assets and to market these assets for sale. The first Report of Deloitte has been presented to the Court. That Report indicates that an "Inventory Theft" may have occurred the night before the interim receivership was ordered. There is also an issue as to whether cheques totalling approximately $290,000 were diverted and not deposited to credit of Battery when received. All of this is set out in detail in the Interim Report.

10 Michael Baigel ("Baigel") is a Senior Manager of Deloitte and has been involved almost on an exclusive basis since its appointment on November 15, 2001, pursuant to the Order of Mr. Justice O'Driscoll, in the management and supervision of Battery's interim receivership. Deloitte's takes the position that Badr's request for each and every of his own documents, E-mails and all pre — and post receivership documents is oppressive and abusive, and is made "in furtherance of Badr's continuous attempts to prevent the sale of the business which was expressly authorized by Order of this Honourable Court." It cannot be forgotten, that when Mr. Justice O'Driscoll made the appointment, he noted in his Reasons that the cheques of Battery were being turned back by the bank, that the rent was due and unpaid, that there was a payroll to meet and that Battery had no funds from which to pay it. The appointment was not one lightly entered into by the Court.

11 Very lengthy affidavits have already been filed for purposes of the aforementioned Motions being

brought on. The Interim Receiver says that Badr is refusing to put any limitation on his request for documentation. Badr has never provided the Interim Receiver with a limited list of documents he needs in order to complete his affidavits. Surely his accountant would have copies of the companies' financial statements for at least 6 years, if all other copies were on the business premises. Since Badr is the person who operated these companies, he must have some more specific idea of which documents it is necessary for him to have, in order to be able to complete the affidavits. The list attached to his counsel's letter of December 21, 2001, is so open-ended as to not have to be taken seriously. For example, counsel asks for the hard drives from the computers of 10 employees plus a copy of the main server for Battery's computer system plus nine other broad requests for information.

12 Baigel says, in his affidavit, that Deloitte has been receiving complaints from prospective purchasers that they have been receiving letters from counsel to Badr. Further, representatives of these prospective purchasers have received subpoenas to appear as witnesses on discovery, although there are no court orders authorizing this. Such tactics, in my view, are meant to discourage these prospective purchasers from bringing forward bona fide offers to the Interim Receiver. Further, Battery and 127 have steadfastly refused to inform the Interim Receiver as to how they obtained the information regarding who were prospective purchasers. That places the source of their knowledge under suspicion.

13 Baigel says in paragraph 35 of his affidavit, that the Interim Receiver changed the password to Badr's voicemail to restrict remote access to information, but that it has not intercepted or listened to Badr's voicemail or E-mail. Baigel says, contrary to Badr's position that a promise was made to him by the Interim Receiver to give him these electronic communications, the Interim Receiver made no such promise. Further, there is a dispute between the parties as to whether or not there was an agreement that the documents copied by Joanne Williams were to all be given to Badr or not. Finally, Deloitte says that there really is no need to give so many documents to Badr to help him prepare his affidavits, when any such Motions to be brought are premature, in the first place. The Interim Receiver did, however, agree in the letter of November 19, 2001 from Baigel to Badr that the Interim Receiver retained the hard drive of his computer because it contained proprietary information of Battery. The letter states that Badr told the Interim Receiver that this hard drive also contained personal information. The Interim Receiver undertook to provide him with a file listing of the contents, and to make copies "of the personal files" for him thereafter, presumably when the listing has been examined by the Interim Receiver. It appears that this did not take place, given the impossible demands for documentation, which Badr made thereafter.

14 On December 21, 2001, counsel for the Interim Receiver wrote to one of Badr's counsel to point out that Badr had no inherent right to everything he was asking for, given that the Interim Receiver, by Order of the Court, was given:

> ...the exclusive power of management, possession and control over the assets and operations of Battery Plus. Accordingly, your client's title provides him with no right to possession or access to any of the books, records or documents of Battery Plus.
>
> Having said that, if you legitimately require access to certain documentation in order to respond to the allegations made in the various court materials, I indicated to Mr. Justice Spence and counsel that copies of the documentation you reasonably require for that purpose would be provided. At no time, however, did I indicate that all of the documentation copied by Chahine's assistant would be released; it must be necessary for the purpose of responding to the allegations made in the court materials.

