

COURT FILE NUMBER 2303 – 06543

COURT COURT OF KING’S BENCH

JUDICIAL CENTRE EDMONTON

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 J.W. CARR HOLDINGS LTD.,
SPRUCE GROVE INDUSTRIAL PARK INC., 272649
ALBERTA LTD., 279896 ALBERTA LTD., GRANDE
PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292
ALBERTA LTD. and 627612 ALBERTA LTD.

APPLICANTS J.W. CARR HOLDINGS LTD., SPRUCE GROVE
INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896
ALBERTA LTD., GRANDE PRAIRIE PLACE
ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and
627612 ALBERTA LTD.

DOCUMENT **BENCH BRIEF OF THE APPLICANTS
(Expedited Sale Approval Protocol
Orders & Sealing Order)**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING
THIS DOCUMENT

MLT AIKINS LLP
Barristers and Solicitors
2200, 10235 – 101 Street,
Edmonton, AB T5G 3G1
Telephone: 306.975.7136 / 780.969.3518
Fax No.: 306.975.7145 / 780.969.3549
Attention: Jeffrey M. Lee, K.C / Mandi A. Deren-Dube
File No.: 0159371.00008

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I. INTRODUCTION AND BACKGROUND

A. Introduction

1. This Bench Brief is submitted on behalf of the Applicants, J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively, the **“Applicants”** or the **“Carr Group”**) in support of their application (the **“Expedited Sale Approval Protocol Application”**) to be heard before the Honourable Justice J.T. Neilson on May 23, 2023 for:

- a) four separate Orders authorizing an expedited Sale Approval Protocol for certain duplexes, condominium units and building lots owned by the Applicants which will facilitate the orderly, efficient and cost-effective closing of transactions for these properties (the **“Expedited Sale Approval Protocol Orders”**) and
- b) an Order effective until the earlier of August 31, 2023 or further order of this Court (the **“Sealing Order”**) sealing the following five Confidential Affidavits sworn by realtors (the **“Confidential Realtor Affidavits”**) and intended to be filed in support of the Expedited Sale Approval Protocol Application, namely:
 - i. Confidential Affidavit of Morgan Maclean, sworn May 15, 2023;
 - ii. Confidential Affidavit of Kim Lissoway, sworn May 15, 2023;
 - iii. Confidential Affidavit of Yuri Smith, sworn May 15, 2023;
 - iv. Confidential Affidavit of Ken Williamson, sworn May 15, 2023; and
 - v. Confidential Affidavit of Darrell Zapernick, to be sworn.

2. The Applicants were granted a stay of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended¹ (the “**CCAA**”) by an Initial Order granted on April 19, 2023 by the Honourable Justice J.J. Gill (the “**Initial Order**”), pursuant to which Ernst & Young Inc. was appointed as the Monitor (the “**Monitor**”).
3. The Applicants were granted the following additional relief by the Honourable Justice J.T. Neilson on April 26, 2023:
 - a. an Amended and Restated Initial Order (the “**ARIO**”) extending the stay of proceedings to August 31, 2023;
 - b. a Sales and Investment Solicitation Process Order (the “**SISP Order**”) approving an expedited Sales and Investment Solicitation Process (“**SISP**”) designed to identify, obtain approval for and close transactions for the real estate assets of the Applicants on or before August 31, 2023; and
 - c. an Order sealing the Confidential Affidavit of Marjorie Carr sworn April 18, 2023 (relied upon in support of the Initial Order) and the Confidential Affidavit of Marjorie Carr sworn April 20, 2023 (collectively, the “**Confidential Carr Affidavits**”), until the earlier of August 31, 2023, or further order of this Court.

B. Summary of Facts

4. The Applicants adopt and rely upon the facts set out in in the Affidavit of Marjorie Carr sworn on April 10, 2023 (the “**April 10 Carr Affidavit**”), the Confidential Carr Affidavits, the Pre-Filing Report of the Proposed Monitor, the First Report of the Monitor and the Confidential Realtor Affidavits.
5. The Confidential Realtor Affidavits contain market opinions of the Licensed Realtors who have been retained by the Applicants pursuant to the SISP Order to list and sell certain parts of the Applicants’ entire real estate portfolio, which is presently being offered for sale pursuant to the SISP Order (the “**Real Estate Assets**”).

¹ [*Companies' Creditors Arrangement Act*](#), RSC 1985, c C-36 [CCAA], TAB 1 of the Initial Order Brief.

6. The subset of Real Estate Assets in respect of which the Applicants' seek the Expedited Sale Approval Protocol Order over includes certain defined categories of lower value residential properties and vacant lots, including:
- a. Hillcrest Lots - Six vacant single-family residential lots in the Hillcrest neighbourhood of Grande Prairie, Alberta (the "**Hillcrest Lots**");²
 - b. Northridge Single Family Lots – 39 vacant single-family residential lots in Phase 6 and Phase 7 of the Northridge subdivision in Grande Prairie, Alberta (the "**Northridge Single Family Lots**");³
 - c. Northridge Duplex Lots - 4 remaining vacant lots (two titles per lot, intended for development of residential duplexes) in Phase 7 of the Northridge residential subdivision in Grande Prairie, Alberta (the "**Northridge Duplex Lots**");⁴
 - d. O'Brien Lake Lots - 20 remaining vacant lots in the O'Brien Lake residential subdivision in Grande Prairie, Alberta (the "**O'Brien Lake Lots**");⁵
 - e. Fort Saskatchewan Duplexes – 10 residential duplexes in Fort Saskatchewan of similar age and size, which are currently rented and generating rental income (the "**Fort Saskatchewan Duplexes**").⁶
 - f. Central Park Condominiums – 23 condominium units in Central Park, a condominium building in the Oliver neighborhood of Edmonton, which are currently rented and generating rental income (the "**Central Park Condos**").⁷

² April 10 Carr Affidavit at para 97(k)

³ April 10 Carr Affidavit at para 97(a)-(b)

⁴ *Ibid*

⁵ April 10 Carr Affidavit at para 97(d)

⁶ April 10 Carr Affidavit at para 85(a)

⁷ *Ibid* at para 85(b)

- g. Rosedale Condominiums – 15 condominium units in Rosedale Place, a condominium building in the Oliver neighborhood of Edmonton, which are currently rented and generating rental income (the “**Rosedale Condos**”).⁸
 - h. Inverness Condominiums – 15 condominium units and associated separately titled parking stalls in the Inverness condominium complex in Grande Prairie, which are currently rented and generating rental income (the “**Inverness Condos**”).⁹
 - i. Spruce Grove Industrial Lots – six vacant industrial lots located in Spruce Grove Industrial Park (the “**Spruce Grove Lots**”).¹⁰
7. Due to the number of properties and the fact that the market value for the categories of Real Estate Assets particularized in the foregoing paragraph should be similar for each sale, the Applicants seek an Order for an Expedited Sale Approval Protocol. This Expedited Sale Approval Protocol would allow the Applicants to sell the Real Estate Assets on an ongoing basis without having to bring an Application on the Commercial List on notice to the entire service list each time a sale is contemplated.
8. Effectively, the Applicants are seeking expedited approval from this Court to sell these defined categories of Real Estate Assets at a price equal to or greater than the Satisfactory Market Value for each category, as defined in the Confidential Realtor Affidavits. How the Satisfactory Market Value was reached for each of the categories of Real Estate Assets is set out in depth in the Confidential Realtor Affidavits, and is supported by independent evidence including recent comparable sales of similar properties.

II. ISSUES

9. This Application raises the following issues:
- A. Is it appropriate for this Court to grant the Expedited Sale Approval Protocol Orders?

⁸ *Ibid* at para 93

⁹ April 10 Carr Affidavit at para 99(g)

¹⁰ April 10 Carr Affidavit at para 104

- B. Is it appropriate for this Court to grant the proposed Sealing Order in regard to the Confidential Realtor Affidavits?

III. LAW AND ARGUMENT

- A. The Expedited Sale Approval Protocol Orders Are an Appropriate Exercise of the Court's Discretion
10. In regard to the Expedited Sale Approval Protocol Application, this Bench Brief will address the jurisdiction of the Court to grant the relief requested and the practical need for such Expedited Sale Approval Protocol Orders in this case.
11. The Court's jurisdiction to grant such relief is set out in sections 11 and 36 of the CCAA.
12. Section 11 describes the plenary jurisdiction of the CCAA Court in the following broad terms:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. [Emphasis added]

13. The CCAA Court's jurisdiction to approve proposed asset sales by companies undergoing restructuring proceedings is set out in section 36 of the CCAA in the following terms:

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. [Emphasis added]

14. The practical need for the Expedited Sale Approval Protocol Orders is grounded in the circumstances described in the April 10 Carr Affidavit, which gave rise to the ARIO and the SISP Order. Pursuant to the SISP Order, the Applicants are offering for sale (under supervision of this Court) their entire real estate portfolio, with the objectives of monetizing the Real Estate Assets, retiring in full the secured debt owed against the Real Estate Assets and capturing value past the secured debt owed against the Real Estate Assets, in order to fund a Plan of Arrangement to unsecured creditors to obtain recovery (in whole or in part) of the unsecured indebtedness owed to them.
15. In order for the Applicants to achieve the objectives described in the immediately preceding paragraph, it is critical that the sale of the Real Estate Assets pursuant to the SISP Order be administered and be supervised by the Court in an orderly, efficient and cost-effective manner.

16. The Expedited SAVO Protocol Orders will allow the Applicants to obtain court approval for, and to close, proposed transactions for the sale of 76 lots, 53 condominium units and ten duplexes by means of an orderly, efficient and cost-effective process involving one oral hearing before a Commercial List Justice, followed by subsequent desk applications for the sale of individual condominiums, duplexes and building lots. This process will avoid the need for multiple oral hearings and will achieve very significant savings of professional fees and court hearing time.
17. The Expedited Sale Approval Protocol Orders will satisfy the requirements of section 36(3) of the CCAA by ensuring that the supervising Court is provided with information addressing the following six points whenever it is called upon to decide subsequent desk applications for approval of the sale of the 76 lots, 53 condominium units and ten duplexes (collectively, the “**Subject Properties**”) which are the subject of the Expedited Sale Approval Protocol Orders:
 - a) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that the process leading to the proposed sale or disposition was reasonable in the circumstances, because the SISP was approved by means of the SISP Order [section 36(3)(a) of the CCAA];
 - b) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that the monitor approved the process leading to the proposed sale or disposition [section 36(3)(b) of the CCAA];

- c) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that the monitor has filed with the court a report stating that the Monitor approves the proposed sale or disposition and regards the proposed sale as more beneficial to the creditors than a sale or disposition under a bankruptcy [section 36(3)(c) of the CCAA];
 - d) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that creditors were consulted, because such applications will be supported by a Sale Endorsement Certificate of the Monitor certifying that both the Interim Lender and the holders of First Charge Encumbrances on the Subject Properties approve the Proposed Sale [section 36(3)(d) of the CCAA];
 - e) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that the effects of the proposed sale or disposition on the creditors and other interested parties have been considered, insofar as the proposed sale will have received written approval from each of the Interim Lender, the holders of First Charge Encumbrances on the Subject Properties and the Monitor [section 36(3)(e) of the CCAA]; and
 - f) the Justice hearing subsequent desk applications for Sale Approval Orders in regard to the Subject Properties will have assurance that the consideration to be received for the assets is reasonable and fair, taking into account their market value, by reason of the information contained in the Confidential Realtor Affidavits and the fact that the Monitor will verify to the Court (in the Sale Endorsement Certificate) that the proposed sale of the Subject Properties is for a value which equals or exceeds the Satisfactory Market Value of such Subject Property (as detailed in the Confidential Realtor Affidavits) [section 36(3)(f) of the CCAA].
18. This practical approach to granting omnibus sale approval orders in insolvency proceedings in order to save costs and to reduce the need for multiple oral hearings has been followed by:
- a) this Court in *Medican Holdings Ltd.*¹¹;

- b) the Saskatchewan Court of Queen’s Bench in *Rivairo Capital Corporation*;¹² and
- c) the Ontario Superior Court of Justice in *Bank of Montreal v. Portofino Corporation*.¹³
19. In *Medican*, this Court granted an order authorizing the sales of certain condominium units on a prospective basis.¹⁴ The order allowed certain sales to proceed without monitor approval if they met certain threshold price requirements and if they were supported by a Monitor’s Certificate.¹⁵ The Court approved a template form of Monitor’s Certificate and authorized the monitor to take all steps necessary to effect the sales.¹⁶
20. In *Rivairo*, the Saskatchewan CCAA Court granted an order approving a form of pre-approved sale and vesting process for certain townhouses in Airidie, Alberta owned by a Saskatchewan company undergoing CCAA restructuring proceedings.¹⁷ The order provided that no further court approval was required for a sale of any of the townhouse units to which the order applied. Under that process, the monitor was required to file copies of the sale endorsement certificates for each townhouse sale, in a form which was approved by the court and appended to the order. Thereafter, and upon completion and filing of the sale approval and vesting order (in a form which was approved by the court and appended to the order), the property was to vest in the name of the purchaser.
21. In *Portofino*, the Ontario Court supervising a receivership granted an Omnibus Sale Approval and Vesting Order prospectively approving the sales of 51 unsold condominium units provided that such sales were to take place for a price acceptable to the Receiver, having regard to the appraised value of the units in question.

¹¹ *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 MEDICAN HOLDINGS LTD., et al*, Unreported June 11, 2010 Order of Justice K.M. Horner J. of the Court of Queen’s Bench of Alberta in Calgary Action No. 1001-07852 (“*Medican*”), TAB 1.

¹² *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 KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION*, unreported February 26, 2019 Order of Justice A.R. Rothery of the Court of Queen’s Bench For Saskatchewan in Saskatoon Action Q.B. No. 885 of 2018 (“*Rivairo*”) TAB 2.

¹³ *Bank of Montreal v. Portofino Corporation*, unreported May 2, 2014 Order of Justice Campbell in Court File No. CV-13-19866 (“*Portofino*”), TAB 3.

¹⁴ *Medican*, TAB 1.

¹⁵ *Ibid* at para 4, TAB 1.

¹⁶ *Ibid* at para 5, TAB 1.

¹⁷ *Rivairo*, TAB 2.

22. For all of the reasons described above the Applicants respectfully submit that for this Court to grant the four Expedited Sale Approval Protocol Orders would be an appropriate exercise of this Court's discretion
- B. It is Appropriate for the Court to Grant a Sealing Order in Regard to the Confidential Realtor Affidavits
23. In *Sherman Estate v Donovan*¹⁸, the Supreme Court of Canada modified the *Sierra Club* test for a sealing order, reframing the previous two-step inquiry into three steps. In order for the Court to grant a sealing order, it must be established that:¹⁹
- a) court openness poses a serious risk to an important public interest;
 - b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
24. In its recent decision in *Yukon (Government of) v Yukon Zinc Corporation*²⁰, the Yukon Supreme Court held that, in the insolvency context, it is standard practice to keep all aspects of the bidding confidential and that Courts have found that doing so appropriately satisfies the *Sierra Club* test, as modified by *Sherman Estate*. The Court found that sealing this information ensures the integrity of the sales and marketing process, and avoids the misuse of information by bidders in a subsequent process to obtain an unfair advantage.²¹

¹⁸ [*Sherman Estate v Donovan*](#), 2021 SCC 25 [*Sherman Estate*], TAB 4.

¹⁹ [*Sherman Estate*](#), at para 38M, TAB 4.

²⁰ [*Yukon \(Government of\) v Yukon Zinc Corporation*](#), 2022 YKSC 2 [*Yukon*], TAB 5.

²¹ [*Yukon*](#), at para 39, TAB 5.

