

Court of Appeal File No. COA-24-CV-1328  
Court File No. CV-23-00701672-00CL

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/  
Respondent in Appeal

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC.

Respondents/  
Respondents in Appeal

**FACTUM OF THE RESPONDENTS,  
AJGL GROUP INC. AND 1001079582 ONTARIO INC.**

March 24, 2025

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**FACTUM OF THE RESPONDENTS,  
AJGL GROUP INC.**

**PART I - INTRODUCTION**

1. The order of the Honourable Justice Black (the “**Motion Judge**”) dated December 10, 2024 (the “**Order**”) is discretionary in nature. There was no error in law, serious misapprehension of the evidence, or exercise of discretion based upon erroneous or irrelevant considerations committed by the Motion Judge.
2. The Appellant omits key facts, rendering the Appellant’s account of the December 10, 2024, hearing (the “**Hearing**”) before the Motion Judge that resulted in the Order fundamentally inaccurate. The Appellant does not refer to the actual recommendations of the receiver at the Hearing, including by omitting any reference to paragraphs 9 and 10 of the Motion Judge’s

December 10 Endorsement. In particular, the Appellant asserts that the Motion Judge “rejected”<sup>1</sup> the recommendation of the receiver. However, the Motion Judge *accepted* the recommendations of the receiver made during submissions at the Hearing.

3. At the Hearing, the receiver expressed a concern about the sales process, that the outcome “risk[ed] improvidence” and the receiver recommended that the Motion Judge provide direction on whether the sales process should continue, under the continued control and discretion of the receiver, in light of the receiver’s concern that, if the receiver did not conduct a “further auction process”, the outcome, objective and purpose of the receivership would not be achieved, and would clearly be assailable.

4. By analogy to comparing “conduct” and “outcome” in a medical operation, consider the situation if the operating surgeon, post surgery, stated to the non-attending chief surgeon that the planned conduct of the operating team as carried out during the process was unassailable, however, the outcome is that the goal of curing the patient would not be met, and therefore recommended to the chief surgeon that the surgery continue with a revision to the planned conduct. The analogous issue on appeal is does the supervising chief surgeon (the Motion Judge) have the jurisdiction to agree with the surgeon, and therefore to answer that given that the goal of curing the patient will not be met, please continue the surgery with the revised process. The integrity of the sales process is maintained when the court on an approval motion, in these circumstances, exercises its jurisdiction to continue the sales process to achieve the outcome the process is supposed to achieve.

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<sup>1</sup> Factum of the Appellant, paras. 6, 31, 44, 46.

5. In *Royal Bank of Canada v. Soundair Corp.* (“**Soundair**”), the court did not find that process trumps outcome in any circumstances, let alone in the unique circumstances where a receiver expresses doubt about the outcome of the process and recommends that the process continue if the Court, at the request of the receiver, finds that the outcome is an improvident price.<sup>2</sup>

6. The Appellant brings this appeal seeking a result which would amount to a rejection of the receiver’s recommendation, without any basis on which that result could be premised.

7. AJGL Group Inc. (“**AJGL**”) and 1001079582 Ontario Inc. (“**100 Inc.**”, and together with AJGL the “**AJGL Parties**”) ask that the appeal be dismissed.

## PART II - SUMMARY OF FACTS

### Background

8. AJGL is the beneficial owner of the shares in 5004591 Ontario Inc. and the beneficial owner of 2849, 2851, 2855 and 2857 Islington Avenue, Toronto (the “**Toronto Property**”).<sup>3</sup> 100 Inc. is a wholly owned subsidiary of AJGL.<sup>4</sup>

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<sup>2</sup> *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ONCA) [**Soundair**], Book of Authorities of AJGL Group Inc. and 1001079582 Ontario Inc. (“**AJGL Parties**”), Tab 7 (“**AJGL BOA**”).

<sup>3</sup> Aide Memorandum of AJGL Parties dated December 9, 2024 (“**AJGL Memorandum**”) at para 2, Appeal Record of the Appellant (“**Appeal Record**”), Tab 7, p 593; Compendium of the Respondents, AJGL Parties (“**AJGL Compendium**”), Tab 7, p 85.

<sup>4</sup> AJGL Memorandum at para 3, Appeal Record, Tab 7, p 593; AJGL Compendium, Tab 7, pp 85-86.

## Appointment of the Receiver

9. Pursuant to an order dated December 6, 2023<sup>5</sup>, as amended<sup>6</sup>, (the “**Appointment Order**”), TDB Restructuring Limited is the receiver (the “**Receiver**”) over the Toronto Property.

