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COURT FILE NO.	25-3002847
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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE NOTICE OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c B-3, AS AMENDED
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF INFARM INDOOR URBAN FARMING CANADA INC.

APPLICANT	INFARM INDOOR URBAN FARMING CANADA INC.
DOCUMENT	**BENCH BRIEF OF LAW**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This bench brief is provided in support of an application, returnable March 21, 2024, (the "**Application**") by Infarm Indoor Urban Canada Farming Canada Inc. ("**Infarm Canada**") before the Court of King's Bench of Alberta (the "**Court**").

2. This Application is for an order, among other things:

    a) approving the sale of certain assets of Infarm Canada to Infarm Technologies Limited (the "**Purchaser**") and the asset purchase agreement between Infarm Canada and the Purchaser dated March 11, 2024 (the "**APA**"), and vesting title to the assets purchased pursuant to the APA free and clear of any claims or encumbrances, except for permitted encumbrances; and

    b) temporarily sealing the confidential appendices (the "**Confidential Appendices**") to the fourth report of KSV Restructuring Inc., in its capacity as Proposal Trustee of Infarm Canada ("**Proposal Trustee**") dated March 18, 2024 (the "**Fourth Report**"), including the confidential appraisal of Infarm Canada's assets located at its Hamilton facility (the "**Confidential Appraisal**").

II. FACTS

3. The facts relevant to the Application are set out in detail in the following materials:

    a) Affidavit of Erez Galonska sworn February 13, 2024 (the "**Third Galonska Affidavit**");

    b) Affidavit of Erez Galonska sworn March 11, 2024 (the "**Fourth Galonska Affidavit**");

    c) Supplemental Affidavit of Erez Galonska sworn March 14, 2024 (the "**Supplemental Affidavit**"); and

d) The Fourth Report.

A. Background

4. Infarm Canada is in the business of vertical farming which is the practice of growing crops in vertically stacked layers. Infarm Canada sells vertical farming equipment to allow indoor and outdoor farming and sells produce prepared using its equipment.[1]

5. Infarm Canada is an Alberta corporation continued from British Columbia. Infarm formerly had operations in other jurisdictions including Calgary, Alberta and Vancouver, British Columbia. These operations ceased prior to the commencement of these insolvency proceedings.[2]

6. Infarm Canada has only one remaining operating facility located in Hamilton, Ontario which currently employs approximately 30 employees in Hamilton (the "**Hamilton Facility**").[3]

7. The sole shareholder of Infarm Canada is a German company, Infarm-Indoor Farming GmbH ("**Infarm Parent**").[4]

B. Procedural History of NOI Proceedings

8. On October 26, 2023, Infarm Canada filed a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended (the "**NOI**").[5]

9. On November 10, 2023, upon application of Infarm Canada, the Honourable Justice Dunlop granted an Order *inter alia* approving a first ranking administration charge of $250,000 CAD for fees and disbursements of Infarm Canada's counsel

[1] Affidavit of Erez Galonska sworn March 11, 2024 (the "Fourth Galonska Affidavit") at para 4.
[2] *Ibid* at paras 5-7.
[3] *Ibid* at para 7.
[4] Affidavit of Erez Galonska sworn February 13, 2024 (the "Third Galonska Affidavit") at para 17.
[5] Fourth Report of the Proposal Trustee dated March 18, 2024 (the "Fourth Report") at para 1.0.1.

as well as for the Proposal Trustee and its counsel and extending the time for Infarm Canada to file a proposal and corresponding stay of proceedings to January 9, 2024.[6]

10. On January 8, 2024, upon application of Infarm Canada, the Honourable Justice Jones granted an Order further extending the time for Infarm Canada to file a proposal and corresponding stay of proceedings to February 23, 2024.[7]

11. On February 23, 2024, upon application of Infarm Canada, the Honourable Justice Gill granted an Order further extending the time for Infarm Canada to file a proposal and corresponding stay of proceedings to April 8, 2024.The current deadline to file a proposal and corresponding stay of proceedings in these NOI proceedings expires on April 8, 2024.[8]

C. Significant Creditors of Infarm Canada

12. There are three significant creditors of Infarm Canada which are described as follows:

    a) Triplepoint Capital LLC ("**TPC**"). Infarm Canada is indebted to TPC pursuant to a continuing guarantee and security agreement. As at September 25, 2024, TPC was owed the principal amount of approximately $16,277,451 EUR and $18,368,080 USD by both Infarm Canada and Infarm Parent.[9] Following the closing of the transaction in the UK Administration Proceedings (defined below), TPC was owed approximately EUR 7,500,000 by Infarm Canada and Infarm Parent. The Proposal Trustee has obtained a legal opinion which confirms, subject to customary qualifications, that TPC's security is valid and enforceable against Infarm Canada's assets.