15 The problem facing the Court is that Badr has made no attempt to be "reasonable" in his requests and demands. That tactic has placed the Interim Receiver in a very difficult position, having been provided with no reasonable list of documents needed to help with the affidavits Badr plans to file in support of his various Motions to be brought on.

Legal Analysis

16 Frank Bennett in *Bennett on Receiverships*, 2nd ed., Carswell Publishing, 1998, notes at p.167, that a court-appointed receiver, in its managerial capacity takes charge of the management of the debtor's assets. The directors of the company in receivership, do, however, have a continuous obligation to the shareholders and to the unsecured creditors to act honestly and in the best interests of the debtor to attain the best possible price for its assets. In the receivership before me, there is really only one shareholder. I am unsure how many unsecured creditors there are. Laurentian, however, is the key debtor. How can Badr be said, as director, to be acting in the best interests of the companies and the debtors by sending out letters to prospective purchasers to discourage them, and by subpoenaing their representatives as witnesses? This tactic is questionable. On the face of it, this appears to be both abusive and oppressive, given the circumstances of the interim receivership in question. See also, p.180 for duties of the court appointed receiver.
Bennett does say, at p.181, supra, that:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.

17 Who then, are these "interested persons", at law? Certainly, any prospective purchaser of the assets of the company in receivership, falls within that category. The information to be provided is financial information relating to the operations of the company, valuations such as prospective purchasers of assets and the company itself, tax information that may be relevant, information respecting leases, franchises and other matters affecting business operations. On the other hand, it is not reasonable to think that the receiver owes a duty to the owner of the shares or business in receivership, who was operating the business until the day before the interim receiver stepped in, to copy every single piece of paper that is now in the interim receiver's possession. That is an expensive folly not worth considering.

18 In *Royal Bank v. Vista Homes Ltd.*, [1984] B.C.J. No. 2713 (B.C. S.C.), Vancouver Registry No. C832220, lien claimants in the receivership, wanted further input into the proposed sale or liquidation of the assets. The Court, there, noted that it would help these claimants better understand what was taking place, if they were to be given copies of all offers for the condominium project, if they received copies of the monthly reports of the receiver-manager, and if the receiver-manager had the services of independent counsel. In the case at bar, the only step not complied with, is that Badr be provided with copies of any offers received. The Court further points out at p.2, para.9 that the receiver-manager is obliged to respond to requests for information "...which are consistent with the position of the party making the request and the amount involved in the particular asset in question."

19 The Interim Receiver is acting in a fiduciary capacity to all parties in the proceedings. See: *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 286. Therefore, the Interim Receiver must respond to reasonable requests for information from Badr, as well as from prospective purchasers. On the other hand, the position of the party making the request, must be taken into account. No one knows more about how he operated the companies than Badr, himself. If he cannot prepare a reasonable list of specific documents, as opposed to broad sweeping categories, in order to assist him to prepare his affidavits, he is not acting in a reasonable fashion. Mr. Justice Ground speaks to the relevancy of such documents in *Nash v. CIBC Trust Corp.*, [1996] O.J. No. 1833 (Ont. Gen. Div.), DRS 96-13495. He notes at p.2, para. 6, that investors are to receive the same information as the other parties in the litigation. The Motion before Ground J., however, was a Motion to remove the solicitors of record for the Receiver, and was not a Motion on what documentation the Receiver must provide to the parties and to the owner/director.

20 In *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.), the Court points out that the directors of the company in receivership, did not have the residual power to interfere with the ability of the receiver to manage the company. Therefore, Badr had no right to cause his counsel to write directly to any of the prospective purchasers of Battery that the Interim Receiver was dealing with. Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the

people involved in the receivership:

> ...does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

21 To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents musts relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

Conclusion

22 The following Orders shall issue:

1. The Interim Receiver shall produce a list to Badr of the documents on the hard drive of his personal computer, and provide him with a copy of all his personal documents found therein.