10. Paragraph 27 of the Appointment Order provides that the Receiver may seek advice and direction at an approval motion (and at any time):

27. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.<sup>7</sup>

## The APS and Approval Motion

11. On October 7, 2024, the Appellant and Receiver entered into an agreement for purchase and sale of the Toronto Property (the “**APS**”), which was subject to the approval of the Court.<sup>8</sup>

12. The Appellant received what it bargained for under the APS, namely that its bid be considered for acceptance. With respect to any “Bid” (as defined in section 7 of Schedule D to the APS) submitted prior to the bid deadline of June 3, 2024, the Appellant’s bid was considered and provisionally determined by the Receiver to be the “Successful Bidder”, as defined in the APS. The APS also expressly provided that “acceptance” of the Appellant’s offer occurs only when the APS has been approved by the Court pursuant to section 12 in Schedule D to the APS.

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<sup>5</sup> Appointment Order, Appendix A to the Third Report of the Receiver dated November 25, 2024 (the “**Third Report**”), the Motion Record of the Receiver dated November 25, 2024 (“**RMR**”), Tab 2A, p. 38, Appellant’s Appeal Book and Compendium (“**ABCO**”), Tab 6, p 65; AJGL Compendium, Tab 2, p 27.

<sup>6</sup> Order dated March 1, 2024, Appendix B to the Third Report, RMR, Tab 2B, p. 56, ABCO Tab 7, p 83; AJGL Compendium, Tab 3, p 44.

<sup>7</sup> Appointment Order at para 27, Appendix A to the Third Report, RMR, Tab 2A, p. 38; ABCO, Tab 6, p 69; AJGL Compendium, Tab 2, p 39.

<sup>8</sup> Third Report at paras 23-24, RMR, Tab 2, p. 29, ABCO, Tab 8; AJGL Compendium, Tab 1, p 19.

13. The Receiver, pursuant to section 2.15 of the APS, filed and served the “Vesting Order Motion” on November 25, 2024, which sought an “Approval and Vesting Order”, approving the sale of the Property to the Appellant under the terms of the APS (the “**Approval Motion**”). The Approval Motion was scheduled to be heard by the Motion Judge on December 4, 2024.<sup>9</sup> The Receiver filed an initial factum for that motion on December 2, 2024, which recommended that the court approve the APS.<sup>10</sup>

14. On December 3, 2024, 100 Inc. made two offers to the Receiver in respect of the Toronto Property (the “**Initial Offers**”).<sup>11</sup>

15. In a supplementary factum filed on December 3, 2024, the Receiver acknowledged that the court had discretion to consider the later bids.<sup>12</sup> This was not precluded by the APS:

- (a) The APS does not govern, restrict or mandate the conduct of the Receiver **after** it has brought the “Vesting Order Motion” seeking an “Approval and Vesting Order”;
- (b) The APS does not state that the Receiver cannot express concerns as to whether a bid is “unreasonable” or “improvident”; and
- (c) The APS does not guarantee approval of the sale on the terms in the APS if the price offered by the Appellant is found to be “unreasonable” or “improvident”.

16. The Receiver was free to make recommendations it deemed appropriate, regarding events that transpired after it brought the Approval Motion.

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<sup>9</sup> Notice of Motion of the Receiver dated November 25, 2024, Appeal Record, Tab 1, p 5; AJGL Compendium, Tab 8, p 110.

<sup>10</sup> Factum of the Receiver dated December 2, 2024 at para 20, Appeal Record, Tab 3, p 347; AJGL Compendium, Tab 9, p 131.

<sup>11</sup> Supplementary Factum of the Receiver dated December 3, 2024 (“**Supplementary Factum of the Receiver**”) at paras 2-4, Appeal Record, Tab 4, p 366; AJGL Compendium, Tab 10, p 149.

<sup>12</sup> Supplementary Factum of the Receiver at paras 5, 7, 14, Appeal Record, Tab 4, pp 366, 367, 369; AJGL Compendium, Tab 10, pp 149-152.

17. The hearing of the Approval Motion commenced on December 4, 2024, but was subsequently adjourned to December 10, 2024. In his endorsement dated December 4 (the “**December 4 Endorsement**”), the Motion Judge, recognizing the additional offers that had been made shortly before the hearing and “certain evidence purporting to confirm a considerably higher value for the property at issue” (being evidence filed by the AJGL Parties), the Motion Judge specifically ordered that “if any parties wish to file additional offers, I have directed that this be done by no later than Noon on Monday, December 9”.<sup>13</sup>

18. On December 6, 2024, 100 Inc. made a third offer to the Receiver in respect of the Toronto Property (the “**Third Offer**”) which is an “additional offer” expressly authorized in accordance with the December 4 Endorsement.<sup>14</sup> The Appellant did not appeal the Motion Judge’s December 4th direction which sanctioned “additional offers”.

19. The Receiver provided its recommendations at the Hearing regarding the advice and directions it sought from the Motion Judge. The Receiver recognized and recommended that: “at a certain level, a late-breaking offer can and perhaps must be considered simply by dint of its value.”<sup>15</sup> The Receiver also recommended that if the Court determined that the AJGL offer was “substantially higher” then the Receiver may not have made sufficient efforts to obtain a sale price which was not improvident. If that was the case, the Receiver recommended that, the Court

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<sup>13</sup> Endorsement of Justice Black dated December 4, 2024, ABCO, Tab 3A, p 32; AJGL Compendium, Tab 11, p 154; Affidavit of Simion Kronenfeld sworn December 3, 2024 (“**Kronenfeld December 3 Affidavit**”), Appeal Record, Tab 10, pp 1019-1026; AJGL Compendium, Tab 5, p 67.