[6] Third Galonska Affidavit, *supra* note 4 at para 15; Fourth Report, *supra* note 5 at para 1.2.
[7] Third Galonska Affidavit, *ibid* at para 16; Fourth Report, *ibid* at para 1.0.5.
[8] Fourth Report, *ibid* at para 1.0.7.
[9] Third Galonska Affidavit, *supra* note 4 at paras 8-10, 17.

b) ACRO/Murray International Construction – Toronto ULC ("**ACRO**"). Infarm Canada is indebted to ACRO pursuant to a judgment awarded against Infarm Canada for certain outstanding amounts owing to ACRO as contractor for leasehold improvements to Infarm Canada's formerly leased facility in Calgary. On October 2, 2023, ACRO obtained judgment in the amount of $3,703,009.33 plus interest.[10]

c) Calgary Industrial Portfolio Nominee Inc. and Albari Holdings Ltd. (together, the "**Calgary Landlord**") who was the landlord of Infarm Canada's formerly leased facility in Calgary. The Calgary Landlord is seeking $5,897,318 CAD from Infarm Canada for amounts owing pursuant to its lease agreement.[11]

D. The Administration Proceedings

13. Infarm Parent was subject to administration proceedings in the United Kingdom (the "**Administration Proceedings**"). Pursuant to an Administration Order Damian Webb and Gordon Thomson of RSM UK Restructuring Advisory LLP were appointed as administrators of Infarm Parent.[12]

14. The Administration Proceedings resulted in a sale by way of a credit bid of substantially all of Infarm Parent's assets pursuant to an agreement dated December 29, 2023 (the "**European Transaction**").[13] A portion of the assets acquired in the European Transaction owned by Infarm Parent were used in Infarm Canada's operations at the Hamilton Facility (the "**Previously Acquired Assets**").[14]

15. TPC was owed the principal amounts of approximately EUR 7,500,000 by Infarm Canada and Infarm Parent following closing of the UK transaction.[15]

[10] Third Galonska Affidavit, *supra* note 4 at paras 11-12.
[11] *Ibid* at para 13.
[12] *Ibid* at para 18.
[13] *Ibid* at para 19.
[14] Supplemental Affidavit of Erez Galonska sworn February 13, 2024 (the "Supplemental Affidavit"), at para 6.
[15] Third Galonska Affidavit, *supra* note 4 at para 19.

16. The Previously Acquired Assets are used together with Infarm Canada's assets to operate in the normal course. Due to the high level of integration of the assets, the utility of the Infarm Canada assets on their own, without the benefit of the Previously Acquired Assets, is uncertain.[16]

E. The Proposed Transaction

17. On or about March 11, 2024, Infarm Canada and Infarm Technologies Inc. (the "**Purchaser**"), a company incorporated pursuant to the laws of the United Kingdom entered into the APA to acquire certain assets including those used in operations at its facility in Hamilton and defined in the APA as the Purchased Assets (the "**Purchased Assets**").[17]

18. The Purchased Assets exclude moveable property, leasehold improvements and equipment, furniture, fixtures and other fixed assets located at Infarm Canada's "Other Premises" which includes its former leased premises in Calgary.[18]

19. Good faith efforts were made, prior to Inform Canada filing the NOI, to sell or otherwise dispose of the assets of Infarm Parent and Infarm Canada, including the Purchased Assets. Specifically, a sale process was conducted in the United Kingdom by the UK Administrator, RSM UK, which is experienced in the marketing and sale of distressed assets. That process consisted of various steps that are more fully described in Part 2 of the Fourth Report (together, the "**Pre-Filing Process**").[19] The Pre-Filing Process included but was not limited to the following:

    a) Approximately 131 potential purchasers (strategic and financial) were contacted about the sales process.

    b) Teasers were sent out initially in June, 2023.

[16] Supplemental Affidavit, *supra* note 14 at para 7.

[17] Fourth Galonska Affidavit, *supra* note 1 at paras 8-9.
[18] *Ibid* at paras 10,14.
[19] Fourth Report, *supra* note 5 at para 2.1.

c) A virtual data room containing information pertaining to each division of Infarm, including the Canadian division, was created and made available to 17 potential purchasers who signed non-disclosure agreements.

d) Indicative offers were initially requested by July 19, 2023 but potential purchasers were advised that the deadline would be extended to July 26, 2023.

e) An information overview package was made available to prospective purchasers that signed non-disclosure agreements along with access to a data room for due diligence purposes. The information overview package was clear regarding the global nature of Infarm Parent's business, including its Canadian operations. It also contained financial and other information regarding Infarm Canada's operating results and assets.

f) Prospective purchasers had the option of acquiring all or a portion of Infarm Parent's assets, including individual divisions such as the Infarm Canada division.

g) The offer by the Purchaser for the Infarm Parent assets alone was the most favourable received in that process and was approved by the Administrator.[20]

20. The transaction contemplated by the APA (the "**Transaction**") contains the following key terms (capitalized terms not otherwise defined are as defined in the APA):

a) . The Purchase Price consists of three elements.