25. In *Yukon*, the important public interest at stake was found to be the commercial interests of the receiver, bidders, creditors and stakeholders in maintaining the integrity of the sales process. In that case, the receiver had represented to bidders that the process would be confidential until completion and the bidders all signed non-disclosure agreements before receiving access to the data. These interests were found to outweigh the negative effects of the sealing order.²²
26. In this case, the Applicants respectfully submit that all three steps of the *Sherman Estate* test have been satisfied.
27. First, the important public interest at stake is the need to maintain the integrity of the SISP (which is the foundation for these entire restructuring proceedings).
28. Second, public disclosure of the value of the Subject Properties contained in the Confidential Realtor Affidavits would undermine this important public interest. The ability of the Applicants, the Selling Agents and the Monitor to obtain the highest and best price for the Subject Properties would be fundamentally and irreparably compromised if the content of the Confidential Realtor Affidavits entered the public domain.
29. Third, as a matter of proportionality, the benefit of sealing the Confidential Realtor Affidavits until August 31, 2023 in order to protect the integrity of the SISP outweighs any potential negative effect of sealing the purchase price until the terms of the SISP Order are carried out.

IV. REQUESTED RELIEF

30. For all of these reasons, the Applicants respectfully request:
- a) that the four Expedited Sale Approval Protocol Orders be granted by the Court; and
 - b) that the proposed sealing order be granted in respect of the Confidential Realtor Affidavits.

²² [Yukon](#), at para 44

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May, 2023.

MLT AIKINS LLP

Jeffrey M. Lee, K.C. and Mandi Deren-Dube,
Counsel for the Applicants, J.W. Carr
Holdings Ltd., Spruce Grove Industrial Park
Inc., 272649 Alberta Ltd., 279896 Alberta
Ltd., Grande Prairie Place Enterprises (1996)
Inc., 1170292 Alberta Ltd. and 627612
Alberta Ltd.

V. INDEX OF AUTHORITIES

TAB	DESCRIPTION
1.	<i>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 MEDICAN HOLDINGS LTD., et al</i> , Unreported June 11, 2010 Order of Justice K.M. Horner J. of the Court of Queen's Bench of Alberta in Calgary Action No. 1001-07852
2.	<i>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 KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION</i> , unreported February 26, 2019 Order of Justice A.R. Rothery of the Court of Queen's Bench For Saskatchewan in Saskatoon Action Q.B. No. 885 of 2018
3.	<i>Bank of Montreal v. Portofino Corporation</i> , unreported May 2, 2014 Order of Justice Campbell in Court File No. CV-13-19866
4.	<i>Sherman Estate v Donovan</i> , 2021 SCC 25
5.	<i>Yukon (Government of) v Yukon Zinc Corporation</i> , 2022 YKSC 2

Court of Queen's Bench of Alberta

Citation: Re: Medican Holdings Ltd., 2013 ABQB 224

Date: 20130423
Docket: 1001 07852
Registry: Calgary

In the Matter of The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended
and The *Judicature Act*, R.S.A. 2000, c. J-2, as Amended

Between:

**And the Matter of a Plan of Compromise or Arrangement of Medican Holdings Ltd.,
Medican Developments Inc., R7 Investments Ltd., Medican Construction Ltd., Medican
Concrete Inc., 1090772 Alberta Ltd., 1144233 Alberta Ltd., 1344241 Alberta Ltd., 9150-
3755 Quebec Inc., Axxess (Sylvan Lake) Developments Ltd., Canva (Calgary)
Developmentxs Ltd., Elements (Grande Prairie) Developments Ltd., Medican (Edmonton
Twrrwillegar) Developments Ltd., Medican (Grande Prairie) Holdings Ltd., Medican
(Kelowna Move) Developments Ltd., Medican (Lethbridge - Fairmnt Park) Developments
Ltd., Medican (Red Deer - Michener Hill) Developments Ltd., Medican (Sylvan Lake)
Developments Ltd., Medican (Westbank) Development Ltd., Medican (Westbank) Land
Ltd., Medican Concrete Forming Ltd., Medican Les Entreprises Medican Inc., Medican
Equipment Ltd., Medican Framing Ltd., Medican General Contractors Ltd., Medican
General Contractors 2010 Ltd., Riverstone (Medicine Hat) Developments Ltd., Sanderson
of Fish Creeek (*calgary) Developments Ltd., Sierras of Eaux Claires (Edmonton)
Developments Ltd., Sonata Ridge (Kelowna) Developments Ltd. Sylvan Lake Marina
Developments Ltd., the Estates of Valleydale Developments Ltd., the Legend (Winnipeg)
Developments Ltd., and Watercrest (Sylvan Lake) Developments Ltd.**

Petitioners

**Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner**

Introduction

[1] The applicant, MCAP Financial Corporation ("MCAP") is seeking a declaration that no monetary amount be allocated to it on account of certain charges arising under an Order made pursuant to the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ("CCAA"). It argues that it should not have to bear any portion of the proposed allocated costs because it received no benefit from the CCAA proceedings, eventually was released from the proceedings and incurred separate fees to enforce its security. The Medican Group and the Monitor submit that MCAP should pay \$397,500 in charges. For the reasons given below MCAP's application is denied.

Background

[2] Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of companies¹. The various Medican Project entities are all affiliated companies engaged in the business of residential real estate development. Both Medican (Westbank) Development Inc. ("Medican Development") and Medican (Westbank) Land Ltd. ("Medican Land") are wholly owned subsidiaries of Medican Holdings.

[3] MCAP is the senior secured lender of the initial phases of a multiunit condominium project in Westbank, British Columbia, known as the Kaleido Project. The Kaleido Project was developed on lands owned by Medican Land as bare trustee on behalf of Medican Development (together the "Kaleido Companies"). MCAP held a first mortgage over the Kaleido Project.

[4] In 2010 the Medican Group sought protection under the CCAA in an attempt to restructure its affairs. The Kaleido Companies were among the petitioners. The initial order which included a stay of proceedings was granted on May 26, 2010 and provided, inter alia, that secured creditors of Medican were liable to pay certain court-ordered charges in relation to the proceedings, including the suppliers' charge, a directors' and officers' indemnification charge, an administration charge, and the debtor-in-possession ("DIP") lender's charge (the "Charges"). In order to pay for the Charges proceeds from the sale of condominium units of projects over which creditors held security were deposited into a separate account (the "Charge Levy").

[5] The Medican Group obtained a DIP loan from Paragon Capital Corporation Ltd. which ultimately totalled \$3.5 million. It was secured as a first priority against all of the Medican Group's assets including those of the Kaleido Companies. As stated, the DIP lender's charge formed part of the Charges. On several occasions project-specific financing was arranged (known as "Mini DIPs"); however, the DIP loan was approved on the basis that it would be used to support the general funding requirements of the Medican Group.

¹There are 39 applicant entities comprising the Medican Group, 36 of which filed the consolidated plan of arrangement under the CCAA (excepting the Kaleido companies and Sanderson)

[6] As a part of the restructuring, and with the approval of MCAP, the Medican Group engaged a listing agent (Coldwell Banker) to market the unsold condo units in the Kaleido Project of which only Phase I had been completed. During the time the units were listed with Coldwell Banker none were sold. MCAP expressed dissatisfaction with the restructuring efforts.

[7] On December 5, 2011 MCAP obtained an Order permitting it to apply to court in British Columbia to appoint a receiver (and ultimately a trustee in bankruptcy) over its collateral in the Kaleido Companies. This occurred following the approval of a related agreement between MCAP and the Medican Group whereby the Kaleido Companies' property and assets were released into the possession of the receiver upon consent of the Medican Group. As a part of the court approved agreement the Medican Group consented to the receivership on the basis that, *inter alia*, the Charges were to remain in existence and that nothing in the agreement "shall determine the allocation to be made against the [Kaleido] Property in respect of the Charges and the parties hereto reserve all rights and remedies in connection with the allocation to be made". The stay of proceedings was lifted for the limited purpose of allowing such receivership to proceed.

[8] At the same time the Medican Group lodged a consolidated Plan of Compromise and Arrangement (the "Plan") dealing with all Medican Group entities subject to the CCAA proceedings excepting the Kaleido Companies and another Medican company. The CCAA proceedings provided that the DIP lender's charge was to be repaid by the Medican Group in part through the Charge Levy and in part through operating cash flow. The Monitor submits that the Kaleido Companies' outstanding contribution to the Charge Levy should be \$397,500. The Monitor further estimates that due to the Charge Levy surplus this amount will be reduced to approximately \$279,300 following the allocation of a portion of the anticipated surplus back to the Kaleido Companies.

[9] On January 11, 2012, MCAP was granted an order nisi by the British Columbia Supreme Court declaring that the outstanding balance owing to MCAP was \$18,216,064. Following the appointment of a receiver MCAP advanced \$2.5 million more than \$1.6 million of which was used to pay strata fee arrears, fix building deficiencies, pay security deposits, and pay fees associated with the National Home Warranty Program. MCAP submits this was done in order make the condo units in the Kaleido Project marketable by the receiver. The receiver is still in the process of completing the sale of units in the Kaleido Project. MCAP submits that when the final sales figures are available it will have sustained a shortfall of approximately \$10.6 million. I note that MCAP did file a proof of claim to participate in the Plan as an unsecured creditor.

[10] MCAP's position through the proceedings has been that even though the Kaleido Project was subject to the CCAA proceedings this did not amount to an agreement on behalf of MCAP that it would bear any obligation for the Charge Levy. The parties disagree as to whether MCAP is obliged to contribute to the Charge Levy.

Issue

[11] This court must determine whether the proposed portion of the CCAA Charge Levy allocated against the Kaleido Project should be reduced or illuminated.

Argument

[12] The parties' positions on the application can be summarized as follows:

a. MCAP

[13] Essentially, Counsel for MCAP submits that it would be inequitable to allocate the Charge Levy against it as though it were an affected secured creditor under the Plan. In particular, it submits that the following factors should be taken into account in determining its allocation: first, it submits that the entities under the Medican Group are distinct with each entity undertaking the development of stand-alone real estate projects such as the Kaleido Project. MCAP stresses that this is not a situation in which a group of debtors carries on a common consolidated purpose. In addition, counsel for MCAP drew attention to the fact that there was no cross-collateralization in that MCAP did not hold security over any other assets of the Medican Group for the obligations arising under the Kaleido Project.

[14] Second, MCAP submits that it received no benefit in connection with the CCAA proceedings. It states that none of the DIP financing was spent on the Kaleido Project. In particular post-filing obligations were not paid during the stay and the Kaleido Project deteriorated during the course of the CCAA proceedings. For example, nothing was paid to the strata corporation, the municipal taxing authority, or to utility providers in relation to the Kaleido Project. MCAP argues that this negatively affected its security over the Project. It submits that the situation became severe enough that the strata corporation (which was stayed from enforcing its rights) approached MCAP directly for funding which it refused to provide absent the ability to appoint a receiver. During this period the National Home Warranty Program ultimately cancelled its coverage, notwithstanding the stay.

[15] In addition, MCAP argues that its ability to realize on any condo unit sales was negatively impacted by the CCAA Proceedings. The initial order was granted on May 26, 2010. MCAP states that it waited approximately 18 months for the Medican Group to come up with a plan in relation to the Kaleido Project or propose some other alternative acceptable to MCAP; all the while MCAP was stayed from enforcing its remedies. During this period, the Medican Group retained Coldwell Banker to market unsold condo units in the Medican Group properties. The Monitor implemented a course of action known as the "MCAP Protocol" to market the unsold units in the Kaleido Properties with a range of proposed square footage listing prices for the units ranging from \$260 to \$280 depending on the unit. MCAP submits that given the deteriorating state of the Kaleido Project and deficiencies in the units the price per square foot was too high and in any event no units were sold during the CCAA Proceedings. Subsequent to the

appointment of the Receiver 46 of the 47 saleable units have been sold at an average square foot price of \$186.

[16] Third, MCAP argues that the case at bar can be distinguished from the authorities before this court in that the existing case law involved failed CCAA proceedings with the eventual appointment of a receiver. MCAP submits that in the present case the Medican Group's Plan sanctioned by the Court excludes the Kaleido Companies. As such, the affected creditors - other than MCAP - benefit from the Plan's pool of funds with the Monitor estimating an average payout of 10 cents on the dollar. MCAP takes the position that it should not have to pay any portion of the aggregate charges for a plan from which it was excluded. It submits that it did not want the Kaleido Project included in the CCAA proceedings from the outset and in getting the stay lifted there was an express reservation of rights.

b. The Monitor

[17] The Monitor takes the position that a portion that MCAP's obligation to contribute to the Charge Levy flows from the fact that the developers of the Kaleido Project were petitioners in the CCAA proceedings whether MCAP was in favour of their inclusion or not. Monitoring the Kaleido Project was a part of the Monitor's mandate in the proceedings and therefore MCAP should bear the associated costs. It argues that although the Kaleido Project was ultimately not included in the Plan this does not detract from the fact that the Project formed part of the monitor's responsibilities throughout the CCAA proceedings prior to the lifting of the stay and the adoption of the Plan.

[18] The Monitor acknowledges that during the CCAA proceedings no units in the Kaleido Project were sold. In its brief, the Monitor suggests that its marketing efforts in relation to the Kaleido Project condo units were "hand-cuffed" by the MCAP Protocol. I note that in the Monitor's "Kaleido Report" dated February 15, 2013 the Monitor states that it proposed the MCAP Protocol and it was accepted by MCAP. This is consistent with correspondence outlining the Protocol. The Monitor argues that in any event MCAP did receive a benefit from the CCAA proceedings in that the stay prevented priority claims being enforced by either the strata corporation for unpaid fees or the municipality for unpaid taxes.

[19] The formula used by the Monitor to allocate contributions to the Charge Levy was to assess the sum of \$8,500 from the sale of condominium units in Medican Group projects for the purposes of addressing the Charge Levy. During oral argument the Monitor submitted that although the global contribution figure was \$8,500 per unit MCAP was only assessed \$7,500 per unit as a result of negotiations surrounding the lifting of the stay and the appointment of the receiver. Although counsel for MCAP agrees that the assessment is \$7,500 it denies that it agreed to any sort of a concession in connection for lifting the stay but reserved its right to challenge its contribution.

[20] The Monitor takes the position that equity demands a contribution from MCAP. In its 15th Report it states, at paras 68-69:

Clearly, without the Kaleido Project contribution to the CCAA Charge Levy, the CCAA Charge Levy Surplus is significantly lower, negatively impacting those Medican Group entities (and ultimately the secured creditors remaining in those entities, if there are any or no subsequent settlements reached with such secured creditors) that are to receive a refund.

Unless the Kaleido Project makes a proportionate contribution to the CCAA Charge Levy, certain of the Company's secured creditors will have disproportionately funded the CCAA Charge Levy. This would appear inherently unfair given that all assets of the Medican Group were encumbered by the Priority Charges.

c. The Medican Group

[21] Counsel for the Medican Group adopts a position similar to that of the Monitor. Medican submits that the DIP loan approved under the Initial Order was sought and obtained on the basis that it would be used to support general funding requirements for the whole of the Medican Group and was not contemplated to fund any particular project. Rather, project-specific financing was arranged through the establishment of "Mini Dips", which have not been included in the proposed allocation.

[22] The Medican Group also raised an argument similar to that of the Monitor concerning equity; namely, that if MCAP does not contribute to the Charge Levy this will increase the cost of repayment for all of the other Medican entities. It submits that increasing the contribution of the remaining creditors to the exclusion of MCAP would be unfair.

[23] In discussing the proper approach to MCAP's contribution the Medican Group asserts that the Kaleido Project was not ignored during the CCAA proceedings. It submits that an extensive memorandum including a detailed market analysis and listing proposal for completed condo units in the Kaleido Project (being the MCAP Protocol) was prepared and delivered to MCAP. The Medican Group also argues that the listing terms of the MCAP Protocol were agreed to by MCAP as opposed to it being unilaterally imposed upon MCAP. In addition, the Medican Group asserts that the saleability issues concerning the Kaleido Project, including unpaid strata fees, utilities and property taxes, as well as deficiencies in the units themselves, constituted pre-filing claims as opposed to being issues which arose solely during the stay.