<sup>14</sup> Third Supplement to the Third Report of the Receiver dated December 7, 2024 at para 28, Appeal Record, Tab 5, p 382; AJGL Compendium, Tab 4, p 65; Affidavit of Jamie Erlick sworn December 8, 2024, Exhibit 5, Appeal Record, Tab 12, p 1193; AJGL Compendium, Tab 6, p 80.

<sup>15</sup> Endorsement of Justice Black dated December 10, 2024 (“**December 10 Endorsement**”) at para 9, ABCO Tab 3B, pp 35-36; AJGL Compendium, Tab 12, p 157.

consider ordering a “further process” because such a further process would guard against the Receiver’s concern that “the subject price risks improvidence”.

20. The Receiver put two competing offers before the Motion Judge: the Appellant’s offer, and AJGL’s offer (if the Court considered the AJGL offer to be “significantly higher” then the Receiver recommended that the Court consider it), and recommended a solution to address the resulting concern that the Appellant’s price risked improvidence (i.e., for a further auction process to be conducted).

21. At the Hearing, the Motion Judge dismissed the Approval Motion. In his endorsement, the Motion Judge recognized that the Receiver had sought the advice and direction of the Motion Judge as to whether “37% is a sufficiently higher price to qualify as “substantially higher”” and if so, whether a further auction process should be ordered<sup>16</sup>:

[...] the Receiver also clearly recognizes that at a certain level, a late-breaking offer can and perhaps must be considered simply by dint of its value.

[10] It is apparent that the Receiver allows that the Third Offer may be in that category. Before me today Receiver’s counsel submitted that, albeit the Receiver’s first position remains that the proposed subject transaction should be approved, it now says that, as a second possibility, **if the court is persuaded that 37% is a sufficiently higher price to qualify as “substantially higher” such that that the subject price risks improvidence, then the Receiver suggests a further “auction” process whereby the bidders are asked to submit their best offers by a specified date in the near term. ...** [emphasis added]

22. The Motion Judge answered in the affirmative:

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<sup>16</sup> December 10 Endorsement at paras 9-10, ABCO Tab 3B, pp 35-36; AJGL Compendium, Tab 12, pp 157-158.

[30] In the unique circumstances as described, I find that this is the preferable approach.

[...]

[34] Nonetheless I find that the magnitude by which the Third Offer exceeds the subject price does in fact qualify as “substantially higher,” [...]

23. The Motion Judge directed that the further auction process must follow the format recommended by the Receiver, as a process “whereby the bidders are asked to submit” to the Receiver “their best offers by a specified date in the near term.”,<sup>17</sup> and continue under the direction of the Receiver (“subject to input from the Receiver, about any fine tuning required”).<sup>18</sup>

### PART III - ISSUES

24. The issues on this appeal are:

- (a) What is the applicable standard of review?
- (b) Whether the Motion Judge erred in principle, made an error of law or exercised his discretion unreasonably?

### PART IV - LAW & ARGUMENT

25. The AJGL Parties do not dispute that the Appellant can appeal the Order as of right pursuant to subsection 193(c) of the *Bankruptcy and Insolvency Act*.<sup>19</sup>

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<sup>17</sup> December 10 Endorsement at para 10, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 157.

<sup>18</sup> December 10 Endorsement at para 35, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 160.

<sup>19</sup> Subsection 193(c), *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [*BIA*].

## Considerable Defence to the Motion Judge is Required

26. The decision of the Motion Judge is entitled to considerable deference on appeal.<sup>20</sup> Appellate intervention is only appropriate where “the judge considering the receiver’s motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations.”<sup>21</sup>

27. The Supreme Court, in the context of a proceeding under the *Companies’ Creditors Arrangement Act*, has held that a “high degree of deference” is owed to discretionary decisions by judges supervising such proceedings, and appellate intervention is only justified where a judge “erred in principle or exercised their discretion unreasonably.”<sup>22</sup> Courts have held that the same principles apply in reviewing the exercise of discretion in the bankruptcy context.<sup>23</sup>

## The Applicable *Soundair* Principles

28. This Court’s decision in *Soundair* summarized the applicable principles to be considered by a court in determining whether to approve a sale of property by a receiver:

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.

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<sup>20</sup> *Re Harmon International Industries Inc.*, [2020 SKCA 95](#) [*Harmon*] at para. 40; AJGL BOA, Tab 5.

<sup>21</sup> *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, [2018 ONCA 713](#) [*Reciprocal*] at para 54; AJGL BOA, Tab 6.