I. Debt Consideration in the amount of seven million Euros (€7,000,000.00) to be paid by the Purchaser pursuant to a payment direction letter (the "**Payment Direction Letter**").

[20] Fourth Galonska Affidavit, *supra* note 1 at para 15; Fourth Report, *supra* note 5 at para 2.3.

II. The Monetary Purchase Consideration, which will be used to pay in cash all Priority Payables, including amounts secured by the Administration Charge. The Monetary Purchase Consideration is currently estimated to be in the amount of $250,000.

III. The assumption of certain liabilities of Infarm Canada by the Purchaser. These liabilities include, all Priority Payables (as defined therein), all obligations and liabilities described under Sections 81.3 and 81.4 of the BIA, Cure Costs (as defined therein) to remedy monetary defaults of Infarm Canada under certain contracts sought to be assigned, and all debts, liabilities and obligations arising from ownership and use of the Purchased Assets for the period from and after the Closing Time.

IV. The total effective Purchase Price after conversion to Canadian dollars is approximately $10,550,000 plus assumed liabilities.

b) The Payment Direction Letter provides for the following:

I. Infarm Canada's principal secured creditor, TPC, will lend the Purchaser seven million Euros (€7,000,000.00) for payment of the Debt Consideration under a new credit facility;

II. The Purchaser will pay seven million Euros (€7,000,000.00) towards the Debt Consideration portion of the Purchase Price; and

III. Infarm Canada will pay seven million Euros (€7,000,000.00) to TPC in satisfaction of a portion of the secured indebtedness owed by Infarm Canada to TPC. Infarm Canada will continue to owe five hundred thousand Euros (€500,000) plus further accruing interest and legal costs and expenses to TPC pursuant to the guarantee dated April 29, 2020 between TPC, Infarm Canada, and Infarm Parent.

c) Following the closing of the transactions contemplated by the Payment Direction Letter and the APA, the secured debt currently owed by Infarm Canada to TPC will have been reduced by seven million Euros (€7,000,000.00), Infarm Canada will have received payment of the estimated amount of outstanding Priority Payables, and the Purchaser will have assumed the Assumed Obligations.

d) The Purchased Assets include the Vendor's right, title and interest, in and to the property, assets and undertaking used in or in relation to the Business of the Vendor, which includes all of the assets located at the Hamilton Facility and owned by the Vendor as well as certain contracts, including the Lease at the Hamilton Facility, all supplier contracts, and all customer contracts.

e) The closing of Transaction is subject to granting of the sought approval and vesting order ("**AVO**").

f) The contemplated Closing Date is three (3) Business Days after the granting of the AVO or such later date as may be agreed by the parties.

g) Infarm Canada understands that the current intention is for the Purchaser to enter into employment contracts with all existing employees of Infarm Canada on substantially the same terms.[21]

21. It is a term of the APA that Infarm Canada obtain the AVO from the Court authorizing, approving and confirming the APA and the underlying purchase and sale transaction, and vesting Infarm Canada's interest in the Purchased Assets in the Purchaser free and clear of all encumbrances, liens, security interests, mortgages, charges or claims or than the encumbrances specifically permitted by the APA.

[21] Fourth Galonska Affidavit, *supra* note 1 at para 10.

III. ISSUES

22. The following issues are before the Court:

a) Should the Court grant the Approval and Vesting Order?

b) Should the Court grant a temporary sealing order with respect to the Confidential Appendices to the Fourth Report?

IV. LAW AND ANALYSIS

A. The Approval and Vesting Order Should Be Granted

23. This Court has the authority to grant an approval and vesting order in the context of proposal proceedings as codified by subsection 65.13(1) and (7) of the BIA,[22] which provide as follows:

> **Restriction on disposition of assets**
> 65.13(1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.
>
> **Assets may be disposed of free and clear**
> (7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

24. Section 65.13(4) of the *BIA* sets out six non-exhaustive factors that must be considered in deciding whether to authorize a sale of the insolvent person's assets outside of the ordinary course of business:[23]

[22] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended ("BIA") at s 65.13(1),(7) **[TAB 1].**
[23] BIA *ibid* at s 65.13(4).

a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

b) whether the trustee approved the process leading to the proposed sale or disposition;

c) whether the trustee 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 as fair, taking into account their marketing value.