The Law

[24] There is a limited body of case law providing guidance on the principles of cost allocation. In arguing their positions before me, counsel referred to the following authorities: *Re*

Respect Oilfield Services, 2010 ABQB 277, 28 Alta LR (5th) 239; *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094, 305 AR 175; *Re Winnipeg Motor Express Inc*, 2009 MBQB 204, 243 Man R (2d) 31, aff'd 2009 MBCA 110, 245 Man R (2d) 274; *Re Hickman Equipment (1985) Ltd*, 2004 NLSCTD 164, 5 CBR (5th) 56; *Re Western Express Air Lines Inc*, 2005 BCSC 53, 10 CBR (5th) 154; *Re Hujan International Inc* (2006), 21 CBR (5th) 276 (ONSCJ); and, *Bank of Nova Scotia v Norpak Manufacturing Inc* (2003), 180 OAC 40 (ONCA).

[25] The parties all agree that the case law instructs that any allocation under the Charge Levy must be fair and equitable and that each case is to be decided on the facts. However, they disagree as to what amounts to an equitable allocation on the facts at bar. In particular, MCAP argues that the unique facts of this case dictate an approach that, while equitable, would not result in an equal allocation. In so doing it relies on this Court's statement in *Hunters Trailer & Marine*, at para 15 that:

Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity calls for an equal allocation of costs.

[26] In *Hunters* the Court examined whether super-priority DIP financing and administrative costs in relation to CCAA proceedings should be allocated equally between a number of major secured creditors. One of the creditors, UMC Financial Management, held a first and second mortgage on the debtor's real property as well as an assignment of certain life insurance proceeds. UMC argued that it would be inequitable to bear the costs on the basis proposed by the other creditors as it would be liable for a disproportionate share of the costs. UMC took the position that it was a 'passive' creditor that gave loans on the value of land as opposed to the value of the business as a going concern. It argued that as the risk of loss was greater for operating lenders these creditors should bear a larger portion of the CCAA costs.

[27] In directing that UMC bear a proportion of the DIP costs, the Court held that it would be unfair to ignore differences in the type of security held by creditors and the degree of potential benefit that they might obtain from CCAA proceedings. In allocating 15 percent of the Monitors fees and 5 percent of the DIP costs to UMC the Court noted that a strict accounting on a cost-benefit basis would be impractical. Of particular note to the case at bar the Court opined at para 23 that:

Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was of the benefit, at least the potential benefit, of all creditors.

[28] *Respec Oilfield Services* dealt with a number of applications to apportion CCAA costs incurred with respect to a failed attempt to reorganize. In *Respec*, the debtor was placed into

receivership and a number of pieces of heavy equipment were sold via auction. Pursuant to a court order those creditors who wished to remove equipment subject to their security from the auction were entitled to do so upon paying the monitor a deposit on the proportion of allocated costs it would ultimately have to pay. Certain parties (including GE and JPL) paid this deposit and removed their equipment. Two separate banks, Canadian Western and the Business Development Bank, held a first and second priority claim, respectively, over the debtor's assets excepting a considerable number of pieces of equipment which were subject to a priority Purchase Money Security Interest ("PMSI").

[29] The monitor recommended that all costs associated with the auction and all DIP related costs be allocated on a *pro rata* basis amongst all secured creditors based upon actual or estimated recovery. This would result in the two banks contributing to the indirect costs on the auction notwithstanding that they were unlikely to receive any of the auction proceeds given that their security status ranked behind the PMSI holders. The court confirmed at para 22 that it was under no obligation to allocate costs on the basis of a cost-benefit analysis as to which creditor benefitted to what degree as a result of the CCAA proceedings.

[30] GE opted to remove the equipment over which it held security from the auction but failed to sell it. It produced evidence that the unsold equipment was worth less than the guaranteed auction price. The court held that the *pro rata* share of the allocated costs would not be reduced based upon the reduced value of the equipment as this would reward GE for making what ended up being a poor business decision by placing the differential upon the other creditors.

[31] JPL also opted to remove its equipment from the auction. However, the Court held that in this instance JPL should not be allocated any costs, as it was a "true" lessor of equipment and therefore received no benefit from the CCAA proceedings. A similar result was reached in *Western Express Air Lines* where the court held that the lessors of certain aircraft were not obliged to pay any portion of the charges under the CCAA proceedings as the lessors were not creditors and did not receive any benefit from a successful restructuring.

[32] In *Hunjan International* the Court confirmed that the allocation of costs is to be analyzed on a case-by-case basis, that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not directly benefit from a proceeding before costs can be allocated against it.

[33] In *Hickman Equipment* the company initially sought protection by obtaining a CCAA order. The debtor went bankrupt and the court subsequently issued a receivership order covering all property of the debtor in the same manner and to the same extent as the CCAA order. The receiver developed a cost allocation plan which included a holdback of 15 percent of the proceeds of sale of assets as a contribution to the plan on the understanding that the final allocation of costs would occur upon the completion of the realization process. GMAC Leasco, a first secured creditor, brought an interlocutory application to seek payment of proceeds arising from security taken in assets which the receiver had sold. Specifically it argued that no

costs/holdback should be allocated in respect to 18 vehicles which were sold solely through the effort and expense of its agent and not through any effort or expense of the receiver.

[34] The receiver argued that generally speaking it did not make a distinction between the assets that the debtor had in its possession and that the costs incurred in the management of the receivership were generally incurred in relation to all property. It argued that the plan applied to numerous matters, in addition to the simple cost of realizing assets. It was unable to determine which costs and fees were directly attributable to the units eventually sold by GMAC. In finding that GMAC was entitled to a reduction in the holdback cost allocation due to the fact that the receiver did not have to expend its efforts on the sale of the equipment the court formulated the following principles, at para 17:

- (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
- (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
- (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
- (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
- (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

[35] *Winnipeg Motor Express* also dealt with a dispute over the appropriate allocation of DIP financing and administrative costs incurred since the granting of a stay. The monitor recommended that the costs be allocated among secured creditors based on *pro rata* recovery. Paccar, which had entered into a financing lease with the debtor under which it leased certain equipment opposed the monitor's proposed allocation on the grounds that it was inequitable. It argued that it received no benefit from the restructuring and that its equipment actually

deteriorated during the stay. In discussing the applicable legal principles, the court held, at para 41:

I turn, then, to the question of principles of allocation of Court Ordered Charges under the CCAA. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the CCAA make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

[36] In noting that the purpose of a stay under the CCAA is to provide a struggling company with the opportunity to restructure in the hopes of achieving viability, the court stated that based upon the monitor's expertise and familiarity with the events surrounding the restructuring period, the onus is on an objecting creditor to demonstrate inequity in instances where the proposal is *prima facie* fair. A number of creditors argued that they would have been better off had they realized on their security and not participated in the CCAA proceedings. In addressing this argument the court found "that may or may not have been so, but of course the point of the CCAA is that the collective good and the benefit to all stakeholders governs": para 45.

[37] After reviewing the factors espoused in *Hickman*, the court made the following observations in adopting the monitor's recommendations for a uniform costs application:

49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[...]

52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding

such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the CCAA.

[38] On appeal, Paccar reiterated its position that it never stood to gain from the CCAA proceedings and that it suffered under the stay. It further argued that the lower court erred in treating all secured lenders equally despite differences in their security and the benefit received. In denying application for leave to appeal the court of appeal noted that the trial judge had been alive to the fact that she could take into account the different nature of the securities held by, as well as the potential benefit to, creditors in determining whether a proposed allocation was equitable. She noted that that Paccar, as well as other contesting creditors, did in fact receive a benefit under the proceedings. In particular, the cost, effort, delay and risk involved in recovering their equipment had been reduced pursuant to the restructuring efforts.

Analysis

[39] The law is clear that where a monitor's proposed allocation is *prima facie* fair the onus falls on the objecting creditor to demonstrate an inequity in the circumstances: *Hunjan*, paras 58 and 73; *Winnipeg Motor Express* (QB), para 48.

[40] MCAP argues that the facts in this case do not demonstrate an allocation which, on the face of it, is fair and reasonable. It states that an inherent unfairness exists in that MCAP has been allocated costs on the same basis as those creditors who were included in and benefited under the Plan. In addition, it argues that the Monitor should not be able to rely on arguments in equity when its proposed allocations do not treat all creditors equally. In support of this position, MCAP submits that although the Monitor is purporting to treat senior secured lenders equally those secured lenders who did not suffer a shortfall in the realization of their security are not included in the allocation of the Charge Levy. In addition, MCAP submits that the actual calculation of the \$397,500 it is being called upon to contribute does not relate to the same "per unit charge" basis that the Monitor used in calculating the amount owing by other creditors. MCAP's per unit allocation equated to \$7,500 per unit while the Monitor indicated that the global per unit allocation would be \$8,500 per unit. While MCAP agrees this discrepancy is favourable to it it suggests that it is nonetheless inequitable.

[41] Given the above MCAP thus submits that the burden remains with the Monitor to demonstrate the fairness of the proposed allocation.

[42] The Monitor takes the position that its proposal is both reasonable and fair. As an officer of the court, the Monitor's allocation is a discretionary decision and is therefore entitled to deference: *Winnipeg Motor Express* (QB), para 48. While the Monitor acknowledges that there may have been a number of different approaches in this instance it asserts that its choice of method was reasonable and reflects the potential benefit to creditors under the CCAA proceedings.

[43] I find that notwithstanding the distinction in the per unit charge allocated by the Monitor the Monitor's proposed Charge Levy treats MCAP like the other senior secured lenders. While the proposal may not be equal (given the \$1,000 per unit charge distinction), it is *prima facie* equitable. Therefore the onus lies with MCAP to demonstrate that the allocation is unfair.

[44] I do not find that MCAP has satisfied this onus. With respect, its arguments are based upon a cost-benefit analysis utilizing any actual benefits received under the CCAA proceedings. The courts have consistently rejected this approach in favour of one based upon a potential benefit analysis. Exceptions to a monitor's proposed allocations are not to be lightly granted and should only be made where the necessity for departure is reasonable articulable: *Hickman*, para 17.

[45] This court cannot accept MCAP's position that its suggested contribution of nothing is grounded in equity. In essence, MCAP participated in the CCAA process for 18 months in cooperation with the monitor in the hopes that the process might yield some benefit. It accepted the Medican Protocol and the sales process established under Coldwell Banker. At any point it could have applied, on appropriate notice and evidence, to have its own receiver put into place but it did not. If it had a serious concern about the sales process or pricing, it could have brought a court application to amend the Protocol; again it did not. It cannot say that it participated, but with no result, so it does not now wish to contribute. The allocation of the Charge Levy is not to be determined with the benefit of hindsight.

[46] There are other factors which bear on whether MCAP's proposed allocation is equitable or not. MCAP would have been aware of the outstanding strata fees and the possible termination of utility services. In a letter from the Strata Corporation's legal counsel to MCAP dated July 26, 2010 the 'dire financial straits' of the Strata Corporation is outlined, along with a forecast that "...the resulting disarray will not enhance the value of the individual strata lots." MCAP acknowledged that it was aware that pre-funding strata fees were not being paid. It acknowledged that it had no reason to believe that the DIP funds were being used to correct these arrears. Yet it waited out the 18 month stay period. That MCAP believed it stood to possibly benefit from the CCAA proceedings and the MCAP Protocol is implicit in its choice to remain under and cooperate within the process. MCAP was aware throughout the process that the ultimate allocation was reserved for future determination.

[47] It is agreed that the CCAA proceedings did not yield any direct benefits to MCAP. No DIP funding was directly allocated to the Kaleido Project and no Mini DIP was established in relation to Kaleido. However, the Charges relate to general expenses associated with the entirety of the CCAA proceeding. The MCAP Protocol was established and condo units were marketed. There was an unsuccessful attempt to sell the Kaleido Project *en bloc*. The National Home Warranty Program (for the majority of the stay period) did not cancel its coverage. The Strata Corporation was prevented from claiming unpaid fees and the municipality for unpaid taxes. The Kaleido Project fell within the scope of the CCAA proceedings and formed a part of the Monitor's responsibilities. Effort was expended in dealing with the Kaleido sales process. DIP

funding allowed Medican to meet urgent financial needs during the stay. As such, while no direct benefit was obtained, MCAP acquired the above-mentioned indirect benefits (maintenance of the status quo) as well as "potential" benefits in the form of possible unit sales under the MCAP Protocol. Indeed, the degree of potential benefit to MCAP under the sales Protocol was far from negligible. The Monitor is not obliged to perform an analysis as to which creditors benefited and to what degree. Here, costs incurred as a part of the Charges were borne in the management of the CCAA proceedings and generally incurred in relation to all Medican property including that of the Kaleido Companies.

[48] Moreover, it is not entirely accurate to argue that MCAP received zero benefits under the proceedings. In addition to its position as a secured creditor of the Kaleido Project, MCAP also stood as a potential unsecured creditor to Medican. In this latter position, MCAP did in fact participate in the Plan and, although there was little evidence before the court in this regard, seemingly benefitted by filing its proof of claim.

[49] I note also that the stay period allowed MCAP to attempt to "wait out" what was clearly a downturn in the residential real estate market although the condominium units were eventually marketed at a reduced price per square foot. Again, MCAP cannot now advance an argument grounded in hindsight. Nor, as per *Respec Oilfield Services*, should it be rewarded for what may have ultimately amounted to a poor business decision.

[50] MCAP argues that its position is analogous to situations in which the courts have refused to allocate priority charges against true lessors. It relies on *Respec Oilfield Services* and *Western Express Airlines* in this regard. I do not find MCAP's position in the current case to be analogous to that of a true lessor. While the courts in *Respec* and *Western Express* clearly held that a true lessor was exempt from contribution towards a cost levy, such cases can be clearly distinguished on the basis that, as property owners, a true lessor does not stand to gain a potential benefit from CCAA proceedings. As an owner of the collateral, a lessor is entitled to a return of the collateral regardless of the outcome of the restructuring attempt. There is no reason on the facts before me to liken MCAP's situation to that of a lessor.

[51] MCAP held the same type of security as other secured creditors. It suffered the same fate as other secured creditors who experienced a shortfall. While it did not receive direct benefits as a result of the Charges the potential for direct benefit clearly existed. It would be inequitable to redistribute MCAP's proposed contribution upon the remainder of the secured creditors given that all assets of the Medican Group were encumbered by the Charges. There is simply no basis upon which to deviate from the Monitor's proposed Charge Levy allocation. For these reasons the Application is denied.

Heard on the 21st day of February, 2013.

Dated at the City of Calgary, Alberta this 23rd day of April, 2013.

K.M. Horner
J.C.Q.B.A.

Appearances:

David W. Mann/Scott D. Kurie of Denton's
for Medican Holdings Ltd. et al

Sean Collins of McCarthy Tetrault
for MCAP

A. Aaron Stephenson of Norton Rose
for the Monitor

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANTS KOLSY HOMES LTD. and
RIVAIRO CAPITAL CORPORATION

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION

**FIFTH EXTENSION ORDER (Extension, Sale Approval, Vesting, Distribution, Credit Offer,
Discharge and Termination)**

Before the Honourable Madam Justice A. R. Rothery in Chambers this 26th day of February, 2019.