<sup>22</sup> *9354-9186 Québec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#), at para 53; AJGL BOA, Tab 1, citing *Grant Forest Products Inc. v. Toronto-Dominion Bank*, [2015 ONCA 570](#), at para 98; AJGL BOA, Tab 2.

<sup>23</sup> *Harmon* at para 41; AJGL BOA, Tab 5.

4. It should consider whether there has been unfairness in the working out of the process.<sup>24</sup>

### **No Palpable and Overriding Error with Respect to Findings of Unique Circumstances**

29. The conduct of the Receiver at the Hearing – the seeking of advice and direction, and the communication at the Hearing of the Receiver’s concerns and recommendations that were set out in the December 10 Endorsement – are truly “unique circumstances” before the Motions Judge. In paragraph 11 of the December 10 Endorsement the Motion Judge identified the conduct of the Receiver cited in the preceding paragraphs 9 and 10 as unique circumstances: “In determining what to do **in these circumstances**, I first observe that I regard the circumstances as unique, likely singular, and unlikely to be replicated in future (or certainly not often)” [emphasis added].<sup>25</sup>

30. Further, prior to filing its Supplementary Factum for the Approval Motion, the Receiver’s motion material did not contain any information regarding the issue whether the price offered by the Appellant in the APS was improvident (i.e., there was no appraisal, or information in respect of the sale of comparable properties, among other things).<sup>26</sup> The only mechanism available to an interested party for obtaining any information about the proposed sale price of the Toronto Property was for the party to sign a confidentiality agreement with the Receiver. However, they would be precluded from making an offer to purchase the property if they did so. That is, if the interested party determined that the price in the APS was improvident, it could not remedy the improvidence by offering a provident price.

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<sup>24</sup> *Soundair*; AJGL BOA, Tab 7.

<sup>25</sup> December 10 Endorsement at para 11, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 158.

<sup>26</sup> Kronenfeld December 3 Affidavit at paras 18-25, Appeal Record, Tab 10, pp 1019-1026; AJGL Compendium, Tab 5, pp 72-73.

31. The process had the effect of effectively making it impossible for a party to make an informed decision on whether the Appellant's offer was improvident **and** take a step to mitigate the consequence of same by making a subsequent bid. The Receiver appropriately exercised its judgment to disclose certain information relating to the delta in bids made in these circumstances.

32. These unique circumstances (among others) were recognized by the Motion Judge and formed the basis (in part) for the appropriate exercise of the Motion Judge's discretion.<sup>27</sup> The Appellant has not identified any palpable and overriding error with the Motion Judge's findings of fact.

**The Motion Judge Accepted the Recommendation of the Receiver and Maintained the Integrity of the Sales Process**

33. The Appellant mischaracterizes the Motion Judge's decision.

34. It is trite law that a receiver is expected to provide its recommendations to the court in the context of an approval and vesting motion. Contrary to the Appellant's submissions, the Motion Judge accepted the Receiver's recommendation in accordance with the principles in *Soundair*.<sup>28</sup> There is no basis on which the Appellant can argue that the Motion Judge ought to have ignored the Receiver's assessment of its prior recommendations in light of further developments and the Receiver candidly addressing issues before the Court.

35. In its Supplementary Factum dated December 3, 2024, the Receiver's position was that the Motion Judge could "refuse to approve the existing offer where the new offer is "substantially higher" than the existing offer."<sup>29</sup> The Motion Judge's decision aligned with this recommendation.

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<sup>27</sup> December 10 Endorsement at para 11-14, ABCO, Tab 3B, p 36; AJGL Compendium, Tab 12, p 158.

<sup>28</sup> *Soundair* at para 16; AJGL BOA, Tab 7.

<sup>29</sup> Supplementary Factum of the Receiver at para 7, Appeal Record, Tab 4, p 367; AJGL Compendium, Tab 10, p 150.

36. Rather, it is the Appellant who seeks (on appeal) an outcome that would require the Court to proceed against the recommendation of the Receiver, thereby rendering a decision contrary to the principles in *Soundair*.<sup>30</sup>

37. There is no basis for any concern that the Motion Judge undermined the integrity of the sales process by doing work the Receiver was responsible for.<sup>31</sup> The Receiver offered to do more work by continuing the sales process, and the Motion Judge accepted that offer. Paragraphs 5 and 8 of the Order expressly provide that it is the Receiver who will run the auction process and bring any approval motion before the court.<sup>32</sup> It is the Receiver, not the Court, who will run the sales process.

### **The Motion Judge Properly Applied the First *Soundair* Criteria**

38. By considering and accepting the recommendations of the Receiver, the Motion Judge appropriately considered and gave effect to the first principle in *Soundair*.

39. In its submissions, the Receiver acknowledged that, if the Court determined that the AJGL offer was “substantially higher” then the Receiver may not have made sufficient efforts, in the sales process, to obtain a sale price which was not improvident. If that was the case, the Receiver recommended that the Court consider ordering a “further process” because such a further process would guard against the Receiver’s concern that “the subject price risks improvidence”.<sup>33</sup>

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<sup>30</sup> *Soundair* at para 58; AJGL BOA, Tab 7.