25. In *Komtech Inc. (Re),* the Ontario Superior Court of Justice held that the presentation of a proposal to creditors is not a condition to the Court's authority to approve a sale of assets under the authority of section 65.13 the *BIA.*[24]

26. In *OEL Projects Ltd. (Re),* this Court cited *Komtech* as authority for the proposition that "as transaction could be approved under section 65.13, even when the insolvent party would not be in a position to actually make a proposal."[25]

27. In addition to the criteria of section 65.13(4), the well-known *Royal Bank of Canada v Soundair Corp ("**Soundair**")* factors may also be considered.[26] [27]

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[24] *Komtech Inc (Re),* 2011 ONSC 3230 at para 33 ["*Komtech*"] **[TAB 2].**
[25] *OEL Projects Ltd (Re),* 2020 ABQB 365, at para 30 ["*OEL*"] **[TAB 3]**..
[26] *Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137, 83 DLR (4th) 76 (ONCA) ["*Soundair*"] at para 16 **[TAB 4]**.
[27] *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 ["Greenfire"] at para 22 **[TAB** 5].

28. In *OEL Projects Ltd. (Re),* this Court approved a sale transaction without a pre-approved sales process. The debtor hired a consultant to conduct an analysis of the return that might be expected in both a going concern sale scenario and a liquidation scenario. The going concern sale was expected to yield a higher return and the Purchaser was paying the higher end of the range.[28] There was no bid or other sale process and no evidence of other approaches to potential buyers.[29] In its decision to approve the sale transaction, this Court held at paragraphs 27 and 29:[30]

> The process leading to the transaction was not as robust as we would often expect to see, particularly for a related-party transaction. There was no public or even private third-party marketing process. However, I find that this was reasonable in the circumstances. The Board did have the independent advice of FTI, both on going concern and liquidation value. The Board's reasoning as to why a sales process is not feasible in this particular set of circumstances makes sense, particularly given the financial circumstances of the company, the lack of liquidity to fund the sale process, the portable nature of the employees and clients, and the circumstances in which a process would have to take place, including the very depressed price of oil, which has a direct impact on work available to engineering consultants who only work in the energy sector, like OEL, and COVID-19 restrictions.
>
> …The question is whether the Court can approve a sale under section 65.13(5), where there has been no actual sale process. While I am of the view that the Court should be cautious in so doing, I am persuaded that the Court may do so where the particular circumstances warrant. <u>While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made</u>. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision. [emphasis added].

29. Since the NOI was filed, TPC has advanced, directly or indirectly, approximately $860,000 CDN to Infarm Canada to enable it to continue to operate and provide

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[28] *OEL, supra* note 25 at paras 22-23.
[29] *Ibid.*
[30] *Ibid,* at paras 27, 29.

employment over the course of these NOI proceedings.[31] As a result of the lack of liquidity available to Infarm Canada, and given the results of the Pre-Filing Process, Infarm Canada determined that a further sales process would not be feasible and in any event, would not result in a bid in excess of the Transaction currently before the Court.[32]

30. The Pre-Filing Process was robust and the information provided by the UK Administrator reflects that the process allowed interested parties to conduct, at minimum, a basic review of the Canadian operations and assets.[33] A sale process in Canada is likely to have been duplicative and unnecessary.[34]

31. The Proposal Trustee conducted a review of Infarm's assets located at the Hamilton Facility. As part of its review, the Proposal Trustee commissioned the Confidential Appraisal of assets located at the Hamilton Facility. The Confidential Appraisal was conducted by Infinity Asset Solutions and is attached as Confidential Appendix "D" to the Fourth Report.

32. The Confidential Appraisal indicates that the Purchased Assets are worth significantly less than the Purchase Price in the APA. Further, 80% of the appraised assets consisted of the Previously Acquired Assets which are now owned by the Purchaser pursuant to the UK Administration Proceedings. Given this, the Purchased Assets being sold in the Transaction <u>are worth only approximately 20% of the overall appraised amount</u>, making it clear that the Purchase Price in the APA significantly exceeds the value of these assets.[35]

33. Infarm Canada and the Proposal Trustee are of the view that the APA provides for the greatest recovery available to Infarm Canada for the Purchased Assets

[31] Fourth Galonska Affidavit, *s supra* note 1 at para 17.

