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 ISSAM A. SAAD AND 2858087 ONTARIO INC.

March 24, 2025

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FACTUM OF THE RESPONDENTS, ISSAM A. SAAD AND 2858087 ONTARIO INC.

PART I - INTRODUCTION

1. This is an appeal of a discretionary order. The Appellant has not shown that the Honourable Justice Black (the "**Motion Judge**") erred in law, seriously misapprehended the evidence, or inappropriately exercised his discretion.

2. This appeal is premised upon an inaccurate characterization of the applicable legal principles and of the receiver's legal position on the underlying motion.

3. The Motion Judge is overseeing a judicially ordered receivership of certain lands, which involved a court-authorized sale process carried out by a court-appointed receiver.

4. The Appellant was the winning bidder. The receiver brought a motion for approval of a sale on short notice. In the lead up to the motion, a number of bids were made for the lands that were approximately 7-14% higher than the Appellant's bid. The receiver's position was that these bids were insufficiently higher than the Appellant's bid to warrant re-opening the sale process.

5. When the initial approval hearing was adjourned, the Motion Judge ordered that interested parties could submit new bids in advance of the new return date. One party did so and put in a new bid that was 37% higher than the Appellant's.

6. The receiver's factum for the approval hearing and the Motion Judge's reasons, reflect that the receiver's position was that if the court found that 37% was "substantially higher" than the Appellant's that it was appropriate for him to re-open the sale process. The Motion Judge made that finding, ordered that the Appellant's costs be paid, and permitted the Appellant to submit a new (higher) bid.

7. The Appellant's core argument on this appeal – that the Motion Judge declined to follow the receiver's recommendation – is based on an incorrect premise. The Motion Judge's ruling was consistent with the receiver's recommendation. He found that 37% was substantially higher than the Appellant's bid. There was no palpable and overriding error in this finding.

8. The Motion Judge's decision was based on findings of fact and involved a balancing of interests that is entitled to deference. The case law provides ample authority for the Court to grant the orders it did, and to manage a sale process. The Motion Judge made no error of law in doing so.

9. 2858087 Ontario Inc. ("**285 Corp.**") and Issam A. Saad ("**Saad**", and together with 285 Corp. the "**Saad Parties**") ask that the appeal be dismissed.

PART II - SUMMARY OF FACTS

Background

10. 258 Corp. is an Ontario corporation which Saad is the sole director of.[1]

11. The debtor company 5004591 Ontario Inc. ("**500 Corp.**") is an Ontario corporation, which prior to his death, was directed by the late Nicholas Kyriacopoulos ("**Kyriacopoulos**"). 500 Corp. is the registered owner of the properties described as PIN Nos. 10306-0032 through and including 10306-0035, and 103016-0064, being 2849-2857 Islington Avenue, Toronto, Ontario (the "**Islington Properties**"). The debtor company Kings Townhomes Limited ("**Kings Townhomes**"), formerly known as Conacher Holdings Inc., is an Ontario corporation that Kyriacopoulos was the sole director of. Kings Townhomes is the registered owner of the properties described as PIN Nos. 36061-0475 through and including 36061-0734 on Conacher Drive, Kingston, Ontario (the "**Kingston Properties**").[2]

12. For the purposes of this proceeding, 285 Corp.'s position is that it holds equitable mortgages over the Islington Properties and Kingston Properties in connection with a promissory note pursuant to which Kings Townhomes provided security by agreeing to grant 285 Corp. a charge/mortgage over the Kingston Properties as collateral for the monies owing under the

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[1] Affidavit of Carly Vande Weghe sworn December 3, 2024 ("**Vande Weghe Affidavit**"), Ex. A – MR Tab 1A, pp. 4-10, Appellant's Exhibit Book ("**EXHB**"), Tab VII-A, p 592; Compendium of Issam A. Saad and 2858087 Ontario Inc. ("**Saad Compendium**"), Tab 5, p 73.