<sup>31</sup> *Soundair* at para 43; AJGL BOA, Tab 7.

<sup>32</sup> Order of Justice Black dated December 10, 2024, at paras 5, 8, ABCO, Tab 4B, p 46; AJGL Compendium, Tab13, pp 163-164.

<sup>33</sup> December 10 Endorsement at para 10, ABCO, Tab 3B, pp 35-36; AJGL Compendium, Tab 12, p 157.

40. The Receiver’s submission to the Motion Judge was straightforward: *before* the Third Offer was received, the Receiver did not think it was necessary to continue the sales process, however, if the Court found that the Third Offer is “substantially higher” then, because “the subject price risks improvidence”, it would be appropriate to continue the sales process.

41. In *Soundair*, the Court expressly noted that the category of late offers which are appropriate for consideration at an approval hearing includes offers which are “substantially higher” than the competing offer:

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 **If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly.** In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.<sup>34</sup> [emphasis added]

42. The Motion Judge accepted the Receiver’s recommendation and invitation to conduct a further auction process as an appropriate safeguard against an improvident price, and the Receiver’s acknowledgement that the Appellant’s price may be unreasonable and improvident.<sup>35</sup>

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<sup>34</sup> *Soundair* at paras 30-31; AJGL BOA, Tab 7.

<sup>35</sup> December 10 Endorsement at paras. 9-10, ABCO, Tab 3B, pp. 35-36; AJGL Compendium, Tab 12, p 157.

The Motion Judge's deference to the recommendations of the Receiver was consistent with this Court's decision in *Soundair*.<sup>36</sup>

43. By accepting the Receiver's recommendation to conduct a further auction process, the Motions Judge accepted the "commercial judgment of the receiver" in accordance with the principle set out in paragraph 46 of *Soundair*. The reasonable expectation of the Appellant qua purchaser was met when the Motion Judge, at the approval Hearing, accepted the "commercial judgement" of the Receiver to conduct the further auction process set out in the Order. The integrity of the sales process is maintained when receivers at an approval hearing can express their "commercial judgement", even if the judgment is a concern that the price before the court is improvident and a recommendation that the solution is to continue the sales process.

44. In *Soundair*, there was a single offer which the receiver recommended be considered by the Court at the approval hearing, and the receiver was not recommending a continuation of the sales process (under any circumstances), or that more should be done to obtain a price that was not improvident.

45. In this case, the unique circumstances included that the Receiver put two competing offers before the Motion Judge: the Appellant's offer, and AJGL's offer (if the Court considered the AJGL offer to be "significantly higher" then the Receiver recommended that the Court consider it), and recommended a solution to address the resulting concern that the Appellant's price risked improvidence (i.e., for a further auction process to be conducted).

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<sup>36</sup> *Soundair* at para 14; AJGL BOA, Tab 7.

46. Contrary to paragraph 3 of the Appellant’s factum, the Motion Judge did not find that the sales process itself was “unassailable”. The Motion Judge stated: “I find that the conduct of the Receiver and those involved in the process, including Colliers, was unassailable.”<sup>37</sup> The Motion Judge’s determination that the conduct of the participants was unassailable does not amount to a finding that the sales process itself or its outcome was “unassailable”, nor did it preclude the Motion Judge’s exercise of his discretion to accept the Receiver’s recommendation that more should be done to avoid an improvident price.

47. The Appellant’s arguments fail to distinguish between the sales process which *had been recommended* to the Court by the Receiver in its initial written submissions and the sales process which *was being recommended* to the Court by the Receiver in the actual Hearing itself. The Motion Judge was careful in the December 10 Endorsement to distinguish between the Receiver’s prior recommendation and the Receiver’s current recommendations at the Hearing:

4. On December 4, and **until the arrival of this latest offer**, the Receiver’s position **had been** [...]

6. In the circumstances of **last week**, in reliance on those cases, the Receiver’s position **was that** [...] <sup>38</sup> [emphasis added]

48. The Receiver’s submissions and recommendations to the Motion Judge were about the sales process. The candid providence of recommendations to the Court is a necessary part of maintaining the efficacy of the sales process.

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<sup>37</sup> December 10 Endorsement at para 33, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 160.

<sup>38</sup> December 10 Endorsement at paras 4, 6, ABCO, Tab 3B, p 36; AJGL Compendium, Tab 12, p 157.

49. In *Soundair*, the Court did not have to address a question, raised by the receiver, of whether more should have been done with respect of the sales process to obtain a reasonable and provident price. Further, the last sentence of paragraph 31 of *Soundair* is distinguishable because:

- (a) in that case, the sale was unequivocally recommended by the receiver; and
- (b) the “process” referred to was not a further sales process recommended by the receiver and was not a sales process to be conducted by the receiver but was a sales process to be conducted by the Court itself, and immediately, at the approval hearing.<sup>39</sup>

50. The Order under appeal provides that after the further sales process recommended by the Receiver has been completed, and the Receiver has made its recommendation about which offer should be approved, then, and only then, will the Court participate in that process in the context of a motion to approve the sale. There is no basis on which to suggest the Court is improperly participating in this auction process.