[32] Fourth Galonska Affidavit, *supra* note 1 at para 17.
[33] Fourth Report, *supra* note 5 at para 2.1.2.
[34] Fourth Galonska Affidavit, *supra* note 1 at para 18.
[35] Fourth Report, *supra* note 5 at para 2.4.at 2.3.12.

and will provide a significantly greater benefit to stakeholders than a liquidation of Infarm Canada in a bankruptcy.[36]

34. The Purchase Price in the APA significantly exceeds any offers that would likely be received for the Purchased Assets on the open market. In addition, the Previously Acquired Assets are owned by the Purchaser following the Administration Proceedings. The Previously Acquired Assets include certain intellectual property required for use in existing operations.[37]

35. In summary, the Transaction represents the best possible going-concern outcome for Infarm Canada and its stakeholders in the circumstances and should be approved, taking into consideration:

    a) The Pre-Filing Process was robust and broadly canvassed the market.

    b) No offers were generated for the Infarm Canada assets in the Pre-Filing Process.

    c) Infarm Canada lacks funding to operate beyond April 8, 2024.

    d) Infarm Canada does not have sufficient funding to run another sales process, and even if it did, it is highly unlikely that the additional process would result in a better outcome for stakeholders.

    e) The Purchaser has already purchased the Previously Acquired Assets in the Administration Proceedings and their use is interconnected with the Hamilton Facility operations.

    f) The Purchase Price is significantly greater than the appraised value for the Purchased Assets in the Confidential Appraisal, and even greater when considering that only approximately 20% of the assets that were

[36] Fourth Galonska Affidavit, *supra* note 1 at para 13; Fourth Report, *supra* note 5 at para 2.3.8.
[37] Fourth Galonska Affidavit, *supra* note 1 at para 11; Fourth Report *ibid* at para 2.3.4.

appraised are owned by Infarm Canada with the remainder being part of the Previously Acquired Assets.

g) The Transaction contemplates continued employment for all of the existing employees on the same or substantially same terms.

h) The Transaction represents an opportunity for the broader community of stakeholders to continue to transact through the ongoing operations of the business, including Infarm Canada's customers, suppliers and landlord.

i) TPC, as the fulcrum creditor, has been consulted in respect of the proposed Transaction and is supportive of it.

j) The Proposal Trustee has indicated that the Transaction is more beneficial than the alternative bankruptcy liquidation.

B. The Sealing Order Should Be Granted

36. Infarm Canada seeks an Order temporarily sealing the Confidential Appendices.

37. The Confidential Appendices contain commercially sensitive information the release of which could harm the interests of stakeholders. They include: (i) the Confidential Appraisal and a summary of the value of the Previously Acquired Assets; and (ii) RSM sales updates in the Administration Proceedings which includes information on prospective purchasers and comments on discussions with the prospective purchasers.[38]

38. The Confidential Appendices contain commercially sensitive information that has the potential to impair the value attained for the Purchased Assets.

[38] Fourth Report, *supra* note 5 at para 2.4.

39. The disclosure of this information prior to closing could prejudice the Company's ability to maximize value for its stakeholders by impairing their ability to pursue alternate transactions should the Transaction not close.

40. The Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* set out the seminal test for determining whether a sealing order or publication ban should be granted. The Court held that a confidentiality order should only be granted when:

    a) the order is necessary to prevent risk to an important interest, including a commercial interest, because reasonably alternative measures will not prevent the risk; and

    b) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes public interest in open and accessible court proceedings.[39]

41. More recently, the Supreme Court of Canada in *Sherman Estate v Donovan* held that to obtain a sealing order, the applicant must "demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance" and must 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.[40] The Supreme Court of Canada also affirmed that a general commercial interest of preserving confidential information was an important interest because of its public character as opposed to a harm to a particular business interest.[41]

[39] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 53 **[TAB 6].**
[40] *Sherman Estate v Donovan,* 2021 SCC 25 at para 3 **[TAB 7]**.
[41] *Ibid* at para 41.

42. Infarm Canada and the Proposal Trustee believe that the Confidential Appendices should not be made public until after the Transaction closes or upon further order of this Honourable Court.[42]

43. Infarm Canada respectfully request that this Honourable Court grant the requested relief sealing the Confidential Appendices.

V. Conclusion

44. For the reasons set out above, Infarm Canada requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF MARCH, 2024

MCMILLAN LLP

Per: 

Preet Saini
Counsel for the Applicant
Infarm Urban Farming Canada Inc

[42] Fourth Galonska Affidavit, *supra* note 1 at para 11; Fourth Report, *supra* note 5 at para 2.4.

APPENDIX "A" TABLE OF AUTHORITIES

TAB	AUTHORITIES
1.	Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended
2.	Komtech Inc (Re), 2011 ONSC 3230
3.	OEL Projects Ltd (Re), 2020 ABQB 365
4.	Royal Bank of Canada v Soundair Corp, [1991] OJ No 1137, 83 DLR (4th) 76 (ONCA)
5.	Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66
6.	Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41
7.	Sherman Estate v. Donovan, 2021 SCC 25

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5.	Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66
6.	Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41
7.	Sherman Estate v. Donovan, 2021 SCC 25

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 20, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of February 20, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 février 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 20 février 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

(b) the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and

(c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.

c) elle subirait vraisemblablement des dommages irréparables s'il ne la rendait pas.

No delay on vote on proposal

(3) The vote of the creditors in respect of a proposal may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.