2. Badr shall provide the Interim Receiver with a list of specific documents from the ones that were copied by Joanne Williams, or elsewhere, which are required by him to assist in him completing his affidavits. Badr shall provide a clear description of the document and state why it is relevant, and for which Motion the affidavit is being prepared in support of. ___

3. The Interim Receiver shall check the messages left on Badr's voicemail after November 14, 2001 and any E-mail messages that may still be on Badr's computer to determine if any are personal to him, and not business-related messages. A copy of such personal voicemail and personal E-mail messages shall be given to Badr, if any. If there is an issue as to which may be personal, and which may be business-related, I may be spoken to.

4. The Interim Receiver shall provide Badr with copies of all Offers received by it for the purchase of the business.

5. I refuse to order any of the so-called witnesses to appear on the subpoenas served on each of them by Badr. In my view, it is an abuse of the process, in the receivership, to subject non-parties, and persons with no knowledge about the receivership, other than what the terms of an arm's length offer is being made by the company he or she works for, to have to attend on discovery.

6. All other requests for Badr for any further information from the hard drives of company employees/executives, from the Interim Receiver about its own records, time spent and documentation involving prospective purchasers, is hereby dismissed. The companies are entitled to receive copies of all Interim Reports prepared by the Receiver.

7. The Interim Receiver is not in breach of the Order of Spence J. made January 3, 2002. Spence J. made it clear that documents to be released must relate to the affidavit in support of the Motion to remove the power of sale from the Interim Receivership's Order. The letter of Bradr's counsel dated December 21, 2001, with its all-encompassing broad list of requests, did not meet the criteria set by Spence J.

8. The balance of relief requested by Badr in hereby dismissed.

23 Given the nature of the Orders made by me respecting documentation, in my view the ordering of Costs is not appropriate.

Order accordingly.

End of Document

2012 ONCA 681
Ontario Court of Appeal

SA Capital Growth Corp. v. Mander Estate

2012 CarswellOnt 12445, 2012 ONCA 681, 117 O.R. (3d) 16, 220 A.C.W.S. (3d) 504, 298 O.A.C. 85, 354 D.L.R. (4th) 748

SA Capital Growth Corp. Applicant and Christine Brooks as Executor of the Estate of Robert Mander, deceased and E.M.B. Asset Group Inc. Respondents and Peter Sbaraglia Moving Party (Appellant, Respondent by way of cross-appeal) and RSM Richter Inc. and Ontario Securities Commission Responding Parties (Respondent, Appellant by way of cross-appeal)

Robert J. Sharpe, E.E. Gillese, David Watt JJ.A.

Heard: October 2, 2012
Judgment: October 10, 2012*
Docket: CA C55588

Proceedings: reversing in part *SA Capital Growth Corp. v. Mander Estate* (2012), 110 O.R. (3d) 765, 2012 CarswellOnt 6330, 2012 ONSC 2800, 90 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]); & additional reasons at *SA Capital Growth Corp. v. Mander Estate* (2012), 2012 ONCA 768, 2012 CarswellOnt 13972 (Ont. C.A.)

Counsel: Kevin D. Toyne for Appellant, Peter Sbaraglia
Matthew Gottlieb, Shannon Beddoe for Respondent, RSM Richter Inc. (now Duff & Phelps Canada Restructuring Inc.)
Evan Cobb for Applicant, SA Capital Growth Corp.
Jennifer Lynch for Respondent, Ontario Securities Commission
Frank Lamie for Tonin & Co. LLP, Peter Tonin

Subject: Corporate and Commercial; Securities; Constitutional; Criminal; Insolvency

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties
Disclosure — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver appointed — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — Court issued order authorizing receiver to investigate affairs of S, wife, and their companies (C group) — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership, resulting in order that receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court, and other relief — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies and C group, pursuant to court order concerning C group only, along with deleted emails — Transcript and documents to be reviewed by court to determine what production should be ordered — Trial judge found principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Trial judge found protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to

make full answer and defence — Trial judge found court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are likely relevant and balancing of competing interests at stake favours disclosure — Debtors appealed, receiver cross-appealed — Appeal dismissed, cross-appeal allowed — Trial judge correctly found that court-appointed receiver cannot be compelled to produce documents obtained in exercise of its mandate in receivership to be used in separate proceeding, and to order disclosure could cause serious mischief — Securities proceedings were clearly distinct from receivership — Inappropriate for trial judge to make what amounted to interlocutory procedural order in relation to proceeding pending before Securities Commission, and third party disclosure issues should be determined by tribunal itself — Rule 20.10 of Rules of Court did not provide jurisdiction to make freestanding production orders regarding Securities Commission.