51. The simplicity of the factors before the Motion Judge (price and only price) and the simplicity of the “further auction process” recommended by the Receiver to obtain an appropriate value are unique factors that were not present in *Soundair*.

52. With respect to the uniqueness of these circumstances of the Receiver’s submissions before the Motion Judge at the Hearing, it is notable that the Appellant has not referred this Court to any authority where a receiver made similar recommendations during an approval hearing, let alone a case in which the court rejected the receiver’s submissions in that respect. There is no such case.

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<sup>39</sup> *Soundair* at para 31; AJGL BOA, Tab 7.

53. Contrary to the Appellant’s submissions, there is no likelihood of a chilling effect. Rather, the ability of a receiver to obtain a price which is not improvident is strengthened if prospective purchasers understand that:

- (a) they should offer a price which is not substantially lower than a price which could be offered at the approval hearing; and
- (b) a receiver can, if it is concerned that the price of a bidder risks being improvident, recommend a further auction process which allows existing bidders to resubmit bids.

54. *Soundair* does not stand for the proposition that the court must approve an offer which the Court determines to be unreasonable or not provident. Likewise, *Soundair* does not stand for the proposition that the Court at an approval hearing must, if the sale process was “unassailable”, approve an offer which the Court determines to be unreasonable and not provident.

### **The Motion Judge Appropriately Considered the Interests of all Parties**

55. The Motion Judge appropriately considered the interests of the creditor and other stakeholders<sup>40</sup>:

[28] Not surprisingly, in light of the 37% larger amount of the Third Offer, it has attracted the support of various parties with a potential stake in the proceeds. Ms. Greenspoon-Soer for the applicant Cameron Stephens Mortgage Capital Ltd., Mr. Taylor for 2858087 Ontario Inc. and Issam A. Saad, creditors of relevant entities, and Mr. Mosonyi on behalf of the estate trustee of the late Nicholas Kyriacopoulos each indicate, albeit for slightly different reasons, that their respective clients favour recognition of the Third Offer, and a process to include AJGL/100 with a view to maximizing the return for the Toronto Property, rather than approval of the subject transaction.

[...]

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<sup>40</sup> *Soundair* at para 30; AJGL BOA, Tab 7.

[34] Nonetheless I find that the magnitude by which the Third Offer exceeds the subject price does in fact qualify as “substantially higher,” and that it is not appropriate or in the interests of a majority of stakeholders to leave that much money “on the table.”<sup>41</sup>

56. The Motion Judge likewise appropriately considered the interests of the debtor. Contrary to paragraph 15 of the Amended Notice of Appeal and paragraph 26(a) of the Appellant’s factum, the Motion Judge did not reject the AJGL Parties’ arguments that AJGL was the beneficial owner of the Toronto Property. Rather, the Motion Judge appropriately recognized this interest:

[17] It is clear that AJGL assembled the five properties making up the Toronto Property and developed them over a number of years, ultimately obtaining planning approval for a 110-unit mid-rise condo building which Colliers (engaged by the Receiver) marketed for sale in the receivership.

[18] It is as a result of that ownership and that “sweat equity” that AJGL, via 100 (hereafter AJGL and 100 will be referred to from time to time collectively as “AJGL”), seeks “to acquire ownership back from the Receiver by submitting the highest bid.”<sup>42</sup>

57. The Motion Judge also considered the interests of the Appellant, qua purchaser, in the very terms of the further auction process ordered by the Motion Judge. The process identifies the Appellant as one of the select and small group of persons qualified to participate in the continued auction process. In particular, qualified bidders in the further auction process are defined in paragraph 79(b) of AJGL’s aide memoire as: “persons who have submitted offers or bids for the Islington Property to date”.<sup>43</sup> The Motion Judge’s endorsement stated:

[35] As such, and subject to input from the Receiver about any fine-tuning required, I am ordering the process (the “Proposed Auction Process”), set out in paragraph 79(b) of AJGL’s Aide Memoire, save and except that the deadline for further bids should be 5:00 p.m. on December 16 (rather than December 18 as suggested in that

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<sup>41</sup> December 10 Endorsement at paras 28, 34, ABCO, Tab 3B, pp 37-38; AJGL Compendium, Tab 12, pp 159-160.

<sup>42</sup> December 10 Endorsement at paras 17-18, ABCO, Tab 3B, p 36; AJGL Compendium, Tab 12, p 158.