Vote sur la proposition

(3) Le vote des créanciers sur la proposition ne peut être retardé pour la seule raison que le délai imparti par les règles de droit applicables aux négociations collectives entre les parties à la convention collective n'a pas expiré.

Claims arising from revision of collective agreement

(4) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the insolvent person, the bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Réclamation consécutive à la révision

(4) Si les parties acceptent de réviser la convention collective après que des procédures ont été intentées sous le régime de la présente loi à l'égard d'une personne insolvable, l'agent négociateur en cause est réputé avoir une réclamation à titre de créancier non garanti pour une somme équivalant à la valeur des concessions accordées pour la période non écoulée de la convention.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du

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.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

(4) 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

Restriction à l'égard de la propriété intellectuelle

(9) Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

TAB 2

In the Matter of the Proposal of Komtech Inc.

[Indexed as: Komtech Inc. (Re)]

106 O.R. (3d) 654

2011 ONSC 3230

Ontario Superior Court of Justice,
Kane J.
July 8, 2011

Bankruptcy and insolvency -- Sale of assets -- Court approval -- Presentation by debtor of proposal to its creditors or ability to present proposal not prerequisite for court approval of sale of debtor's assets under s. 65.13 of Bankruptcy and Insolvency Act -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.13.

K Inc. filed a Notice of Intention to make a proposal under s. 50.4 of the Bankruptcy and Insolvency Act ("BIA"), and a proposal trustee was appointed. K Inc. subsequently brought a motion for approval of a bidding process for the auction of its assets and the preliminary approval of an asset purchase agreement. The trustee recommended that the motion be granted. It was unlikely that K Inc. would be able to present a proposal for approval by its creditors.

Held, the motion should be granted.

Presentation of, or the ability to present, a proposal is not a condition to the exercise of the court's jurisdiction under

the Minister of Labour has pointed out[.]

Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.

To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.
(Emphasis added)

[32] The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees. [page661]

[33] Although different legislation, the similarity of language of s. 65.13 of the BIA and s. 36 of the CCAA, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding (a) the filing of an NOI or (b) an order under the CCAA, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors is not a condition to this court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the BIA.
Interim Charges

[34] The Stalking Horse Bidders Charge as security for the

TAB 3

Court of Queen's Bench of Alberta

Citation: OEL Projects Ltd (Re), 2020 ABQB 365

Date: 20200619
Docket: 25 2646438
Registry: Calgary

In the Matter of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended

- and -

In the Matter of the Notice of Intention to Make a Proposal of OEL Projects Ltd.

Oral Decision
of the
Honourable Justice April Grosse

Context

[1] OEL Projects Ltd. filed a Notice of Intention to Make a Proposal under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 on May 20, 2020. BDO Canada Limited is acting as the Proposal Trustee.

[2] The 30-day period for making a proposal has not yet expired; however, on May 21, 2020, OEL entered an Asset and Share Purchase Agreement with McIntosh Perry Energy Limited, which I will refer to as the Purchaser.

[3] OEL now seeks approval and a vesting order in respect of that transaction, pursuant to section 65.13 of the *Bankruptcy and Insolvency Act*. OEL also seeks a distribution order with respect to the sale proceeds.

[18] Pursuant to section 65.13(5), after considering the factors that apply to all transactions under subsection (4), the Court may only grant authorization for the sale if it is satisfied that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and.
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[19] In applying section 65.13 to the facts of this case, as I outlined to counsel during the hearing yesterday, the concern I wanted to make sure was addressed in this case was the potential combined effect of three factors.

[20] First, not all of the unsecured creditors were given notice of the application. In fact, they likely do not even have notice of the NOI yet. OEL and the Proposal Trustee argue that in this particular case, the unsecured creditors really have no material interest because with or without this transaction, and regardless of whether the company is sold as a going concern to the Purchaser or any other entity, or liquidated, all the figures show that the unsecured creditors stand to be paid zero. The delta between the secured debt and available funds is so high that there is no realistic scenario where the remaining unsecured creditors get paid. That is the argument.

[21] The second factor that goes into this combination is that the proposed sale is to a related party. Again, this on its own is not a disqualifying factor, and is specifically contemplated by section 61.13(5). However, it brings additional scrutiny to bear.

[22] The third factor is that there was no sale process, per se. The Board of OEL hired FTI in March to do an analysis of the return that might be expected in both a going concern sale scenario and a liquidation of assets scenario. The going concern sale was expected to yield a higher return, and the Purchaser is paying at the high end of the range estimated by FTI. However, there was no bid or other sale process. There is no evidence of even approaches to potential buyers.