Securities --- Commissions and exchanges — Hearings and appeals — Right to fair hearing
Disclosure — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver appointed — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — Court issued order authorizing receiver to investigate affairs of S, wife, and their companies (C group) — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership, resulting in order that receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court, and other relief — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies and C group, pursuant to court order concerning C group only, along with deleted emails — Transcript and documents to be reviewed by court to determine what production should be ordered — Trial judge found principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Trial judge found protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to make full answer and defence — Trial judge found court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are likely relevant and balancing of competing interests at stake favours disclosure — Debtors appealed, receiver cross-appealed — Appeal dismissed, cross-appeal allowed — Trial judge correctly found that court-appointed receiver cannot be compelled to produce documents obtained in exercise of its mandate in receivership to be used in separate proceeding, and to order disclosure could cause serious mischief — Securities proceedings were clearly distinct from receivership — Inappropriate for trial judge to make what amounted to interlocutory procedural order in relation to proceeding pending before Securities Commission, and third party disclosure issues should be determined by tribunal itself — Rule 20.10 of Rules of Court did not provide jurisdiction to make freestanding production orders regarding Securities Commission.

Table of Authorities

Cases considered:

Anvil Range Mining Corp., Re (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]) — referred to

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — considered

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2002), 2002 CarswellOnt 3678, 37 C.B.R. (4th) 267 (Ont. S.C.J. [Commercial List]) — referred to

Impact Tool & Mould Inc., Re (2007), 41 C.B.R. (5th) 112, 2007 CarswellOnt 9136 (Ont. S.C.J.) —

referred to

Impact Tool & Mould Inc., Re (2008), 2008 ONCA 187, 41 C.B.R. (5th) 1, 2008 CarswellOnt 1360, 234 O.A.C. 377 (Ont. C.A.) — referred to

Impact Tool & Mould Inc., Re (2008), *(*sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 256 O.A.C. 395 (note), 2008 CarswellOnt 6367, 2008 CarswellOnt 6368, *(*sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 391 N.R. 394 (note) (S.C.C.) — referred to

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of) (2006), 2006 CarswellOnt 1523, 20 C.B.R. (5th) 220, *(*sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 208 O.A.C. 133, *(*sub nom. *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 79 O.R. (3d) 241, *(*sub nom. *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 266 D.L.R. (4th) 192 (Ont. C.A.) — referred to

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 30.10 — considered

Authorities considered:

Bennett, Frank, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011)

APPEAL by debtor and CROSS-APPEAL by receiver from judgment reported at *SA Capital Growth Corp. v. Mander Estate* (2012), 110 O.R. (3d) 765, 2012 CarswellOnt 6330, 2012 ONSC 2800, 90 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]), regarding disclosure.

***Per curiam*:**

1 The appellant faces allegations before the Ontario Securities Commission ("OSC") related to an alleged Ponzi scheme. In an unrelated proceeding and at the suit of the respondent SA Capital Corp., a court-appointed receiver conducted an investigation of the appellant, his wife, and companies they controlled in relation to the alleged Ponzi scheme. The appellant sought and obtained from the Superior Court a third-party production order requiring the respondent, RSM Richter Inc. ("the receiver"), to produce materials the appellant claims he needs in order to make full answer and defence in the OSC proceedings.

2 The appellant appeals that order, arguing that the Superior Court judge erred by failing to order further production. The receiver cross-appeals arguing that no production should have been ordered.

3 For the following reasons, we conclude that the appeal should be dismissed, the cross-appeal allowed, and the order requiring the receiver to produce materials set aside.

Analysis

4 The appellant submits that the third-party production order was justified on two grounds:

1. the appellant is an "interested person" in the receivership and is thereby entitled to production; and

> 2. the Superior Court has the authority to order third-party production to protect the appellant's right to make full answer and defence before the OSC.