<sup>43</sup> AJGL Memorandum at para 79(b), Appeal Record, Tab 7, p 615; AJGL Compendium, Tab 7, p 107.

paragraph). To be clear, as will be evident, the subject purchaser is able to participate in this further process, and so is not precluded from making a further bid to purchase the Toronto Property.<sup>44</sup>

58. The further auction process set out in the Order:

- (a) does not mandate that the Toronto Property will be sold to the highest bidder;
- (b) does not mandate that the Appellant must increase its price, or alter any terms set out in the APS. It states that the Appellant's bid: "may be the same as ...the amount in any of their previous bids"; and
- (c) affirms and provides for the Receiver's continued role in the sales process: "the Receiver shall determine which of such bids the Receiver intends to recommend to the Court for acceptance and approval".<sup>45</sup>

59. As a result, under the terms of the further auction process, the Appellant can participate in the further sales process and is unfettered in its ability to make the same submissions it asserts on this appeal regarding the equities/consideration which it says should weigh in its favor as a bidder who had submitted a bid in compliance with the original deadline for bids (being June 3, 2024) and then resubmitted a bid in compliance with the further sales process (assuming the Appellant complies with the further sales process).

60. Thus, the terms of the further auction process in the Order did not, with respect to the factor of the efficacy and integrity of the sales process regarding the participation of a compliant bidder, reset all of the equities or arguments available to the Appellant in respect of any subsequent approval motion to be brought following the further auction process.

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<sup>44</sup> December 10 Endorsement at para 35, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 160.

<sup>45</sup> Order of Justice Black dated December 10, 2024 at para 8(a), ABCO, Tab 4B, p 46; AJGL Compendium, Tab 13, pp 163-164.

61. The special status of the Appellant in the continued sales process, including the fact that the winning bidder in the continued sales process will not necessarily be the highest bidder, and the continuation of the Receiver's role in running the sales process, support the conclusion that, contrary to paragraphs 3b, 25(b) and 32 of the Appellant's Factum, the Order directs a continued sales process. It does not "convert the sales process into an auction". The Receiver's role remains the same, thus the scenario which the case law cautions against – of conducting an auction at an approval hearing, and the court stepping into the shoes of a receiver and doing the job of a receiver – is not present in the Order under appeal. On the contrary, under paragraphs 5 and 8 of the Order, the Receiver continues its role of running the sales process, exercising its discretion and making recommendations to the Court at the next motion for an approval and vesting order. The sales process under the terms of the Order continues to be a process under the supervision and direction of the Receiver, with the Receiver's recommended bid subject to approval of the court.

62. The very short (six day) duration of the further sales process also considers the interest of the Appellant by eliminating the prospect of prejudice arising from significant delay.

63. Further, in ordering the reimbursement of the Appellant's costs thrown away, the Appellant's interests were considered, and the integrity of the sales process was maintained, in accordance with the principles in *Peahill Capital Inc. v. 1000093910 Ontario Inc.*<sup>46</sup>

64. In *Peahill*, rather than approving the receiver's recommended stalking horse agreement to sell the subject property to the bidder, 2557904 Ontario Inc., who alone had participated in the

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<sup>46</sup> *Peahill Capital Inc. v. 1000093910 Ontario Inc.*, [2024 ONSC 3887](#), aff'd in part [2024 ONCA 584](#) [*Peahill*] ; AJGL BOA, Tabs 3 and 4.

sales process, Sutherland J. terminated that agreement and approved a transaction under which the debtor would redeem by refinancing the first mortgage.

65. The Court of Appeal declined to set aside the motion judge's decision, finding that he had identified the relevant governing principles. The Court likewise stated that "protecting the integrity of the receivership sale process required the court to impose, as a condition of properly exercising its judicial discretion to grant an 11th hour redemption request, the obligation that the redeeming Debtor pay the successful bidder's reasonable costs thrown away."<sup>47</sup>

66. Compensating the Appellant for its costs thrown away if it ultimately was not the successful bidder upholds these principles.<sup>48</sup> The Motion Judge elected to order this compensation despite the fact that the Appellant did not put any evidence before the Motion Judge of detrimental reliance or any prejudice arising from its participation in the bidding process.

67. The Appellant is in a different position to the purchaser in *Soundair*.<sup>49</sup> There is no evidence that the Appellant "bargained at some length" or at what expense. To the contrary, the APS is a standard form and does not identify any counsel for the Appellant (as purchaser) suggesting the Appellant may not have had a lawyer assisting with filling in the blanks in the draft standard form APS in the Receiver's data room.

68. Unlike the judgment reversed on appeal in *Reciprocal*, the Motion Judge fully considered the interest of the Appellant. In *Reciprocal* "the motion judge did not give any consideration to the interests of the purchaser".<sup>50</sup>

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<sup>47</sup> *Peakhill* at para 16; AJGL BOA, Tab 3.

<sup>48</sup> December 10 Endorsement at para 36, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 12, p 160.

<sup>49</sup> *Soundair* at para 40; AJGL BOA, Tab 7.

<sup>50</sup> *Reciprocal* at para 61; AJGL BOA, Tab 6.

69. The Motion Judge’s decision shows a careful balancing of interests which is entitled to deference by this Court.

### **There Was No Misuse of Confidential Information**

70. This ground of appeal is another unfounded challenge by the Appellant to the authority and conduct of the Receiver and should be dismissed.