[23] OEL's evidence is that its Board considered a sale process, and determined that it was not feasible. The company's circumstances, combined with a highly mobile clientele and workforce -- both of whom could simply go elsewhere in the face of a sales process -- meant that the Board did not consider a third-party sale process to be realistic. The Board considered that the likely departure of employees and clients would probably mean that the sale process would erode the value that OEL still had. The company also lacks the liquidity to fund a sale process, and would lose an estimated $600,000 during the process. In other words, from the Board's perspective, as I understand it, it was not just a case of having nothing to lose by giving a third-party sale process a try, even if the prospects of finding a buyer were slim. The Board considered that the sale process itself would erode the value that was left in OEL, and there would be nothing left to sell at the end.

[24] In its report, the Proposal Trustee does not specifically endorse nor disagree with the Board's reasoning, per se. However, the Proposal Trustee is of the view that it is unlikely that incurring the costs of a public marketing process would yield sufficient funds to otherwise render funds available for unsecured creditors, and the Proposal Trustee also notes that OEL no longer has the ability to fund its operations, or the time available to administer a protracted public sales process, in light of the calling of the Promissory Note by McIntosh Perry.

[25] I appreciate that section 65.13(3) only references notice to secured creditors. There is no specific requirement, per se, that all unsecured creditors be served. However, the *Bankruptcy and Insolvency Act* is, to a great extent, focused on addressing creditor claims and rights, when a party has become insolvent. Here, there is no realistic chance of there being a proposal if the transaction proceeds. Creditors would still have their rights in bankruptcy, but any value in OEL will be gone. It is at least fair to consider whether creditors should have an opportunity to know about the transaction, scrutinize it, and take any position that might be available to them. The extent to which creditors were consulted is an express factor for consideration under section 65.13(4)(d). In reviewing some of the reported decisions under section 65.13, it seems that in most cases, at least representatives of the unsecured creditors were notified or will be notified somewhere before a final vesting order is granted.

[26] The role of the creditor takes on more potential importance in a circumstance where there is a proposed sale to a related party, with no actual third-party sale process. Their involvement would provide one more potential source of scrutiny in terms of whether the assessment by the company and the Proposal Trustee of the merits of a third-party sale process, and the merits of the proposed transaction are fair and reasonable. It is fine to say that under any scenario, the unsecured creditors will not get paid. However, perhaps they should be able to at least test that proposition.

[27] On the particular facts of this case, my concern as I just outlined has been answered, and am satisfied that I can and should approve the transaction and grant the relief sought by OEL. My reasons, including my analysis of the factors and requirements of section 65.13(4) and (5) follow in bullet form:

- While not all unsecured creditors had notice of the application, the largest unsecured creditors were notified and were represented by counsel. These are not just any unsecured creditors. They are unsecured creditors whose claims are not trade debt being assumed by the Purchaser under the proposed transaction, and they are senior employees, presumably familiar with the engineering business. If anyone were in a position to critique the analysis of OEL, FTI, or the Proposal Trustee, it would be them. While they do not consent, they have raised no particular opposition. I think it would be safe to say that after analyzing the materials, they are resigned to the situation in terms of this transaction. I appreciate that they may well be pursuing whatever rights are available to them going forward. The unsecured creditors, and those not being taken on as assumed debt by the Purchaser, may never recover or may never recover their full amounts. But if that is the case, I am satisfied on the record that it will not be as a result of this transaction, but rather, would be a result of the more general circumstances facing the company.

- OEL's landlords, who will be materially impacted by the proposed transaction, have been consulted, and had notice of the application. They did not come to Court to oppose.

- The number and value of non-served unsecured claims is relatively small. All but one such unsecured claim for just under $3,000 is being taken on as assumed

trade debt by the Purchaser. So for the most part, with that one exception, the unserved unsecured creditors are not prejudiced by the transaction.

- In any event, the delta between the valuation of OEL or its assets, and the secured debt is so large that unless there have been serious errors by OEL, FTI, and the Proposal Trustee, there is no scenario where the unsecured creditors would be paid, unless their debt was assumed by a purchaser. In other words, the proposed transaction does not prejudice them. In fact, arguably, most of them are better off, given the assumption of their accounts by the Purchaser.

- The process leading to the transaction was not as robust as we would often expect to see, particularly for a related-party transaction. There was no public or even private third-party marketing process. However, I find that this was reasonable in the circumstances. The Board did have the independent advice of FTI, both on going concern and liquidation value. The Board's reasoning as to why a sales process is not feasible in this particular set of circumstances makes sense, particularly given the financial circumstances of the company, the lack of liquidity to fund the sale process, the portable nature of the employees and clients, and the circumstances in which a process would have to take place, including the very depressed price of oil, which has a direct impact on work available to engineering consultants who only work in the energy sector, like OEL, and COVID-19 restrictions.