UPON THE APPLICATION of counsel on behalf of the Applicants, Kolsy Homes Ltd. and Rivairo Capital Corporation (the "**Company**"), and upon hearing Michael Russell and Kevin Hoy, counsel on behalf of the Applicants, and upon hearing Jeffrey M. Lee, Q.C., counsel on behalf of the Monitor, and upon hearing Jerritt Pawlyk, counsel on behalf of KV Capital Inc., and upon hearing from counsel on behalf of all represented secured creditors and upon reading the Notice of Application returnable February 26, 2019, and all supporting materials filed therewith (collectively, the "**Application Materials**"), all filed with proof of service, and upon being advised that the secured creditors who are likely to be affected by the charges created herein were given notice:

The Court Orders:

EXTENSION

1. The July 9, 2018, Initial Order of the Honourable Madam Justice A. R. Rothery in these proceedings (the "**Initial Order**") with respect to the Applicant, Rivairo Capital Corporation ("**Rivairo**"), including the stay of proceedings provided for therein, is hereby extended and shall continue to apply in accordance with all of its terms and conditions, save and except for such terms and conditions as amended by this Order, until 11:59 p.m. on Monday, April 29, 2019, unless these proceedings shall be terminated earlier pursuant to paragraph 14 hereof.

SERVICE

2. Service of the Application Materials and other materials filed in support of this application upon all parties listed on the Service List established in these proceedings (a current copy of which is appended as Schedule "A" hereto) shall be and is hereby deemed to be good, timely, and sufficient.

APPROVAL OF THE MONITOR'S REPORT AND ACTIVITIES

3. The February 21, 2019, Report of The Bowra Group Inc. (the "**Monitor**"), together with the conduct and activities of the Monitor described therein, are hereby approved.

APPROVAL OF THE MONITOR'S COSTS

4. The fees and disbursements of the Monitor and its solicitors, MLT Aikins LLP, attached at Appendix "A" to the February 21, 2019, Report of the Monitor are hereby approved.

APPROVAL OF THE COMPANY'S COSTS

5. The fees and disbursements of the company's solicitors, the W Law Group LLP (the "**Company's Solicitors**"), attached at Appendix "A" to the February 21, 2019, Report of the Monitor are hereby approved.

TOWNHOME SALES APPROVAL, VESTING AND DISTRIBUTION ORDERS

6. Upon the registration of the Subdivision Plan, as that term is defined at paragraph 4 of the January 17, 2019, Fourth Extension, Interim Financing and Subdivision Order of the Honourable Madam Justice A. R. Rothery in these proceedings, by the registrar of titles for the Province of Alberta, the Monitor shall file with the Court individual certificates (the "**Sale Endorsement Certificates**") substantially in the form of the draft Sale Endorsement Certificate appended as Schedule "B" hereto, certifying:
 - a. that discrete titles to the seven completed townhome units (each, a "**Townhome Unit**"), sited on Condominium Plan 1511490 Unit A, have been issued in the name of the Company by the Registrar of Titles for the Province of Alberta;
 - b. that the solicitor of the purchaser of each Townhome Unit or any agent thereof has provided the Monitor with confirmation in writing that the purchaser of such Townhome Unit intends to purchase the Townhome Unit at the previously agreed-upon purchase price; and
 - c. that no new Encumbrances (as hereinafter defined in paragraph 8 hereof) have registered against the title to the Townhome Unit to which the Sale Endorsement Certificate pertains, subsequent to the issuance of this Order.
7. Upon the filing of a Sale Endorsement Certificate, the Local Registrar shall, without further application by the Company and without further notice to any party on the Service List, constituted as of the date of the issuance of this Order, and without further notice to any party appearing on the undivided certificate of title of the Townhome Units as of the date of the issuance of this Order, grant further orders, substantially in the form of the draft Sale Approval, Vesting and Distribution Orders appended collectively hereto as Schedule "C" in relation to each individual Townhome Unit, requiring the titles to the Townhome Units to vest in the names of the purchasers of the

Townhome Units free and clear of all Encumbrances, save and except for permitted encumbrances, in exchange for payment of the previously agreed-upon purchase price for each such Townhome Unit.

8. No Sale Approval, Vesting, and Distribution Order issued pursuant to paragraph 7 hereof, shall cause title to any of the Townhome Units to vest free and clear of any additional caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgments, executions, levies, taxes, writs of enforcement, charges, certificates of *lis pendens*, or other claims or encumbrances (collectively "**Encumbrances**") registered subsequent to the issuance of this Order, unless the holder of such Encumbrances has been served with the Application Materials or has been deemed to have been served with the Application Materials pursuant to paragraph 12 hereof.
9. The Company's Solicitors shall provide an original issued copy of each Sale Approval, Vesting and Distribution Order relating to the sale of any of the Townhome Units to the solicitor for the purchaser of such Townhome Unit upon trust conditions requiring the solicitor for the purchaser of such Townhome Unit to refrain from submitting such Order to the Land Titles Registrar for the Province of Alberta until such time as the solicitor for the purchaser of such Townhome Unit holds the purchase price for such Townhome Unit in trust on conditions rendering such funds releasable to the Company's Solicitors or the Monitor.

CREDIT OFFER APPROVAL AND VESTING ORDER

10. Upon the registration of the Subdivision Plan, the Company is hereby granted leave to bring forward an Application Without Notice seeking a further Order, substantially in the form of the draft Sale Approval and Vesting Order, appended as Schedule "D" hereto, requiring that the title to Condominium Plan 1511490 Unit B and all subdivided titles to Condominium Plan 1511490 Unit A, save and except for the titles to the Townhome Units, (collectively, the "**Remainder Lands**") vest in the name of KV Capital Inc. or its nominee (collectively "**KV Capital**"), free and clear of all Encumbrances, save and except for certain permitted encumbrances.
11. No Sale Approval and Vesting Order for the Remainder Lands shall issue in the event that any Encumbrance registered subsequent to the issuance of this Order is registered against the Remainder Lands, unless the holder of such Encumbrance has been served with the Application Materials or has been deemed to have been served with the Application Materials pursuant to paragraph 12 hereof.

NOTICE TO ENCUMBRANCE HOLDERS

12. In the event that:
 - (a) any holder of an Encumbrance was not, as of the date of this Order, listed on the Service List established in these proceedings; or
 - (b) any Encumbrance is registered against the undivided or divided titles to any of the Townhome Units subsequent to the issuance of this Order,

the Company shall apply to this Court, upon notice exclusively to each holder of an Encumbrance pursuant to subparagraphs 12(a) & (b) hereof, for a further Order deeming the holder of such

Encumbrance to have been served with the Application Materials. Unless otherwise directed by the Court, any such application made by the Company shall be considered by the Court on written materials alone, with any reply materials by any respondent Encumbrance holder to be filed not later than five days following service by the Company of such Application Material. Any such application brought by the Company shall be served together with the Application Materials and a copy of this Order.

TERMINATION OF PROCEEDINGS

13. The Monitor shall file with the Court a certificate (the "**Discharge Certificate**"), substantially in the form of the draft Certificate of Completion appended as Schedule "E" hereto, upon the satisfaction of all of the following conditions:
- a. that titles to the Townhome Units and the Remainder Lands have vested in the names of the purchasers of the Townhome Units and KV Capital, respectively;
 - b. that the net proceeds from all asset sales have been distributed in accordance with all Sale Approval, Vesting and Distribution Orders issued in these proceedings.
14. Notwithstanding paragraph 1 hereof, upon the filing of the Discharge Certificate, the Court shall issue an Order (the "**Discharge and Termination Order**"), substantially in the form of the draft Termination Order appended as Schedule "F" hereto, terminating these CCAA proceedings, indemnifying the Monitor and lifting all stays as Ordered in the Initial Order and thereafter extended in favour of the Company and its directors.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this 26th day of February, 2019.



DEPUTY LOCAL REGISTRAR

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of Firm:	The W Law Group LLP
Name of lawyer in charge of file:	Mike Russell
Address of legal firm:	110-21 st Street East Saskatoon, SK, S7K 0B6
Telephone number:	(306) 244-2242
Facsimile:	(306) 652-0332
Email:	mrussell@wlawgroup.com

Schedule "A"

Service List

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

KOLSY HOMES LTD. and

APPLICANTS RIVAIRO CAPITAL CORPORATION

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION**

SERVICE LIST

(Updated on February 22, 2019)

NAME, ADDRESS, EMAIL ADDRESS, TELEPHONE AND FAX NUMBER	COUNSEL FOR (OR ON BEHALF OF)
The W Law Group LLP Suite 300, 110 – 21st Street East Saskatoon, SK S7K 0B6 T: (306)244-2242 Michelle M. Tobin T: (306) 665-9509 E: mtobin@wlawgroup.com Mike J. Russell T: (306) 665-9507 E: mrussell@wlawgroup.com Kurt Kolisnek E: kurt@kdgroupcanada.com	Kolsy Homes Ltd. Rivairo Capital Corporation
MLT Aikins LLP 1500 - 410 22nd Street East Saskatoon, SK S7K 5T6 T: (306) 975-7100 Jeff Lee, Q.C.	The Bowra Group Inc.

T: (306) 975-7136 E: jmlee@mltaikins.com Paul Olfert T: (306) 956-6970 polfert@mltaikins.com The Bowra Group Inc. 1411 TD Tower 10088-102 Avenue Edmonton, AB T5J 2Z1 Doug Chivers T: (780) 809-1224 E: DChivers@bowragroup.com Kristin Gray T: (780) 705-0073 E: KGray@bowragroup.com	
Leland Kimpinski LLP 336 – 6th Avenue North Saskatoon, SK, S7K 2S5 T: (306) 244-6686 Ryan Pederson T: (306) 244-6686 E: RPederson@lelandlaw.ca Wayne Pederson T: (306) 653-6427 E: WPederson@lelandlaw.ca	Diamond North Credit Union
McKercher LLP 374 Third Avenue South Saskatoon, SK S7K 1M5 T: (306) 653-2000 Janine L. Lavoie-Harding T: (306) 664-1265 E: j.lavoie-harding@mckercher.ca Joel Hesje Q.C. T: (306) 664-1274 E: j.hesje@mckercher.ca	Di-Ad Investment Corp of Canada Ltd.
Burstall LLP Suite 1600 Dome Tower 333 – 7th Avenue SW Calgary, AB T2P 2Z1 T: (403) 264-1915 Darren Smits	Gencap Equity #11 Inc.

T: (403) 234-3325 E: smits@burstall.com Jasmin Dhaliwal T: (403) 234-3345 E: dhaliwal@burstall.com	
Bishop & McKenzie LLP Suite 2300, 10180 - 101 Street Edmonton, Alberta T5J 1V3 T: (780) 426-5550 Jerritt R. Pawlyk T: (780) 421-2477 E: JPawlyk@bmlp.ca KV Capital Inc. #108, 2627 Ellwood Dr. SW Edmonton, AB T6X 0P7 T: (780) 433-1222 Nicholas Jeanes T: (780) 433-1222 Ext. 249 E: nicholas@kvcapital.ca	KV Capital Inc.
James McCall Panunto 300, 444-5th Avenue SW Calgary, AB T2P 2T8 T: (403) 221-8333 Norman D. Anderson T: (403) 221-8335 E: nanderson@jmp-legal.com <u>Kerry Holmes</u> T: (403) 221-8328 E: kholmes@jmp-legal.com	BMP Construction Management Ltd.
Robertson Stromberg LLP 600, 105 – 21st Street East Saskatoon, SK S7K 0B3 T: (306) 652-7575 M. Kim Anderson, Q.C. T: (306)933-1344 E: mk.anderson@rslaw.com	Beverly Elaine Kolisnek

Stewart and Stewart Lawyers #340, 4723 1 st Street SW Calgary, AB T2G 4Y8 T: (403) 262-1367 George Stewart E: natalie@stewartlegalservices.net	Rick Balbi Architect Ltd.
Regal Shelf & Mirror Ltd. Bay A 7121 – 6 th Street SE Calgary, AB T2H 2M8 T: (403) 253-9194 Doug Barber E: kathy@regalshelfandmirror.com	Regal Shelf & Mirror Ltd.
Bjornson Designs Inc. 3403 8th Street SE Calgary, AB T2G 3A4 T: (403)287-3403 Efrem Dadi E: efrem@bjornsondesigns.com	Bjornson Designs Inc.
Coast Wholesale Appliances Inc. 8488 Main Street Vancouver, BC V5X 4W8 T: (604) 301-3405 Denise Peacock E: dpeacock@coastappliances.com	Coast Wholesale Appliances Inc.
Daniel J. Aberle Barrister, Solicitor & Notary Public #1110, 396 – 11 th Avenue SW Calgary, AB T2R 0C5 T: (403) 229-1129 Daniel J. Aberle E: djalaw@aberle.ca	Competition Concrete Inc.

Regal Building Materials Ltd. 7131D 6 th Street SE Calgary, AB T2H 2M8 T: (403) 253-2010 James Aucoin E: flip@regalbuilding.com	Regal Building Materials Ltd.
Ford Nelson Lawyers 110 – 707 10 th Avenue SW Calgary, AB T2R 0B3 T: (403) 455-7837 Nelson Osamudiamen E: nelson@fordnelson.ca Kyle Friedman E: kylefriedman@thewallinco.ca	The Wallin Company Inc.
Duncan Craig LLP 2800, 10060 Jasper Avenue Edmonton, AB T5J 3V9 (780) 428-6036 Jarin K.P. Myskiw E: jmyskiw@dcllp.com	Aviva Insurance Company of Canada
Bennet Jones LLP 4500 Bankers Hall East 855-2 nd Street SW Calgary, AB T2P 4K7 T: (403) 298-3187 David J. Wahl E: wahld@bennettjones.com Ben Ohler E: ben@rimrocklandscaping.ca	Rimrock Landscaping and Property Management Ltd.
Monika Sestakova 1701, 1530 Bayside Ave SW Airdrie, AB T4B 4B5 T: (403) 667-8788 E: Cgy242@gmail.com	

Vit Dockal T: (306) 974-5411 E: Vdoc52@gmail.com	
Brownlee LLP Barristers & Solicitors 2200 Commerce Place 10155 – 102 Street Edmonton, AB T5J 4G8 Lorne Randa T: (780) 497-4832 E: lranda@brownleelaw.com Gregory Plester T: (403) 260-1475 E: gplester@brownleelaw.com	City of Airdrie
Kristina Dominguez Justin Havre & Associates Re/Max E: kristina@justinhavre.com	
Norton Rose Fulbright Canada LLP Barristers & Solicitors 3700 - 400 – 3 rd Avenue SW Calgary, AB T2P 4H2 Joshua Sadovnick T: (403) 267-8343 E: joshua.sadovnick@nortonrosefulbright.com	Astoria Electric Inc.

McLeod Law LLP – Downtown Office Barristers & Solicitors Centennial Place, West Tower 2110 - 250 – 5 th Street SW Calgary, AB T2P 0R4 Laurie S. Kiedrowski T: (403) 225-6413 E: lkiedrowski@mcleod-law.com	Condominium Corporation No. 151 1490
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Email Address List

mtobin@wlawgroup.com; mrussell@wlawgroup.com; kurt@kdgroupcanada.com;
jmlee@mltaikins.com; polfert@mltaikins.com; DChivers@bowragroup.com; KGray@bowragroup.com;
RPederson@lelandlaw.ca; WPederson@lelandlaw.ca; j.lavoie-harding@mckercher.ca; j.hesje@mckercher.ca;
smits@burstall.com; dhaliwal@burstall.com; JPawlyk@bmlp.ca; nicholas@kvcapital.ca; nanderson@jmp-legal.com;
kholmes@jmp-legal.com; mk.anderson@rslaw.com; natalie@stewartlegalservices.net;
kathy@regalshelfandmirror.com; efrem@bjornsondesigns.com; dpeacock@coastappliances.com; djalaw@aberle.ca;
flip@regalbuilding.com; nelson@fordnelson.ca; kylefriedman@thewallinco.ca; jmyskiw@dcllp.com;
wahld@bennettjones.com; ben@rimrocklandscaping.ca; Cgy242@gmail.com; Vdoc52@gmail.com;
lranda@brownleelaw.com; gplester@brownleelaw.com; kristina@justinhavre.com;
joshua.sadovnick@nortonrosefulbright.com; lkiedrowski@mcleod-law.com

SCHEDULE "B"

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

**APPLICANTS KOLSY HOMES LTD. and
 RIVAIRO CAPITAL CORPORATION**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
RSC 1985, c C-36, AS AMENDED (the "CCAA")
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION**

SALE ENDORSEMENT CERTIFICATE

To: The Honourable Madam Justice A.R. Rothery of the Court of Queen's Bench for Saskatchewan.