5 We are unable to accept either of these propositions.

1. "Interested person"

6 In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceeding.

7 The application judge recognized that in some circumstances, a party involved in a receivership can insist upon the production of documents and materials that have been obtained by the receiver. Reference was made to *Bennett on Receiverships*, 3rd ed. (Toronto: Thomson Reuters, 2011) at p. 232:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. The receiver must produce all documents in its possession which are relevant to the issues in the receivership.

8 The reach of the phrase "interested person" was discussed and applied by Greer J. in *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc., Re* (2003), 126 A.C.W.S. (3d) 790 (Ont. S.C.J. [Commercial List]) [2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List])]; *Impact Tool & Mould Inc., Re* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.), affirmed (2008), 41 C.B.R. (5th) 1 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 220 (S.C.C.); and *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose: see, for example, *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (Ont. C.A.); *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2002), 37 C.B.R. (4th) 267 (Ont. S.C.J. [Commercial List]).

9 The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

10 We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

2. Full answer and defence

11 The application judge made the third-party production order on the basis that the appellant was entitled to

the material he ordered produced to make full answer and defence to the allegations he faces before the OSC. The application judge applied, by way of analogy, the procedure contemplated by *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) in criminal proceedings.

12 In our view, the application judge erred. However, in fairness, we observe that the basis upon which we reach that conclusion does not appear to have been clearly articulated before the application judge.

13 It was inappropriate for the Superior Court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC.

14 Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case, it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with appropriate remedies.

15 Further, resort to the courts on an interlocutory basis disrupts orderly decision-making by the tribunal. There is a long-established principle that ordinarily, neither appeals nor judicial review should be entertained until after the tribunal proceedings have come to a final conclusion. Although this application did not take the form of an appeal or application for judicial review, it was inconsistent with that basic principle.

16 In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

17 We are aware of the fact that before the appellant brought his application before the Superior Court, a time when he was acting in person, he brought a motion before the OSC requesting third-party production from the receiver. The receiver was not served with that motion. The motion was heard by a single commissioner who ruled that the OSC "does not have the authority to order productions from the Receiver, who is an independent officer of the Court" and observed that, as Staff counsel had submitted, the respondent was not left without a remedy. The commissioner did not specify what remedy he had in mind, but we were informed during oral argument that the OSC Staff had pointed out that the appellant could seek a summons including an order for production of the material he seeks in the OSC proceeding or he could go to the Superior Court and ask for an order for third-party production pursuant to rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

18 The appellant did not challenge that ruling but instead commenced this Superior Court application for third-party production.

19 We agree with the receiver that rule 30.10 could have no application to the appellant's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule plainly does not confer jurisdiction on the Superior Court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.

20 We make no comment on whether the commissioner was right or wrong in his ruling. We observe, however, that the dismissal of the appellant's motion for third party production does not preclude the appellant from seeking an alternative remedy before the OSC. In any event, the refusal to order production within the OSC proceedings cannot confer authority on the Superior Court to make such an order if, as we find, there is no basis in law for the Superior Court to exercise that authority.

Conclusion

21 For these reasons, the appeal is dismissed, the cross-appeal is allowed, and the order of the Superior Court is set aside. We have received the receiver's bill of costs for the application before the Superior Court and for this appeal. We will entertain brief written submissions in support of that request, to be submitted within 7 days from the release of these reasons and responding submissions from the appellant within 7 days thereafter.

Appeal dismissed; cross-appeal allowed.

Footnotes

[*] Additional reasons at *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2013), 2013 ONSC 917, 2013 CarswellOnt 1264 (Ont. S.C.J.).

End of Document

The Court of Queen's Bench Act

(Assented to November 16, 1988)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

...

Sealing confidential documents

77(1)

The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

Documents public

77(2)

Upon payment of the prescribed fee, if any, a person may see

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

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

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

Copies

77(3)

Upon payment of the prescribed fee, if any, a person shall receive a copy of a document filed in a proceeding that is available for public inspection under subsection (2).

S.M. 2004, c. 42, s. 21.

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
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Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their

current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3

R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it

could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules,*

1998, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence

was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais*

test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its

commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and

defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the

appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*:

Keegstra, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.
Pourvoi accueilli.

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