- The Proposal Trustee's opinion is not determinative; however, the Proposal Trustee is aware of his duties to all stakeholders and sees no scenario in which a third-party sale, or a third-party sales process, leads to a better result for OEL or any of its creditors, whether secured or unsecured. The Proposal Trustee approves the process leading up to the transaction and has filed the report required by section 65.13(4)(c) of the *Act*.

- The secured creditors are supportive, and they are not being paid in full.

- As already outlined, the unsecured creditors are not being prejudiced in fact. On the other hand, the transaction is designed to at least potentially preserve 34 jobs in at least the short term. Jobs are not easy to come by for engineers working in the oil and gas sector right now, so that is a relevant consideration.

- Based on both the FTI analysis and the Proposal Trustee's analysis, the Purchaser is paying consideration at the very highest end of the possible range of value that could be recovered for either the company as a going concern, or on a liquidation basis. And in fact, the purchase price is significantly more than would be achieved in a liquidation. Even though there was no bid process, the analysis of FTI and the Proposal Trustee do provide us with some independent benchmarks of value. I am satisfied that the consideration is reasonable and fair.

- The transaction is going to proceed quickly, so as to avoid further erosion of value. It does not contemplate any interim or debt financing, which would be required for any longer sale process. Such financing may or may not be available, and if it were, it would further add to the costs to OEL.

[28] The wording of section 65.13(5) has given me some pause. On its face, subparagraph (a) contemplates that there must be some actual effort made to sell or dispose of the assets to unrelated parties. Subparagraph (b) follows up on this by referring to the consideration in the proposed transaction being superior to the consideration that would be received under any other offer made in accordance with the process. Again, the contemplation seems to be that there would be some process that could at least generate other offers.

[29] The question is whether the Court can approve a sale under section 65.13(5), where there has been no actual sale process. While I am of the view that the Court should be cautious in so doing, I am persuaded that the Court may do so where the particular circumstances warrant. While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision.

[30] Time has not permitted a thorough investigation into the legislative history of section 65.13(5); however, I note that in ***Re Komtech***, 2011 ONSC 3230, Justice Kane reviewed the history of section 65.13. At paragraph 31, Justice Kane cited from some Senate committee meetings that were part of the process leading up to the introduction of the bill that included section 65.13. One of the comments in those meetings was that the bill in question is designed to promote restructuring , which had been found to provide greater protection than liquidations in bankruptcy. This does not mean that anything goes. In fact, the comments at the committee also confirmed that the bill sought to increase transparency, provide better opportunities for participation, and approve checks and balances. But I must keep in mind that the provision is designed to be facilitative of restructuring. In ***Komtech***, Justice Kane found that a transaction could be approved under section 65.13, even when the insolvent party would not be in a position to actually make a proposal.

[31] Counsel provided me with the decision of Justice Morawetz in ***Re Target Canada Co.***, 2015 ONSC 2066. Justice Morawetz was considering the analogous provision to section 65.13(5) under the CCAA. While the facts in ***Target*** are distinguishable in many ways, Justice Morawetz's decision did approve an asset sale where there had been no marketing process for the assets in question. In so doing, he held that the Court should not take a formulaic approach to the provision, and must be satisfied overall that: (as read)

> Sufficient safeguards were adopted to ensure that the related-party transaction is in the best interests of the stakeholders of the applicants, and that the risk to the estate associated with a related-party transaction have been mitigated.

And that's from paragraph 15.

TAB 4

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

TAB 5

In the Court of Appeal of Alberta

Citation: **Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66**

Date: 20210218
Docket: 2101-0002-AC
2101-0004-AC
Registry: Calgary

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Docket: 2101-0004-AC

Between:

Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish, Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi, Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,

(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

TAB 6

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

TAB 7

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 *Interveners*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média 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, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

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.

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

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

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

The judgment of the Court was delivered by

KASIRER J. —

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

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

proportionality, the benefits of that order restricting openness outweigh its negative effects.

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

[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.

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[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,

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

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

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

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

même temps précisé que l'intérêt important doit être exprimé en tant qu'intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n'aurait pas été suffisant, mais « l'intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l'égard de la jurisprudence relative à l'arrêt *Oakes*, laquelle met l'accent sur l'objectif « urgen[t] et rée[l] » d'un texte de loi d'application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L'expression « intérêt important » vise donc un large éventail d'objectifs d'intérêt public.

[42] Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants pour l'application de ce test, je partage l'opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu'ils constatent les intérêts publics importants (par. 56). Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d'une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d'une part, un intérêt important et celui de constater, d'autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu'un intérêt public important valide n'est pas sérieusement menacé au vu des faits de l'affaire ou, à l'inverse, parce que les intérêts constatés, qu'ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] Le test énoncé dans *Sierra Club* continue d'être un guide approprié en ce qui a trait à l'exercice du pouvoir discrétionnaire des tribunaux dans des