And to: Rivairo Capital Corporation (the "**Company**") c/o: Mike Russell and Michelle Tobin, the W Law Group LLP, Suite 300, 110 – 21st Street East, Saskatoon, SK S7K 0B6

THIS SHALL CERTIFY THAT The Bowra Group Inc. (the "**Monitor**") hereby certifies that the discrete title to property within the City of Airdrie, Alberta, legally described as _____ (the "**Property**"), being the divided title to an individual Townhome Unit, as defined in paragraph six of the Order of the Honourable Madam Justice A.R. Rothery dated the ____ day of February, 2019 (the "**Fifth Extension Order**"), in the matter of Q.B. No. 885 of 2018, has issued in the name of the Company;

AND THAT the solicitor for _____, being a purchaser of such Townhome Unit, has provided the Monitor with confirmation in writing that the purchaser of the Townhome Unit intends to complete the sale for the Property at the price agreed upon in the agreement in writing between _____ and the Company dated the ____ day of _____, 2018, being the sum of \$ _____;

AND THAT no additional Encumbrances as defined in paragraph eight of the Fifth Extension Order have been registered against the Certificate of title to the Property subsequent to February 26, 2019.

DATED this ____ day of _____, 2019.

THE BOWRA GROUP INC.
in its capacity as Monitor of
RIVAIRO CAPITAL CORPORATION.
and not in its personal capacity

Per:

Kristin Gray

SCHEDULE "C"

Form 10-3

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANTS KOLSY HOMES LTD. and

RIVAIRO CAPITAL CORPORATION

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION

ORDER (Approval, Vesting and Distribution Order)

Before the Honourable Madam Justice A. R. Rothery in Chambers February 26th, 2019.

UPON THE APPLICATION of Mike Russell and Kevin Hoy, counsel on behalf of the Applicant, Kolsy Homes Ltd. and Rivairo Capital Corporation (the "**Applicants**"), for an order approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale (the "**Sale Agreement**") between the Applicant Rivairo Capital Corporation ("**Rivairo**") and _____, (the "**Purchaser**"), and upon hearing counsel on behalf of the Applicants, and upon hearing Jeffrey M. Lee, Q.C., counsel on behalf of the Monitor, and upon hearing from Jerriit Pawlyk, counsel on behalf of KV Capital, and upon hearing from counsel on behalf of all represented secured creditors and upon reading the Notice of Application and all supporting materials filed (collectively, the "**Application Materials**"), all filed with proof of service, and upon being advised that the secured creditors and stakeholders who are likely to be affected by the order herein were given notice:

The Court Orders:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application and time for service of this application is abridged to that actually given.

APPROVAL OF TRANSACTION

2. The Transaction, as contemplated by the "**Sale Agreement**", dated the ____ day of _____, 2018, concerning the sale of real property within the City of Airdrie, Alberta, legally described as

_____ (the "**Purchased Asset**"), by Rivairo to the Purchaser (or its nominee) for the purchase price contained in the Sale Agreement (the "**Purchase Price**"), is hereby authorized and approved.

VESTING OF PROPERTY

3. Upon the Monitor determining that the Transaction has closed to the satisfaction of the Monitor and on terms substantially as approved by this Honourable Court pursuant to this Order, the Monitor shall file with the Court a certificate substantially in the form set out at Schedule "A" hereto (the "**Closing Certificate**"), whereupon all of the right, title and interest of Rivairo in and to the Purchased Assets shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, certificates of *lis pendens*, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing:

- a. any encumbrances or charges created by Order of this Court;
- b. any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system;
- c. any liens or claims of lien under the *Builders' Lien Act* (Alberta); and
- d. those Claims listed in Schedule "B" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, caveats, interests, easements and restrictive covenants listed in Schedule "C" (collectively, "**Permitted Encumbrances**"),

and for greater certainty, this Court orders that all Claims, including Encumbrances other than Permitted Encumbrances, affecting or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets.

4. Upon filing of a copy of this Order (as though it was an original), together with any applicable registration fees, all governmental authorities, including those referred to below in this paragraph (collectively, "**Governmental Authorities**"), are hereby authorized to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

- (a) the Province of Alberta's Registrar of Land Titles ("**Land Titles Registrar**") for the lands defined below shall and is hereby authorized, requested and directed to forthwith:
 - i. cancel existing Certificate of Title No. _____ for those lands and premises municipally described as _____, and legally described as _____ (the "**Lands**")

- ii. issue new Certificate of Title for the Lands in the name of the Purchaser (or its nominee), namely, _____;
 - iii. transfer to the New Certificate of Title the existing instruments listed in Schedule "C", to this Order, and to issue and register against the New Certificate of Title such new caveats, utility rights of ways, easements or other instruments as are listed in Schedule "C"; and
 - iv. discharge and expunge the Encumbrances listed in Schedule "B" to this Order and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the Sale Agreement against the existing Certificate of Title to the Lands;
5. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Sale Agreement. Presentment of this Order shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.
 6. No authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery and performance of the Sale Agreement.
 7. Upon delivery of a copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed.
 8. Except as expressly provided for in the Sale Agreement the Purchaser (or its nominee) shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against Rivairo.
 9. Upon completion of the Transaction, Rivairo and all persons who claim by, through or under Rivairo in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).
 10. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by Rivairo, or any person claiming by, through or against Rivairo.

PAYMENT OF PURCHASE PRICE

11. On a date as mutually determined between the Monitor and the Purchaser (the “**Closing Date**”), the Purchaser shall pay to the Monitor the Purchase Price.
12. The net proceeds from the Transaction, less all reasonable fees, costs, disbursements, Realtors’ commissions required to close the Transactions, shall stand in the place and stead of the Lands and, from and after the delivery of the Closing Certificates, all Encumbrances shall attach to the net proceeds from the Transactions ranking in the same priority that the Encumbrances had prior to the sale of the Unit as if the Company had not sold the Lands and had remained the registered owner thereof.
13. The Monitor may rely on written notices from Rivairo or the Purchaser regarding the fulfillment or, if applicable, waiver of conditions to closing the Transaction and shall have no liability with respect to the delivery of the Closing Certificate.

DISTRIBUTION

14. The Monitor is authorized and directed to distribute the net proceeds herein in accordance with the ordering of charges as set out in paragraph 9 of the January 17, 2019, Fourth Extension, Interim Financing, and Subdivision Order granted by the Honourable Madam Justice A.R. Rothery in these proceedings.
15. Upon payment of the amounts set out in paragraph 14 of this Order, all of the Encumbrances shall cease to attach to the net proceeds from the Transaction.

MISCELLANEOUS MATTERS

16. Notwithstanding:
 - a. the pendency of these proceedings and any declaration of insolvency made herein;
 - b. the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the “BIA”), in respect of the Debtor, and any bankruptcy order issued pursuant to any such applications;
 - c. any assignment in bankruptcy made in respect of the Debtor; and
 - d. the provisions of any federal or provincial statute:

the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Rivairo and shall not be void or voidable by creditors of the Rivairo, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

17. Rivairo, the Monitor, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give

full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

18. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist Rivairo, the Purchaser or their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist in carrying out the terms of this Order.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this ____th day of ____, 2019.

DEPUTY LOCAL REGISTRAR

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of Firm:	The W Law Group LLP
Name of lawyer in charge of file:	Mike Russell
Address of legal firm:	110-21 st Street East Saskatoon, SK, S7K 0B6
Telephone number:	(306) 244-2242
Facsimile:	(306) 652-0332
Email:	mrussell@wlawgroup.com

SCHEDULE "A" [To Schedule "C"]

CLOSING CERTIFICATE

To: _____ (the "Purchaser"),
c/o _____

And to: Rivairo Capital Corporation ("Rivairo"), c/o: Mike Russell and Michelle Tobin, the W
Law Group LLP, Suite 300, 110 – 21st Street East, Saskatoon, SK S7K 0B6

Re: Unit _____

TAKE NOTICE THAT, pursuant to paragraph 5 of the Order of the Honourable Madam Justice A.R. Rothery dated October 26, 2018, (the "**Order**"), The Bowra Group Inc. (the "**Monitor**"), the Monitor of Rivairo appointed pursuant to the Initial Order issued in these proceedings under the *Companies' Creditors Arrangement Act* on July 9, 2018, by the Honourable Madam Justice A.R. Rothery, hereby confirms that the sale by Rivairo to the Purchaser of the Lands (as that term is defined at paragraph 4 of the **Order**) has closed to the satisfaction of the Monitor and pursuant to the terms of the Order effective as of the date of this Closing Certificate.

DATED this ____ day of _____, 201__.

THE BOWRA GROUP INC.
in its capacity as Monitor of
RIVAIRO CAPITAL CORPORATION
and not in its
personal capacity

Per:

Kristin Gray

SCHEDULE "B" [To Schedule "C"]**Non-Permitted Encumbrances**

	Interest	Holder	Registration Number
a.	MORTGAGE	GENCAP EQUITY #11 INC.	131 018 602
b.	CAVEAT	THE CITY OF AIRDRIE	141 041 684
c.	CAVEAT	THE CITY OF AIRDRIE	141 092 117
d.	MORTGAGE	DI-AD INVESTMENT CORPORATION OF CANADA	151 204 886
e.	CAVEAT	DI-AD INVESTMENT CORPORATION OF CANADA	151 204 887
f.	POSTPONEMENT	N/A	151 210 567
g.	CAVEAT - RE: AMENDING AGREEMENT	DI-AD INVESTMENT CORPORATION OF CANADA LTD.	161 122 952
h.	POSTPONEMENT	N/A	161 175 430
i.	MORTGAGE	KV CAPITAL INC.	171 109 506
j.	CAVEAT RE: ASSIGNMENT OF RENTS AND LEASES	KV CAPITAL INC.	171 109 507
k.	POSTPONEMENT	N/A	171 160 852
l.	POSTPONEMENT	N/A	171 160 853
m.	AMENDING AGREEMENT	N/A	171 160 854
n.	BUILDER'S LIEN	RIMROCK LANDSCAPING & PROPERTY MGMT LTD.	181 097 573
o.	BUILDER'S LIEN	CREATIVE DOOR SERVICES LTD.	181 100 435
p.	BUILDER'S LIEN	BMP CONSTRUCTION MANAGEMENT LTD	181 123 544
q.	BUILDER'S LIEN	THE WALLIN COMPANY INC.	181 136 782
r.	BUILDER'S LIEN	M D MASONRY INC.	181 139 745

s.	CERTIFICATE OF LIS PENDENS	N/A	181 143 809
t.	BUILDER'S LIEN	WOODCRAFT KITCHEN CABINETS LTD.	181 144 077
u.	BUILDER'S LIEN	QUALITY FLOORING DESIGN CENTRE INC.	181 145 114
v.	BUILDER'S LIEN	GRANITE COUNTRY INC.	181 145 490
w.	BUILDER'S LIEN	ARTISTIC STAIRS LTD.	181 149 209
x.	BUILDER'S LIEN	ASTORIA ELECTRIC INC.	181 154 912
y.	CERTIFICATE OF LIS PENDENS	N/A	181 165 434
z.	CERTIFICATE OF LIS PENDENS	N/A	181 233 495
aa.	CERTIFICATE OF LIS PENDENS	N/A	181 265 027
bb.	CERTIFICATE OF LIS PENDENS	N/A	181 274 576
cc.	CERTIFICATE OF LIS PENDENS	N/A	191 018 370

SCHEDULE "C" [To Schedule "C"]

PERMITTED ENCUMBRANCES

	Interest	Holder	Registration Number
a.	CAVEAT	N/A	021 303 263
b.	RESTRICTIVE COVENANT		081 370 161
c.	TITLE LOCK ORDER	CITY OF AIRDRIE	
d.	RESTRICTIVE COVENANT		151 138 623

Schedule "D"

Form 10-3

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

**APPLICANTS KOLSY HOMES LTD. and
 RIVAIRO CAPITAL CORPORATION**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION

ORDER (Credit Offer Sale Approval and Vesting)

Before the Honourable Madam Justice A. R. Rothery in Chambers this ____ day of _____, 2019.

UPON THE APPLICATION of counsel on behalf of the Applicants, Kolsy Homes Ltd. and Rivairo Capital Corporation (collectively, the "**Applicants**"), for an order approving the sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale (the "**Sale Agreement**") between the Applicant Rivairo Capital Corporation ("**Rivairo**") and KV Capital Inc, and upon hearing Mike Russell and Kevin Hoy, counsel on behalf of the Applicants, and upon hearing Jeffrey M. Lee, Q.C., counsel on behalf of the Monitor, and upon hearing from Jerritt Pawlyk, counsel on behalf of KV Capital and upon hearing from counsel on behalf of all represented secured creditors, and upon reading the Notice of Application returnable February 26, 2019, and all supporting materials filed therewith (collectively, the "**Application Materials**") with proof of service, and upon being advised that the secured creditors and stakeholders who are likely to be affected by the order herein were given notice:

The Court Orders:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application and time for service of this application is abridged to that actually given.

Approval of Transaction

2. The Transaction is hereby approved and execution of the Sale Agreement by Rivairo is hereby authorized and approved, with such minor amendments as the parties may deem necessary.

Rivairo is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for completion of the Transaction and conveyance of the Purchased Assets to the Purchaser (or its nominee).

Vesting of Property

3. Upon written confirmation from counsel for Rivairo that it has received or is satisfied that it will receive payment from the purchaser, all of the Rivairo's right, title and interest in and to the purchased assets listed in Schedule "A" hereto (the "**Purchased Assets**") shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, certificates of *lis pendens*, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing:
 - a. any encumbrances or charges created by Order of this Court;
 - b. any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system;
 - c. any liens or claims of lien under the *Builders' Lien Act* (Alberta); and
 - d. those Claims listed in **Schedule "B"** hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in **Schedule "C"** (collectively, "Permitted Encumbrances")),

and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets.

4. Upon filing of a copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "**Governmental Authorities**") are hereby authorized, a copy of this Order as though it was an original and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:
 - (a) the Province of Alberta's Registrar of Land Titles ("Land Titles Registrar") for the lands defined below shall and is hereby authorized, requested and directed to forthwith:
 - i. cancel existing Certificates of Title for the Purchased Assets, those being the below listed Certificates of Title for the below listed legal descriptions of certain lands:

Title No.

Legal Description

(collectively the “**Lands**”

- ii. issue new Certificates of Title for the Lands in the name of the Purchaser (or its nominee), namely, KV Real Estate Inc.;
 - iii. transfer to the New Certificates of Title the existing instruments listed in Schedule “C”, to this Order, and to issue and register against the New Certificates of Title such new caveats, utility rights of ways, easements or other instruments as are listed in Schedule “C”; and
 - iv. discharge and expunge the Encumbrances listed in Schedule “B” to this Order and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the Sale Agreement against the existing Certificate of Title to the Lands;
5. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Sale Agreement. Presentment of this Order shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.
6. No authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery and performance of the Sale Agreement.
7. Upon delivery of a copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed.
8. Except as expressly provided for in the Sale Agreement the Purchaser (or its nominee) shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against Rivairo.
9. Upon completion of the Transaction, Rivairo and all persons who claim by, through or under the Rivairo in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).
10. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by Rivairo, or any person claiming by, through or against Rivairo.