[2] First Report of the Receiver dated July 16, 2024 ("**First Report**"), para 9, Appendix C to the Third Report, RMR Tab 2C, p. 74, Appeal Record of the Appellant ("**Appeal Record**"), Tab 1, p 74; Saad Compendium, Tab 4, p 61.

promissory note, and 500 Corp. agreed to grant 285 Corp. a charge/mortgage over the Islington Properties as collateral for the monies owing under the 2023 Promissory Note.[3]

13. The relative priority of the charges on the properties has not been dealt with by the Court to date. The Saad Parties have not put in any bid on the properties. However, like other creditors, they have an economic interest in seeing the Islington Properties sold for the highest possible price.

Appointment of the Receiver and the Approval Motion

14. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) dated December 6, 2023, effective as of December 22, 2023 (the "**Appointment Order**"), RSM Canada Limited was appointed receiver (the "**Receiver**"), without security, over the Kingston Properties and the Islington Properties (collectively, the "**Properties**").[4] TDB Restructuring Limited is now the Receiver in place of RSM Canada Limited.[5]

15. The Appointment Order was sought by a secured lender, Cameron Stephens Mortgage Capital Inc., pursuant to a $15,600,000 mortgage registered on the Islington Properties.[6]

16. The Appointment Order specified that the Receiver was empowered to, amongst other things, sell, convey, transfer lease or assign the Properties, or parts of them, out of the ordinary course, but that for transactions with an aggregate value of over $500,000 it could only do so "with the approval of this Court". It also specified that the Receiver would have to "apply for any vesting

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[3] Vande Weghe Affidavit, Ex. B – MR Tab 1B, p. 12, EXHB, Tab VII-B, p. 600 and Ex. C – MR Tab 1C, pp. 14-40, EXHB, Tab VII-C, p 602; Saad Compendium, Tab 6, p 81.

[4] 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; Saad Compendium, Tab 2, p 27.

[5] Order dated March 1, 2024, Appendix B to the Third Report, RMR, Tab 2B, p. 56, ABCO, Tab 7, p 83; Saad Compendium, Tab 3, p 44.

[6] Third Report, paras 33-35, RMR, Tab 2, p. 32; ABCO, Tab 8, p 107; Saad Compendium, Tab 1, p 22.

order or any others necessary to convey the Properties free and clear of liens or encumbrances, and that the Receiver was permitted to apply to the court "for advice and directions in the discharge of its powers".[7]

17. On June 12, 2024, the Receiver entered into an Agreement of Purchase and Sale for the Islington Properties. The Transaction was scheduled to close on July 30, 2024, but did not do so after several extensions.[8]

18. As of September 25, 2024, the real estate broker for the Receiver had received two offers and one letter of intent for the Islington Properties. A subsequent offer was received on September 28, 2024 (after the initial deadline). The Receiver accepted the offer from the Appellant Arjun Anand, in trust.[9]

19. On October 7, 2024, the Receiver and the Appellant entered into an Agreement of Purchase and Sale with respect to the Islington Properties (the "**APS**"), which was conditional upon the approval of the Court.[10] Other conditions were waived by the Appellant on October 26, 2024.[11]

20. On November 25, 2024, the Receiver served its record for a motion seeking an approval and vesting order in respect of the sale of the Islington Properties to the Appellant (the "**Approval**

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[7] Appointment Order, paras 3(k)(i)-(ii), 3(l), 27, Appendix A to the Third Report, RMR, Tab 2A, p. 42, 59; ABCO, Tab 6, pp 69, 77; Saad Compendium, Tab 2, pp 30-39.
[8] Third Report, para 4, RMR, Tab 2, p. 24, ABCO, Tab 8, p 99; Saad Compendium, Tab 1, p 14.
[9] Factum of Receiver dated December 2, 2024, paras 14, 17, Appeal Record, Tab 3, p 346; Saad Compendium, Tab 10, p 118.
[10] Third Report, paras 23-24, RMR, Tab 2, pp. 29, ABCO, Tab 8, p 104; Saad Compendium, Tab 1, p 19.
[11] Affidavit of Simion Kronenfeld sworn December 3, 2024 ("**First December Kronenfeld Affidavit**"), para 6, Appeal Record, Tab 10, p 1018; Saad Compendium, Tabs 7, p 84.