71. The limited information disclosed by the Receiver regarding the difference or spread in price between the Appellant’s offer and the late bids (submitted prior to the Third Offer), that “the late offers are only marginally (6.7%- 14.2%) higher” (the “**Information**”)<sup>51</sup> was not confidential information.

72. The decision of the Receiver to disclose information about competing bids is a matter of discretion of the Receiver and fully within the Receiver’s authority as an officer of the court charged with conducting the sales process. Paragraph 3(m) of the Appointment Order provides that the Receiver is authorized and empowered:

...to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Properties and receivership, and to share information, subject to terms as to confidentiality as the Receiver deems advisable.<sup>52</sup>

73. The Appellant raises this issue for the first time on Appeal. The Information was disclosed by the Receiver on December 3, 2024, in the Receiver’s Supplemental Factum.<sup>53</sup> As of December

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<sup>51</sup> Supplementary Factum of the Receiver at para 12, Appeal Record, Tab 4, p 369; AJGL Compendium, Tab 10, p 152.

<sup>52</sup> Appointment Order at para 3(m), Appendix A to the Third Report, RMR, Tab 2A, p. 38; ABCO, Tab 6, p 69; AJGL Compendium, Tab 2, p 31.

<sup>53</sup> Supplementary Factum of the Receiver, Appeal Record, Tab 4, p 365; AJGL Compendium, Tab 10, p 148.

3<sup>rd</sup>, the Appellant was aware that all participants in the Approval Motion had access to the Information.

74. The Appellant did not raise this issue in its Aide Memoire dated December 9, 2024, or before the Motion Judge during the Hearing. Likewise, the Appellant did not seek to have the Information declared confidential or otherwise seek to prevent further offers in respect of the Toronto Property.

75. The citation of the *Soundair* case in paragraph 12 of the Appellant's factum regarding the "use of such Confidential Information", is misplaced. *Soundair* did not involve the issue of confidential information. Further, the application of *Soundair* to the Receiver's disclosure of the Information would result in the opposite outcome: judicial deference to the decision of the Receiver to disclose the Information, recognizing that decision as a matter within the discretion and expertise of the Receiver.

76. In any event, there is no evidence that AJGL used or misused the Information.

77. The many references in the Appellant's Factum to executed confidentiality agreements are not relevant. AJGL did not execute a confidentiality agreement and AJGL was not subject to any confidentiality obligations. The particulars of the initial bids were properly before the Motion Judge and did not contain confidential information.<sup>54</sup> Likewise, there is no evidence that (i) AJGL did not always intend to make a third offer at a higher price, including one 37% higher than the Appellant's price, or that (ii) AJGL used any confidential information in doing so.

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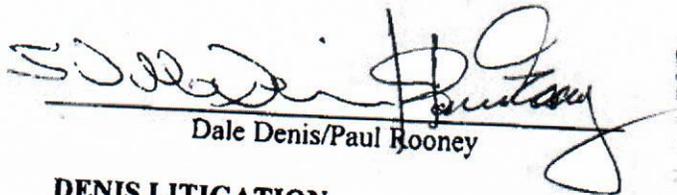
<sup>54</sup> Kronenfeld December 3 Affidavit at paras 9-13, Appeal Record, Tab 10, pp 1019-1020; AJGL Compendium, Tab 5, p 69-70.

**PART V - ORDER REQUESTED**

78. The AJGL Parties request that the Court dismiss the appeal, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of March, 2025.

March 24, 2025



Dale Denis/Paul Rooney

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**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/  
Respondent in Appeal

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC.

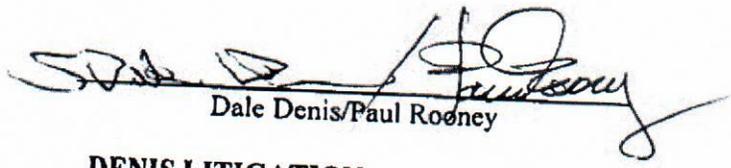
Respondents/  
Respondents in Appeal

**CERTIFICATE**

I estimate that one hour will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with subrule (5.1). There are 6,671 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 24 day of March, 2025.



Dale Denis/Paul Rooney

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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
2. *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570
3. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 584
4. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 3887
5. *Re Harmon International Industries Inc.*, 2020 SKCA 95
6. *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713
7. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA)

I certify that I am satisfied as to the authenticity of every authority.

*Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).*

Date March 24 2025

  
Signature

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3*

##### **Appeals**

##### **Court of Appeal**

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/Respondent in Appeal

-and- CONACHER KINGSTON HOLDINGS INC. AND 5004591  
ONTARIO INC.

Respondents/Respondents in Appeal

Court of Appeal File No. COA-24-CV-1328

Court File No. CV-23-00701672-00CL

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RESPONDENTS,  
AJGL GROUP INC. AND 1001079582 ONTARIO  
INC.**

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