MISCELLANEOUS MATTERS

11. Notwithstanding:

- a. the pendency of these proceedings and any declaration of insolvency made herein;
- b. the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA"), in respect of the Debtor, and any bankruptcy order issued pursuant to any such applications;
- c. any assignment in bankruptcy made in respect of the Debtor; and
- d. the provisions of any federal or provincial statute:

the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Rivairo and shall not be void or voidable by creditors of the Rivairo, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

12. Rivairo, the Monitor, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.
13. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist Rivairo, the Purchaser or their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist in carrying out the terms of this Order.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this ____th day of _____, 2019.

DEPUTY LOCAL REGISTRAR

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of Firm:	The W Law Group LLP
Name of lawyer in charge of file:	Mike Russell
Address of legal firm:	110-21 st Street East Saskatoon, SK, S7K 0B6
Telephone number:	(306) 244-2242
Facsimile:	(306) 652-0332
Email:	<u>mrussell@wlawgroup.com</u>

SCHEDULE "A" [To Schedule "D"]

Purchased Assets

SCHEDULE "B"[To Schedule "D"]**Non-Permitted Encumbrances**

	Interest	Holder	Registration Number
a.	MORTGAGE	GENCAP EQUITY #11 INC.	131 018 602
b.	CAVEAT	THE CITY OF AIRDRIE	141 041 684
c.	CAVEAT	THE CITY OF AIRDRIE	141 092 117
d.	MORTGAGE	DI-AD INVESTMENT CORPORATION OF CANADA	151 204 886
e.	CAVEAT	DI-AD INVESTMENT CORPORATION OF CANADA	151 204 887
f.	POSTPONEMENT	N/A	151 210 567
g.	CAVEAT - RE: AMENDING AGREEMENT	DI-AD INVESTMENT CORPORATION OF CANADA LTD.	161 122 952
h.	POSTPONEMENT	N/A	161 175 430
i.	MORTGAGE	KV CAPITAL INC.	171 109 506
j.	CAVEAT RE: ASSIGNMENT OF RENTS AND LEASES	KV CAPITAL INC.	171 109 507
k.	POSTPONEMENT	N/A	171 160 852
l.	POSTPONEMENT	N/A	171 160 853
m.	AMENDING AGREEMENT	N/A	171 160 854
n.	BUILDER'S LIEN	RIMROCK LANDSCAPING & PROPERTY MGMT LTD.	181 097 573
o.	BUILDER'S LIEN	CREATIVE DOOR SERVICES LTD.	181 100 435
p.	BUILDER'S LIEN	BMP CONSTRUCTION MANAGEMENT LTD	181 123 544
q.	BUILDER'S LIEN	THE WALLIN COMPANY INC.	181 136 782
r.	BUILDER'S LIEN	M D MASONRY INC.	181 139 745
s.	CERTIFICATE OF LIS PENDENS	N/A	181 143 809

t.	BUILDER'S LIEN	WOODCRAFT KITCHEN CABINETS LTD.	181 144 077
u.	BUILDER'S LIEN	QUALITY FLOORING DESIGN CENTRE INC.	181 145 114
v.	BUILDER'S LIEN	GRANITE COUNTRY INC.	181 145 490
w.	BUILDER'S LIEN	ARTISTIC STAIRS LTD.	181 149 209
x.	BUILDER'S LIEN	ASTORIA ELECTRIC INC.	181 154 912
y.	CERTIFICATE OF LIS PENDENS	N/A	181 165 434
z.	CERTIFICATE OF LIS PENDENS	N/A	181 233 495
aa.	CERTIFICATE OF LIS PENDENS	N/A	181 265 027
bb.	CERTIFICATE OF LIS PENDENS	N/A	181 274 576
cc.	CERTIFICATE OF LIS PENDENS	N/A	191 018 370

SCHEDULE “C” [To Schedule “D”]

PERMITTED ENCUMBRANCES

	Interest	Holder	Registration Number
a.	CAVEAT	N/A	021 303 263
b.	RESTRICTIVE COVENANT		081 370 161
c.	DEPOSIT SECURITY ORDER	CITY OF AIRDRIE	
d.	TITLE LOCK ORDER	CITY OF AIRDRIE	
e.	RESTRICTIVE COVENANT		151 138 623

SCHEDULE "E"

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

**APPLICANTS KOLSY HOMES LTD. and
 RIVAIRO CAPITAL CORPORATION**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
RSC 1985, c C-36, AS AMENDED (the "CCAA")
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION**

DISCHARGE CERTIFICATE

RECITALS

- A.** Pursuant to the Order (the "**Initial Order**") of the Honorable Madam Justice A.R. Rothery of the Saskatchewan Court of Queen's Bench (the "**Court**") dated July 9, 2018, The Bowra Group Inc. was appointed as monitor (the "**Monitor**") of Kolsy Holmes Ltd. and Rivairo Capital Corporation (the "**Company**") in these CCAA proceedings with the powers, duties and obligations set out in the Initial Order.
- B.** Pursuant to the Sale Approval, Vesting, and Distribution Orders of the Court granted in these proceedings, the Company has disposed of substantially all of its assets.
- C.** Capitalized terms not defined herein have the meanings ascribed to them in the Fifth Extension Order dated February 26, 2019, of the Honorable Madam Justice A.R. Rothery.

THE MONITOR CERTIFIES THE FOLLOWING

- 1. Titles to the seven Townhome Units have vested in the names of the purchasers of the Townhome Units.
- 2. Titles to the Remainder Lands have vested in the name of KV Real Estate Inc.
- 3. The net proceeds from all sales of the Company's assets have been distributed in accordance with various Sale Approval, Vesting and Distribution Orders issued in these proceedings.

DATED at the City of Edmonton in the Province of Alberta, this ____ day of _____, 2019.

THE BOWRA GROUP INC.
in its capacity as Monitor of
RIVAIRO CAPITAL CORPORATION.
and not in its personal capacity

Per:

Kristin Gray

SCHEDULE "F"

Form 10-3

COURT FILE NUMBER Q.B. No. 885 of 2018

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

**APPLICANTS KOLSY HOMES LTD. and
 RIVAIRO CAPITAL CORPORATION**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT

OF KOLSY HOMES LTD. and RIVAIRO CAPITAL CORPORATION

FIFTH EXTENSION ORDER (Discharge and Termination)

Before the Honourable Madam Justice A. R. Rothery in Chambers the ____ day of _____, 2019.

UPON THE APPLICATION of counsel on behalf of the Applicants, Kolsy Homes Ltd. and Rivairo Capital Corporation (the "**Company**"), and upon hearing Mike Russell and Kevin Hoy, counsel on behalf of the Applicants, and upon hearing Jeffrey M. Lee, Q.C., counsel on behalf of the Monitor, and upon hearing from counsel on behalf of all represented secured creditors and upon reading the Notice of Application returnable February 26, 2019, and upon reading all supporting materials filed therewith (collectively, the "**Application Materials**") with proof of service, and upon being advised that the secured creditors who are likely to be affected by the charges created herein were given notice:

The Court Orders:

SERVICE

1. Service of the Application Materials and other materials filed in support of this application upon all parties listed on the Service List established in these proceedings (a current copy of which is appended as Schedule "A" hereto) shall be and is hereby deemed to be good, timely, and sufficient and any further requirement for service is hereby dispensed with.

APPROVAL OF THE MONITOR'S REPORT AND ACTIVITIES

2. The activities and conduct of The Bowra Group Inc. (the "**Monitor**") in relation to the Company, Kolsy Homes Ltd. and these CCAA proceedings generally are hereby ratified and approved.

DISCHARGE AND INDEMNIFICATION

3. The Monitor, having fulfilled its duties as Monitor of the Company and Kolsy Homes Ltd. pursuant to the terms of the July 9, 2018, CCAA Initial Order (the "**Initial Order**"), granted by the Honourable Madam Justice A. R. Rothery in these proceedings, shall be and is hereby discharged of its duties set forth in the Initial Order, any subsequent Orders of this Court extending the Initial Order, save and except for administrative matters or other duties that may subsequently arise from time to time incidental to the termination of these CCAA proceedings.
4. Any and all claims of any person, whether such claims are direct, indirect, derivative or otherwise, against the Monitor, arising from or relating in any way to its capacity, its conduct, or to the services provided by the Monitor to the Company or Kolsy Homes Ltd. in these CCAA proceedings or otherwise in connection with the performance by the Monitor of its duties as such shall be and are hereby stayed, extinguished and forever barred and the Monitor shall have no liability whatsoever in respect thereof.

TERMINATION OF CCAA PROCEEDINGS

5. Notwithstanding the extension of the Initial Order granted in paragraph 1 of the Fifth Extension Order, granted by the Honourable Madam Justice Rothery on February __, 2019, in these CCAA proceedings, these CCAA proceedings shall, effective as of the issuance of this Order, be terminated, and any and all stays of proceedings instituted pursuant to the Initial Order, as extended by further Order of this Court, are hereby lifted or otherwise vacated.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this __ day of __, 2019.

DEPUTY LOCAL REGISTRAR

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of Firm:	The W Law Group LLP
Name of lawyer in charge of file:	Mike Russell
Address of legal firm:	110-21 st Street East Saskatoon, SK, S7K 0B6
Telephone number:	(306) 244-2242
Facsimile:	(306) 652-0332
Email:	mrussell@wlawgroup.com

Court File No. CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR.	)	FRIDAY, THE 2ND
JUSTICE CAMPBELL	)	
	)	DAY OF MAY, 2014

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

OMNIBUS APPROVAL AND VESTING ORDER

THIS MOTION, made by BDO Canada Limited, in its capacity as Court-appointed receiver of all of the assets, undertakings and properties of Portofino Corporation ("**Portofino**") pursuant to the Order of The Honourable Justice Thomas dated October 29, 2013 (the "**Receiver**"), for an order:

- (a) prospectively authorizing the Receiver to accept an offer or offers to purchase any or all of the unsold units (the "**Unsold Units**") provided that the sale price for each Unsold Unit to which such offer(s) relates is acceptable to the Receiver having regard to the appraised value for such Unsold Unit(s) and prior sales of similar units and all other terms of the offer(s) are, in the Receiver's sole opinion, in the best interests of the stakeholders of Portofino;
- (b) prospectively authorizing the execution of an agreement of purchase and sale in respect of each Unsold Unit by the Receiver, as vendor, and the purchaser of each Unsold Unit (each purchaser hereinafter referred to as the "**Purchaser**") substantially in the form of the Form of Unsold Unit Sale Agreement attached as Schedule "A" to the Sale Agreement Order, together with any amendments or

modifications thereto deemed necessary by the Receiver (each agreement hereinafter referred to as an **"Unsold Unit Sale Agreement"**);

- (c) prospectively approving the sale transactions (each such transaction, a **"Transaction"** and together, the **"Transactions"**) in respect of the Unsold Units, more particularly described on **Schedule "A"** to this Order; and
- (d) providing that, upon the delivery by the Receiver to a Purchaser of a Receiver's Certificate substantially in the form attached as Schedule **"B"** to this Order (the **"Receiver's Certificate"**), all of Portofino's right, title and interest in and to the Unsold Unit(s) described in each applicable Unsold Unit Sale Agreement (the **"Purchased Assets"**) will vest in and to the applicable Purchaser, free and clear of any and all claims and encumbrances including those listed on Schedule **"C"** and in paragraph 3 of this Order, save and except for those encumbrances listed on Schedule **"D"** of this Order,

was heard this day at the Courthouse, 245 Windsor Avenue, Windsor, Ontario.

ON READING the Third Report of the Receiver dated April 21, 2014 and all appendices thereto (the **"Third Report"**), and the Confidential Supplement to the Third Report and all appendices thereto (the **"Confidential Supplement"**) and on hearing the submissions of counsel for the Receiver, and such other persons as may be present and on noting that no other persons appeared, although properly served as appears from the affidavit of Susan Jarrell sworn April 22, 2014, filed:

1. THIS COURT ORDERS that the Receiver is hereby prospectively authorized to accept an offer or offers to purchase any or all of the Unsold Units provided that the sale price for each Unsold Unit to which such offer(s) relates is acceptable to the Receiver having regard to the appraised value for such Unsold Unit(s) and prior sales of similar units and all other terms of the offer(s) are, in the Receiver's sole opinion, in the best interests of the stakeholders of Portofino.
2. THIS COURT ORDERS AND DECLARES that each Transaction is hereby prospectively approved, and the execution of each applicable Unsold Unit Sale Agreement by the Receiver is hereby authorized and approved, with any amendments or modifications thereto deemed necessary by the Receiver. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for

the completion of any Transaction and for the conveyance of the Purchased Assets to each applicable Purchaser.

3. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as **Schedule "B"** hereto, all of Portofino's right, title and interest in and to the Purchased Assets described in the applicable Unsold Unit Sale Agreement and listed on Exhibit "A" of the applicable Receiver's Certificate in respect of such Unsold Unit Sale Agreement shall vest absolutely in and to the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Thomas dated October 29, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; (iii) any Claims filed in respect of or affecting the Purchased Assets, which Claims are filed on or after the date of the granting of this Order, including without limitation, Claims in respect of the *Construction Lien Act* (Ontario); (iv) those Claims listed on **Schedule "C"** hereto in relation to the Purchased Assets (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on **Schedule "D"** in relation to the Purchased Assets) and, for greater certainty, this Court orders that upon delivery of the applicable Receiver's Certificate all of the Encumbrances affecting or relating to the Purchased Assets shall be expunged and discharged as against the Purchased Assets.

4. THIS COURT DIRECTS that the Land Registrar in respect of the Land Registry Office for the Land Titles Division of Essex (No. 12) (the "**Land Registry**") shall register a copy of this Order along with the applicable fully completed and executed Receiver's Certificate in respect of the Purchased Assets once the Land Registrar is in receipt of same.

5. THIS COURT ORDERS that upon the registration in the Land Registry of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act* (which will include a copy of this Order and the fully completed and executed Receiver's Certificate in respect of the Purchased Assets), the Land Registrar is hereby directed to enter the Purchaser named in the applicable Receiver's Certificate as the owner of the

Purchased Assets listed in Exhibit "A" to the Receiver's Certificate in fee simple, and is hereby directed to delete and expunge from title to the Purchased Assets all of the Claims listed in Schedule "C" hereto and in paragraph 3 of this Order.

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

7. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of each Receiver's Certificate, forthwith after delivery thereof, and in any event no later than thirty (30) days after the date of the closing of the Transaction detailed in each applicable Unsold Unit Sale Agreement.