Motion"). The Approval Motion was scheduled to be heard by the Motion Judge, who has been case managing this proceeding, just seven days later on December 4, 2024.[12]

21. The timing for the Approval Motion was abridged. The Receiver filed an initial factum for that motion on December 2, 2024, which recommended that the court approve the APS in the context of the Approval Motion.[13]

22. Certain parties, amongst them AJGL Group Inc. ("**AJGL**") – another creditor with an interest in maximizing the proceeds of sale – advised of their intent to object to the Approval Motion, noting, amongst other things:

(a) issues with the sufficiency of the marketing process undertaken by the Receiver including that: (i) it was too short, and (ii) the Islington Properties were only marketed in bulk as opposed to as individual properties;

(b) a lack of analysis of sale prices of comparable properties;

(c) concerns about the abbreviated timeline of the Approval Motion (i.e. short notice to creditors); and

(d) that AJGL only did not bid for the Islington Properties earlier because it understood that a sale for the Kingston Properties would be going through (which would have meant that the senior secured creditor would have been paid off from the proceeds of that sale).[14]

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[12] Notice of Motion of the Receiver dated November 25, 2024, RMR, Tab 1, p 5, Appeal Record, Tab 1, p 5; Saad Compendium, Tab 9, p 98.

[13] Factum of the Receiver dated December 2, 2024, para 20, Appeal Record, Tab 3, p 347; Saad Compendium, Tab 10, p 119.

[14] First December Kronenfeld Affidavit, paras 8, 15, 17-22, Appeal Record, Tab 10, pp 1018-1023; Saad Compendium, Tab 7, pp 84-89.

23. AJGL confirmed that it did not know the amount of the Appellant's bid for the Islington Properties, but that it was prepared to pay $3 million (which was later amended to be $3.3 million). AJGL asked that the Receiver disclose the price of the Appellant's bid, suggested that an auction would be appropriate if the price to be paid by the Appellant was less than $4 million, and requested that the December 4, 2024, Approval Motion be adjourned.[15]

24. On December 3, 2024, the Receiver received two additional offers (one of which was by a company related to AJGL) as well as one expression of intent to submit an offer for the purchase of the Islington Properties, each of which the Receiver noted was higher than the offer made by the Appellant. The bids were placed before the Motion Judge in a confidential compendium.[16] These late offers were described by the Receiver as "marginally (6.7%-14.2%) higher" than the Appellant's bid.[17]

25. In a supplementary factum filed on December 3, 2024, the Receiver noted, amongst other things, that the court had discretion to consider the later bids if it wished to, but that the Receiver's view was that at that time the court should not do so because the newer bids were not sufficiently larger to displace the Receiver's initial recommendation. The Receiver noted, amongst other things, that:

> The additional offers put the following additional issue before the Court: under what circumstances should a court consider or accept a late, but higher offer from an unsuccessful bidder? [paragraph 5]

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[15] First Kronenfeld Affidavit, para 12, 40, Appeal Record, Tab 10, p 1019, 1027; Saad Compendium, Tab 7, pp 85, 93-94; Second Affidavit of Simion Kronenfeld, sworn December 3, 2024, para 2, Appeal Record, Tab 11, p 1076; Saad Compendium, Tab 8, p 96.

[16] Supplementary Factum of Receiver dated December 3, 2024 ("**Supplementary Factum of Receiver**"), para 3, Appeal Record, Tab 4, p 366; Saad Compendium, Tab 11, p 137.

[17] Supplementary Factum of Receiver, para 4, Appeal Record, Tab 4, p 366; Saad Compendium, Tab 11, p 137.