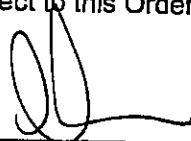
8. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of Portofino and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of Portofino;

the vesting of the Purchased Assets in each applicable Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Portofino and shall not be void or voidable by creditors of Portofino, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada), or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. THIS COURT ORDERS AND DECLARES that each Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

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



Justice, Superior Court of Justice

ENTERED AT WINNIPEG	
In Book No.	25
Ex Document No.	572
On	May 2 14
by	DP

Schedule "A" – Unsold Units

Legal Description

Description: Essex Standard Condominium Plan No. 122 and its appurtenant interest. The description of the condominium property is: LT 1, South Side of Sandwich Street, PI 392 & Pt Lot 73 Concession 1 Windsor; Pt 1 PI 12R17829; S/T Ease as set out in Schedule "A" of Declaration CE278123, Windsor Ontario (LT) (LRO#12)

Unsold Condominium Units					
Unit	Level		PIN		
1	1		01872	-	0001
2	1		01872	-	0002
3	1		01872	-	0003
4	1		01872	-	0004
5	1		01872	-	0005
6	1		01872	-	0006
3	2		01872	-	0052
4	2		01872	-	0053
4	3		01872	-	0058
9	3		01872	-	0063
1	4		01872	-	0065
2	4		01872	-	0066
8	4		01872	-	0072
8	5		01872	-	0082
1	6		01872	-	0085
3	6		01872	-	0087
1	7		01872	-	0095
4	7		01872	-	0098

Unsold Condominium Units					
Unit	Level		PIN		
8	7		01872	-	0102
3	8		01872	-	0107
4	8		01872	-	0108
5	8		01872	-	0109
6	8		01872	-	0110
1	9		01872	-	0115
3	9		01872	-	0117
4	9		01872	-	0118
6	9		01872	-	0120
1	10		01872	-	0123
2	10		01872	-	0124
8	10		01872	-	0130
1	11		01872	-	0131
2	11		01872	-	0132
4	11		01872	-	0134
5	11		01872	-	0135
1	12		01872	-	0139
2	12		01872	-	0140
1	13		01872	-	0145
2	13		01872	-	0146
3	13		01872	-	0147
1	14		01872	-	0151
2	14		01872	-	0152
3	14		01872	-	0153

Unsold Condominium Units					
Unit	Level		PIN		
4	14		01872	-	0154
1	15		01872	-	0157
2	15		01872	-	0158
3	15		01872	-	0159
5	15		01872	-	0161
1	16		01872	-	0162
2	16		01872	-	0163
3	16		01872	-	0164
5	16		01872	-	0166

Unsold Parking Units					
Unit	Level		PIN		
7	1		01872	-	0007
8	1		01872	-	0008
12	1		01872	-	0012
13	1		01872	-	0013
16	1		01872	-	0016
17	1		01872	-	0017
18	1		01872	-	0018
19	1		01872	-	0019
20	1		01872	-	0020
21	1		01872	-	0021
22	1		01872	-	0022
23	1		01872	-	0023

Unsold Parking Units					
Unit	Level		PIN		
24	1		01872	-	0024
25	1		01872	-	0025
26	1		01872	-	0026
27	1		01872	-	0027
28	1		01872	-	0028
29	1		01872	-	0029
30	1		01872	-	0030
31	1		01872	-	0031
32	1		01872	-	0032
33	1		01872	-	0033
34	1		01872	-	0034
35	1		01872	-	0035
36	1		01872	-	0036
37	1		01872	-	0037
38	1		01872	-	0038
39	1		01872	-	0039
40	1		01872	-	0040
41	1		01872	-	0041
42	1		01872	-	0042
43	1		01872	-	0043
44	1		01872	-	0044
45	1		01872	-	0045
46	1		01872	-	0046
47	1		01872	-	0047

Unsold Parking Units					
Unit	Level		PIN		
48	1		01872	-	0048
49	1		01872	-	0049

Unsold Storage Units					
Unit	Level		PIN		
2	A		01872	-	0168
1	A		01872	-	0167

Schedule "B" – Form of Receiver's Certificate

Court File No. CV-13-19866

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Thomas of the Ontario Superior Court of Justice (the "**Court**") dated October 29, 2013, BDO Canada Limited ("**BDO**") was appointed as the receiver (the "**Receiver**") of all of the assets, undertakings and properties Portofino ("**Portofino**").

B. Pursuant to an Order of the Court dated May 2, 2014, the Court granted an omnibus approval and vesting order (the "**Omnibus Approval and Vesting Order**"), providing for among other things:

(a) the Court's approval of this Transaction in respect of the Purchased Assets (as defined below) as described in the Sale Agreement (as defined below);

(b) the Court's authorization of the Receiver entering into the Agreement of Purchase and Sale made as of _____ [DATE OF AGREEMENT] (the "**Sale Agreement**") between the Receiver and _____ [NAME OF PURCHASER] (the "**Purchaser**"); and

(c) the vesting in and to the Purchaser all of Portofino's right, title and interest in and to the lands and premises legally described on **Exhibit "A"** to this Receiver's Certificate (the "**Purchased Assets**"), with such vesting to be effective in respect of the Purchased

Assets upon the delivery by the Receiver to the Purchaser of this certificate confirming (i) the payment by the Purchaser of the purchase price for the Purchased Assets; (ii) that the conditions to closing as set out in the Sale Agreement have been satisfied or, to the extent that such conditions could be waived, have been waived by the Receiver and the Purchaser; and (iii) the transaction described in the Sale Agreement (the "Transaction") has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Omnibus Approval and Vesting Order.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the purchase price for the Purchased Assets payable on closing pursuant to the Sale Agreement;
2. The conditions to closing as set out in the Sale Agreement have been satisfied or, to the extent such conditions could be waived, have been waived by the Receiver and the Purchaser;
3. The Transaction has been completed to the satisfaction of the Receiver;
4. In accordance with the provisions of the Omnibus Approval and Vesting Order, upon delivery by the Receiver of this Receiver's Certificate to the Purchaser, the Transaction is approved and the Purchaser is vested with all of Portofino's right, title and interest in and to the Purchased Assets; and
5. This Certificate was delivered by the Receiver at _____ [TIME] on _____ [DATE].

BDO CANADA LIMITED solely in its capacity
as Court-appointed receiver of Portofino
Corporation and not in its personal capacity

Per: _____

Name: _____

Title: _____

Exhibit "A" to Form of Receiver's Certificate – Purchased Assets

**(INSERT LEGAL DESCRIPTION AND MUNICIPAL ADDRESS FOR EACH UNSOLD UNIT
COMPRISING THE PURCHASED ASSETS SUBJECT TO THE APPLICABLE UNSOLD UNIT
SALE AGREEMENT)**

BANK OF MONTREAL
Plaintiff

and

PORTOFINO CORPORATION
Defendant

Court File No: CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

RECEIVER'S CERTIFICATE

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Tony Van Klink LSUC#: 29008M
Tel: 519.931.3509
Fax: 519.858.8511
Email: tvanklink@millerthomson.com

Sherry A. Kettle, LSUC #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for BDO Canada Limited, Court-Appointed
Receiver of Portofino Corporation

Schedule "C" – Claims to be deleted and expunged from title to the Unsold Units

Description:	Essex Standard Condominium Plan No. 122 and its appurtenant interest. The description of the condominium property is: LT 1, South Side of Sandwich Street, Pl 392 & Pt Lot 73 Concession 1 Windsor; Pt 1 Pl 12R17829; S/T Ease as set out in Schedule "A" of Declaration CE278123, Windsor Ontario (LRO#12)
Unsold Condominium Units (See Schedule "A" for individual unit descriptions)	
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.	
	Instrument No. CE185236 – Charge in the principal amount of \$30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.
	Instrument No. CE185421 – Charge in the principal amount of \$4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.
	Instrument No. CE297353 – Charge in the principal amount of \$1,000,000 from Portofino Corporation to Remo Valente Real Estate (1990) Limited, registered on October 12, 2007.
	Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.
	Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.
	Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.
	Instrument No. CE482047 – Charge in the principal amount of \$400,000 from Portofino Corporation to Sutts Strosberg LLP, registered on August 9, 2011.
	Instrument No. CE500568 – Charge in the principal amount of \$1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
	Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
	Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation, registered on March 1, 2012.
	Instrument No. CE551002 – Charge in the principal amount of \$524,312 from Portofino Corporation to Sutts Strosberg LLP, registered on January 10, 2013.
	Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal,

registered on July 22, 2013.

13. Instrument No. CE584310 – Construction lien in the amount of \$875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.
14. Instrument No. CE584311 – Construction lien in the amount of \$3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.
15. Instrument No. CE587801 – Construction lien in the amount of \$3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.
16. Instrument No. CE587802 – Construction lien in the amount of \$875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.
17. Instrument No. CE588099 – Condo Lien/98 in the amount of \$80,749 registered by Essex Standard Condominium Corporation No. 122 on October 29, 2013.
18. Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.
19. Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.
20. Instrument No. CE592122 – Application Court Order registered on November 28, 2013.

Unsold Parking Units (See Schedule "A" for individual unit descriptions)

1. Instrument No. CE185236 – Charge in the principal amount of \$30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.
2. Instrument No. CE185421 – Charge in the principal amount of \$4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.
3. Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.
4. Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.
5. Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.
6. Instrument No. CE500568 – Charge in the principal amount of \$1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
7. Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
8. Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation,

registered on March 1, 2012.

9. Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal, registered on July 22, 2013.
10. Instrument No. CE584310 – Construction lien in the amount of \$875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.
11. Instrument No. CE584311 – Construction lien in the amount of \$3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.
12. Instrument No. CE587801 – Construction lien in the amount of \$3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.
13. Instrument No. CE587802 – Construction lien in the amount of \$875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.
14. Instrument No. CE588098 – Condo Lien/98 in the amount of \$23,497 registered by Essex Standard Condominium Corporation No. 122 on October 29, 2013.
15. Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.
16. Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.

Unsold Storage Units (See Schedule "A" for individual unit descriptions)

1. Instrument No. CE185236 – Charge in the principal amount of \$30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.
2. Instrument No. CE185421 – Charge in the principal amount of \$4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.
3. Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.
4. Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.
5. Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.
6. Instrument No. CE500568 – Charge in the principal amount of \$1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
7. Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to

Royal Bank of Canada, registered on December 20, 2011.

8. Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation, registered on March 1, 2012.
9. Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal, registered on July 22, 2013.
10. Instrument No. CE584310 – Construction lien in the amount of \$875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.
11. Instrument No. CE584311 – Construction lien in the amount of \$3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.
12. Instrument No. CE587801 – Construction lien in the amount of \$3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.
13. Instrument No. CE587802 – Construction lien in the amount of \$875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.
14. Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.
15. Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.

**Schedule "D" – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Unsold Units (Unsold Condominium Units, Unsold Parking Units and
Unsold Storage Units)**

(unaffected by the Omnibus Approval and Vesting Order)

- (i) Instrument No. CE98338 – Notice from the Corporation of the City of Windsor to Portofino Riverside Tower Inc.
- (ii) Instrument No. CE191717 – Notice from the Corporation of the City of Windsor to Portofino Corporation
- (iii) Instrument No. CE278123 – Declaration Condo
- (iv) Instrument No. ECP122 – Plan Condominium
- (v) Instrument No. CE279560 – Condo By-Law/98 (By-Law No. 1)
- (vi) Instrument No. CE279561 – Condo By-Law/98 (By-Law No. 2)
- (vii) Instrument No. CE279607 – Condo By-Law/98 (By-Law No. 3)
- (viii) Instrument No. CE279624 – Condo By-Law/98 (By-Law No. 4)
- (ix) Instrument No. CE279635 – Condo By-Law/98 (By-Law No. 5)
- (x) Instrument No. CE279643 – Condo By-Law/98 (By-Law No. 6)

BANK OF MONTREAL

Applicant

and

PORTOFINO CORPORATION

Respondent

Court File No: CV-13-19866

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Windsor

OMNIBUS APPROVAL AND VESTING ORDER

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Tony Van Klink LSUC#: 29008M
Tel: 519.931.3509
Fax: 519.858.8511
Email: tvanklink@millerthomson.com

Sherry A. Kettle, LSUC #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for BDO Canada Limited, Court-Appointed
Receiver of Portofino Corporation



SUPREME COURT OF CANADA

CITATION: Sherman Estate v.
Donovan, 2021 SCC 25

APPEAL HEARD:
October 6, 2020
JUDGMENT RENDERED:
June 11, 2021
DOCKET: 38695

BETWEEN:

**Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate**
Appellants

and

**Kevin Donovan and
Toronto Star Newspapers Ltd.**
Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia,
Canadian Civil Liberties Association, Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc.,
CTV, a Division of Bell Media Inc., Global News, a division of Corus
Television Limited Partnership, The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario, HIV Legal Network
and Mental Health Legal Committee**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

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

JUDGMENT:
(paras. 1 to 108)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

SHERMAN ESTATE v. DONOVAN

**Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate**

Appellants

v.

**Kevin Donovan and
Toronto Star Newspapers Ltd.**

Respondents

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Canadian Civil Liberties Association,
Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers Association,
Postmedia Network Inc., CTV, a Division of Bell Media Inc.,
Global News, a division of Corus Television Limited Partnership,
The Globe and Mail Inc., Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario,
HIV Legal Network and Mental Health Legal Committee**

Intervenors

Indexed as: Sherman Estate v. Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; 3834310 *Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

Statutes and Regulations Cited

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and Timothy Youdan, for the appellants.

Iris Fischer and Skye A. Sepp, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

I. Overview

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

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

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public

importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

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

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that,

on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

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

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

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

II. Background

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

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

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy

¹ As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

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

III. Proceedings Below

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

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court’s judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: “(1) such an

² The use of “Toronto Star” as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings” (para. 13(d)).

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

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

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

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

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

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have

a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that “[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle” (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

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

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

C. *Subsequent Proceedings*

[21] The Court of Appeal’s order setting aside the sealing orders has been stayed pending the disposition of this appeal. The *Toronto Star* brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles.

This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

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

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

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

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an “administrative” character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star’s view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees’ position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive.

On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26).

Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. “In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so” (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court’s jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a

fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing

orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise

than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at “serious risk”. For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become ““one of the hallmarks of a democratic society”” (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that “acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

understanding of the administration of justice” (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the “fairness of the trial” (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the “proper administration of justice” (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an “important interest, including a commercial interest, in the context of litigation” (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the “general commercial interest of preserving confidential information” was an important interest because of its public character (para. 55). This is consistent with the fact that this test

was developed in reference to the *Oakes* jurisprudence that focuses on the “pressing and substantial” objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term “important interest” therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.’s sense, explained in *Sierra Club*, that courts must be “cautious” and “alive to the fundamental importance of the open court rule” even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at “serious risk” is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of “important interest” transcends the interests of the parties to the dispute and provides significant

flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court’s authority. The court’s decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example

by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court’s authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to “[p]ersonal concerns” which cannot, “without more”, satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that “[p]urely personal interests cannot justify non-publication or sealing orders” (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that “personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test” (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the

necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the “sensibilities of the individuals involved” (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions “personal concerns”. Certain personal concerns — even “without more” — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a “public interest in confidentiality” that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face “a substantial risk of serious debilitating emotional . . . harm”, an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a “public interest in confidentiality” is therefore not whether the interest reflects or is rooted in “personal concerns” for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual’s privacy is

pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: “The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual’s unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one’s own thoughts, actions and decisions” (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733

(“UFCW”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as “intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values” (para. 24). The importance of privacy, its “quasi-constitutional status” and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that “the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests” (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).³ Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective

³ At the time of writing the House of Commons is considering a bill that would replace part one of PIPEDA: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

(*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which “the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process” was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, “Privacy and Speech” (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person’s personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced,

alongside its personal interest to the parties, a “public interest in confidentiality” (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the *Toronto Star* suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is “something more” to elevate them beyond personal concerns and sensibilities (*R.F.*, at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one’s professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect

of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at

p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that “[i]f we are serious about peoples’ private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way” (“Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The *Toronto Star* has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong

presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that “covertness is the exception and openness the rule”, he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, “that the ‘privacy’ of litigants requires that the public be excluded from court proceedings” (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that “[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings” (p. 185).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that “a party who institutes a legal proceeding waives his or her right to privacy, at least in part” (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule

and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, “Conceptualizing Privacy” (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of “theoretical disarray” (*R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the *Toronto Star* that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of

openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] “[t]he confidentiality of the proceedings may be justified, in

particular, in order to protect the parties' privacy However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the *Toronto Star*. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial

proceedings addressed “a somewhat different aspect of privacy, one more closely related to the protection of one’s dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one’s private life printed in the newspapers” (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person’s ability to control sensitive information was said to foster respect for “dignity, personal integrity and autonomy” (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 (“C.C.P.”), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 C.C.P., a discretionary exception to the open court principle can be made by the court if “public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests”, requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the “important public interest” that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as

fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 C.C.P., the interest must be understood as defined [TRANSLATION] “in terms of a public interest in confidentiality” (see 3834310 *Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 C.C.P. alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 C.C.P. — [TRANSLATION] “what is part of one’s personal life, in short, what constitutes a minimum personal sphere” (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The “preservation of the dignity of the persons involved” is now consecrated as the archetypal public order interest in art. 12 C.C.P. It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, “Article 12”, in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its

preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from*

the Identity Trail: Anonymity, Privacy and Identity in a Networked Society (2009), 319, at pp. 327-28; L. M. Austin, “Re-reading Westin” (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as “[a]n expression of an individual’s unique personality or personhood” (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to

other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this

Court has described in its jurisprudence on s. 8 of the *Charter* as the “biographical core” — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that “reasonable and informed Canadians” would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the “biographical core” or, “[p]ut another way, the more personal and confidential the information” (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is “personal” to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the

structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a

result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious

risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was “practically obscure” (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity” (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude

further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305, at p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual’s highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with “privacy”, are generally insufficient to justify a

restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage “social values of superordinate importance” beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual’s biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court’s emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception

to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that “[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating” (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals’ privacy, as I have defined it above in reference to dignity, is not serious. The information the

Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might

well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is

worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was “foreseeable” and “grave” (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the *Toronto Star* agrees that the application judge’s conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious

risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the

Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated “cases involving gang violence and dangerous firearms” and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it “self-evident” that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans’ deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis.

Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the *Toronto Star* would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the *Toronto Star*'s motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v
Yukon Zinc Corporation*,
2022 YKSC 2

Date: 20220121
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
as represented by the Minister of the Department of
Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

John T. Porter and
Kimberly Sova (by video)

No one appearing

Yukon Zinc Corporation

Counsel for Welichem Research
General Partnership

H. Lance Williams and
Forrest Finn (by video)

Counsel for
PricewaterhouseCoopers Inc.

Tevia Jeffries and
Emma Newbery (by video)

REASONS FOR DECISION

Introduction

[1] The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related

assets of Yukon Zinc Corporation (“Yukon Zinc”) to Almaden Minerals Ltd. (“Almaden”) and for the termination of the sale and investment solicitation plan (the “SISP”), and the second for an Order sealing the Receiver’s Confidential Supplemental Eighth Report to the Court, with appendices, currently unfiled.

[2] The Government of Yukon supports these applications. The applications are unopposed or subject to no position taken by Welichem Research General Partnership (“Welichem”) a secured creditor of Yukon Zinc and lessor of items comprising substantially all of the infrastructure, tools, vehicles and equipment at the Wolverine Mine (the “Mine”). No other interested party appeared on the application or made submissions.

[3] For the following reasons, I will grant the Orders requested, subject to certain conditions as set out below.

Background

[4] These applications arise in the context of the ongoing receivership of all the assets, undertakings and property of Yukon Zinc. Its principal asset is the Mine, a zinc-silver-lead mine located 282 km northeast of Whitehorse, Yukon. It holds 2,945 quartz mineral claims, a quartz mining license issued under the *Quartz Mining Act*, SY 2003, c.14, and a water licence issued under the *Waters Act*, SY 2003, c.19. Yukon Zinc carried out exploration and development activities between 2008 and 2011. The Mine began production in March 2012. In January 2015, the Mine ceased operating because of financial difficulties and was put into care and maintenance. Despite a successful restructuring in October 2015, Yukon Zinc was unable to obtain additional funds to operate the Mine and it continued in care and maintenance. In 2017, the underground

portion of the Mine flooded and contaminated water was diverted to the tailings storage facility, creating an increased risk of the release of untreated water into the environment. In May 2018, the Yukon government requested from Yukon Zinc an increase in reclamation security from \$10,588,966 to \$35,548,650 to enable it to address the deteriorating condition of the Mine. Yukon Zinc never provided this increased amount. In September 2019, the Yukon government's petition for the appointment of the Receiver of Yukon Zinc's property and assets was granted by this Court. By October 2019, Yukon Zinc had not filed a proposal in the bankruptcy matter, commenced in British Columbia, and Yukon Zinc was deemed to have made an assignment into bankruptcy. PricewaterhouseCoopers Inc. was appointed the trustee in bankruptcy.

[5] Pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "*BIA*"), the Receiver became responsible for the care and maintenance of the Mine. It developed the SISP that proposed the evaluation of bids for the assets and property of Yukon Zinc on various factors. The SISP was approved by the Court on May 26, 2020 but was stayed pending the outcome of an appeal by Welichem. The Court's approval was confirmed on appeal.

[6] The sale process began in April 2021. The Receiver contacted 559 potential bidders, advertised the SISP on-line and through media in British Columbia and Yukon and encouraged other stakeholders such as Yukon government and the Kaska Nation to provide additional contacts. Eighteen potential bidders signed non-disclosure agreements and were given access to the data room. By June 2021 several entities submitted non-binding expressions of interest. Throughout the summer of 2021, the

Receiver held multiple calls with each of these potential bidders to discuss their plans and ensure the Receiver understood them, to explain and clarify the SISP evaluation criteria, and to support the bidders' due diligence work, including providing explanations of the regulatory requirements. The Receiver also discussed the progress of the SISP regularly with Yukon government and the Kaska Nation. The binding bid deadline was extended and by July the Receiver had received several binding bids. The Receiver began to evaluate these bids. By September 2021, however, some bidders withdrew from the process for various reasons. These withdrawals were confirmed in writing by the Receiver (the "Removal Letters").

[7] On completion of the evaluation of the remaining bids, the Receiver concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. The Receiver advised the relevant stakeholders by letter, after consultation with Yukon government, that the sale process would be terminated (the "Termination Letters"). The Receiver also determined at that time that the preferred approach was to transfer the care and maintenance to the Yukon government.

[8] In June 2021, the Receiver received a non-binding expression of interest and subsequently a binding bid from Almaden for a small portion of the assets of Yukon Zinc, the Logan interests. Almaden had entered into a joint venture agreement with Yukon Zinc (then called Expatriate Resources Ltd.) in 2005. This agreement led to the forming of a contractual joint venture to explore and develop the Logan interests. No such activity was ever commenced. The Logan interests consist of 156 mineral claims located approximately 100 km south of the Mine. Under the joint venture, Yukon Zinc

had an interest of 60% and Almaden 40%. Almaden offered to purchase the Yukon Zinc 60% interest.

[9] The Receiver believes the Almaden bid could be a viable sale of the Logan interests and has entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

[10] The Receiver has submitted copies of the non-binding expressions of interest, binding bids, Removal letters, Termination letters, the Almaden bid, and the Almaden purchase agreement as attachments to the Receiver's Confidential Supplemental Eighth Report. All of these documents along with the report are considered to contain sensitive commercial information and the Receiver seeks a sealing order over them.

Approval of Sale to Almaden

[11] Subsections 3(k) and (l) of the Receiver's powers set out in the Order dated September 13, 2019 provide the Receiver with express power and authority to market any or all of the Yukon Zinc assets, undertakings or property, including advertising and soliciting offers for all or part of the property, negotiating appropriate terms and conditions, as well as authority to sell, convey, transfer, lease or assign the property with approval of this Court if the transaction exceeds \$150,000.

[12] The SISP sets out at s. 22 the evaluation criteria for qualified purchase bids.

They are:

- (a) Price;
- (b) Structural complexity of the proposed transaction;
- (c) Nature and sufficiency of funding for the proposed transaction;

- (d) Probability of closing the proposed transaction and any relevant risks thereto, including nature of any remaining conditions and due diligence requirements;
- (e) Whether the proposed transaction leaves any of the YZC [Yukon Zinc Corporation] Assets within the receivership;
- (f) Impact on former employees of YZC;
- (g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;
- (h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;
- (i) Strength of a bidder's proposal for posted required Reclamation Security as required by the DEMR [Department of Energy, Mines and Resources] and any other security required by any other applicable regulator;
- (j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or care and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;
- (k) Benefits that may accrue to Yukon residents and businesses and the affected Kaska Nations of Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

[13] The SISP also requires the Receiver to report to the Court on the outcome of the solicitation process, including whether it intends to proceed with any one or more of the qualified purchase bids. The applicable statutory obligations on the Receiver are set

out in s. 247(a) and (b) of the *BIA*: to act honestly and in good faith, and to deal with the property of the debtor in a commercially reasonable manner.

[14] The principles to be applied by a court in determining whether to approve a proposed sale by a receiver are set out in the leading case of *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (CA) at para. 16:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

[15] Here, the Receiver made extensive efforts through direct and indirect contacts of potential bidders and advertising to obtain the best price for the assets. There is no evidence of any improvident actions by the Receiver. The Receiver spent time with each interested potential bidder to assist with their due diligence activities and other aspects of the bidding process.

[16] As the Receiver reported, a review of the submitted bids shows that Almaden was the only bidder specifically for the Logan interests. While other bidders referred to the Logan interests, and included them in their bids, their overall bids were withdrawn or unacceptable to the Receiver. Almaden provided the best price for the Logan interests. Almaden is an experienced mining exploration company based in Vancouver.

[17] The Receiver noted that although the Logan interests represent a small fraction of the Yukon Zinc assets and property, their sale will generate some funds for the estate

which is in the interests of all parties. Yukon government supports this sale and Welichem does not oppose it.

[18] The Almaden offer was obtained through the SISP process. This process was approved by the Court as fair, transparent and commercially efficacious.

[19] Finally, the evidence shows the SISP process was conducted by the Receiver honestly and in good faith. There is no suggestion or evidence of unfairness in the way the process was carried out.

[20] The finalizing of this sale process will be simple: the 60% interest in the Logan assets under the joint venture agreement will be transferred to Almaden. The other 40% are already in the name of Almaden. The commercial joint venture agreement will become defunct on closing. The Receiver advised the splitting off of these interests from the remainder of the assets and property would not be detrimental to any future sale process as they represent a small portion and there was no other bidder interested in solely the Logan interests. The cost to the Receiver of this transaction is reasonable given Almaden's existing agreement and interests.

[21] The Almaden Purchase Agreement, a redacted copy of which is included in the filed materials, is approved.

Termination of the SISP

[22] As noted above, the Receiver concluded that the SISP process did not lead to a viable sale. None of the bids was acceptable, either because the bidder withdrew from the process, or the bids contained conditions for closing or available consideration that were unacceptably uncertain. The specifics of each bid were not disclosed in the

publicly filed eighth report of the Receiver, for reasons of confidentiality. This issue is addressed below.

[23] In general, the reasons why certain bidders withdrew from the process included:

- (a) the realization during the SISP process of the need for the purchaser to obtain a new water licence instead of assuming the current water licence, a process which could take two years or more;
- (b) the possibility of ongoing litigation over the Welichem assets which remain at the site (the Court has been advised that the matter is in the process of settling, although the settlement agreement is not yet finalized);
- (c) the unknown extent and costs of reconstruction to make the Mine operational, given the flooded state of the underground part of the Mine and its questionable structural integrity;
- (d) the inability to determine potential value of the mineral claims because of an absence of updated exploration results; and
- (e) the uncertainty of reclamation or remediation costs and how they will be shared with the Yukon government.

[24] The Receiver explained that there was not one issue that presented a bar to the bidders who withdrew or were rejected; the concerns were different for each bidder.

[25] The Order approving the SISP or the SISP do not contain a provision for termination of the SISP process. However, s. 30(a) of the SISP states that the Receiver, in consultation with Yukon government, may reject at any time any bid that is:

- (i) inadequate or insufficient;

- (ii) not in conformity with the requirements of the BIA, this SISP or any orders of the Court applicable to YZC or the Receiver; or
- (iii) contrary to the interests of YZC's estate and stakeholders as determined by the Receiver;

[26] Further, s. 23(f) of the SISP contemplates the possibility that the Receiver may report to the Court that it will not proceed with any one or more of the bids.

[27] The jurisprudence offers little guidance on the role of the court in a situation of termination of a sales process in the event of no acceptable bidders. The Receiver noted one decision in which the Supreme Court of British Columbia observed it saw no reason why the Receiver could not recommend against completion of a sale, and that it had a duty to advise the court of any reason why the court might conclude the sale should not be approved (*Bank of Montreal v On-Stream Natural Gas Ltd Partnership* (1992), 29 CBR (3) 203 (BC SC) at para. 24).

[28] The case law is clear that in reviewing a sales process the court is to defer to the business expertise of the Receiver, and is not to intervene or “second guess” the Receiver’s recommendations and conclusions (*Royal Bank of Canada v Keller & Sons Farming Ltd*, 2016 MBCA 46 at para. 11). The court is to ensure the integrity of the process is maintained through the exercise of procedural fairness in any negotiations and bidding.

... The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. ... [*Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (H Ct J) at para. 65]

[29] Here, the Receiver undertook a thorough process in attempting to attract and identify an acceptable bidder and ultimate purchaser, in consultation with Yukon

government and the Kaska Nation. By its own account, it provided substantial assistance to potential bidders throughout the summer of 2021, including extending deadlines, participating in multiple calls to clarify and understand their proposals, and providing them with necessary information and connections to enable them to complete their due diligence. The SISP has already been approved as fair and reasonable by this Court and as noted above, the Receiver's appears to have implemented the SISP fairly and in good faith.

[30] Yukon government agreed with the termination of the SISP, indicating that the Receiver's good faith efforts were the best that could be achieved at this time.

Welichem did not oppose the termination of the SISP.

[31] While the confidential documents set out the more detailed reasons why the Receiver has concluded there are no appropriate bidders, scrutiny or assessment of these reasons is not the Court's role.

[32] I note that the SISP process may have some value for future in that entities with interest in the project were identified and educated about the process, and a large amount of information was gathered and learned about the Mine both by the interested parties and the Receiver in consultation with Yukon government and the Kaska Nation. This may have some value for future bidding or sales processes.

[33] For these reasons, the termination of the SISP is approved. The draft Approval and Vesting Order filed by the Receiver on this application is approved, with appropriate adjustments to reflect appearances of counsel.

Sealing Order

[34] The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

- (a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;
- (b) the details of each bid, including price and conditions;
- (c) the challenges of each bid;
- (d) the Receiver's review and application of the evaluation criteria; and
- (e) the reasons why certain bidders withdrew or were eliminated from the process.

[35] The documents attached to the report include unredacted:

- (a) expressions of interest;
- (b) binding bids;
- (c) Removal Letters;
- (d) Termination Letters;
- (e) Almaden's bid; and
- (f) Almaden's Purchase Agreement.

[36] The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the

bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

[37] The two-part test for a sealing order was set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") at 543-44:

- (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 [sealing] 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.

[38] The recent Supreme Court of Canada decision of *Sherman Estate v Donovan*, 2021 SCC 25 ("*Sherman Estate*") confirmed the test set out in *Sierra Club* continues to be an appropriate guide for judicial discretion (at para.43), and added the following three core prerequisites to be met before the imposition of a sealing order at para. 38:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[39] In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing

process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

[40] This requirement for confidentiality no longer exists when the sale process is completed and as a result any sealing order is generally lifted at that time. As noted by the court in the insolvency proceeding of *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc*, 2014 ONSC 1173 at paras. 33-34:

The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.

To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place. [emphasis added].

[41] *Look Communications Inc v Look Mobile Corp* (2009), 183 ACWS (3d) 736 (Ont Sup Ct) (“*Look*”) was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the *Business Corporations Act*, R.S.C. 1985, c. C.44. The facts

were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

[42] The court in *Look* noted at para. 17:

It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994) 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

[43] The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

[44] Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

[45] The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISF process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

[46] Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar

sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

[47] The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

[48] The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para. 23 ("*New Brunswick*"); *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "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* at para. 22). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

[49] Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

[50] Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

[51] The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club* at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

[52] The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that

some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

[53] I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

[54] The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

DUNCAN C.J.