> The case law establishes that where the sale process was fair, the Court will only refuse to approve the existing offer where the new offer is "substantially higher" than the existing offer. [paragraph 7]
>
> The existence of marginally higher bids, submitted on the even of the hearing, are not sufficient to displace the Receiver's recommendation set out in its Third Report. [paragraph 14][18] [emphasis added]

26. The hearing over the Approval Motion commenced on December 4, 2024, but was adjourned to December 10, 2024. The Motion Judge noted in his endorsement (the "**December 4th Decision**") that there had been a "flurry of activity" before the hearing, which required more time for argument and for the parties to "exchange and consider one another's materials".[19] He further noted that "a handful of additional offers, and certain evidence purporting to confirm a considerably higher value for the property at issue, arrived in the hours before the hearing."[20] The Motion Judge also specifically ordered – without finding that the court would accept those bids – that additional bids could be made on the condition that the Receiver be afforded additional time to consider them, noting that: "While it may well be that now all offers that will be made are on the table, if any parties wish to file additional offers, I have directed that this be done by no later than Noon on Monday, December 9" [emphasis added].[21]

27. The Appellant does not accurately characterize the December 4th Decision in its factum (omitting that the Motion Judge expressly invited the submission of additional bids).[22] The

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[18] Supplementary Factum of Receiver, paras 5, 7, 14, Appeal Record, Tab 4, p 366, 367, 369; Saad Compendium, Tab 11, pp 137-138, 140.
[19] Endorsement of Justice Black dated December 4, 2024 ("**December 4 Endorsement**"), ABCO, Tab 3(A), p 32; Saad Compendium, Tab 13, p 169.
[20] December 4 Endorsement, ABCO, Tab 3(A), p 32; Saad Compendium, Tab 13, p 169.
[21] December 4 Endorsement, ABCO, Tab 3(A), p 32; Saad Compendium, Tab 13, p 169.
[22] See the Appellant's Factum, para 22.

Appellant, notably, did not appeal the December 4th Decision (although he now complains that no further bids should have been allowed).[23]

28. At a hearing on December 10, 2024, the Motion Judge dismissed the Approval Motion and directed the Receiver to solicit and consider further offers to purchase the Islington Properties from potential bidders.[24] In his endorsement, the Motion Judge noted how the Receiver's position had evolved, including in oral argument before the Motion Judge, given the economic significance of the late-breaking offers:

> [3] Since the parties were before me last week, there has been one significant development. That is, 1001079582 Ontario Inc ("100")., a would-be purchaser of the Toronto Property delivered a further offer on Saturday December 6, 2024, (the "Third Offer") at a higher price than its two previous offers.
>
> [4] On December 4, and until the arrival of this latest offer, the Receiver's position had been, even-handedly but firmly, to the effect that the prior offers from 100, although higher than the offer/price (the "subject offer" or the "subject price") in the transaction for which the Receiver was seeking approval (the "subject transaction"), was not "substantially higher" than that price so as to raise concerns about the providence of the proposed sale.
>
> [5] In its supplementary factum for purposes of the December 4 hearing, the Receiver had reviewed certain caselaw in which late offers ranging from 8% to 30% higher than the offers subject to approval in those cases had not led to a conclusion that the subject price was unreasonable, or that the process undertaken to obtain the subject price was unreasonable or flawed.
>
> [6] In the circumstances of last week, in reliance on those cases, the Receiver's position was that it had run a comprehensive marketing effort, that the (existing) purchaser (the "subject purchaser"), had

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[23] Notice of Appeal dated January 16, 2025, ABCO, Tab 1, p 1; Saad Compendium, Tab 16, p 181; *KingSett Mortgage Corporation v. 30 Roe Investments Corp.,* 2023 ONCA 219 at para. 42; Book of Authorities of Issam A. Saad and 2858087 Ontario Inc. ("**Saad BOA**"), Tab 8.

[24] Order of Justice Black dated December 10, 2024 ("**December 10 Order**"), ABCO, Tab 4(B), p 43; Saad Compendium, Tab 15, p 176.

> "acted in good faith" and was a "bona fide third party purchaser" and that the "existence of marginally higher bids, submitted on the eve of the hearing, are not sufficient to displace the Receiver's recommendation set out in its Third Report."
>
> [7] That recommendation, stressing the "overriding concern with integrity, fairness and predictability of the court-ordered sales process," was that the court should approve the conforming, successful (subject) bid. The Receiver reminded the court of the words of Cumming J. in *1730960 Ontario Ltd. (Re)*, in which His Honour said "[i]t is unfair and objectionable for a party to wait until another bid is made and has been accepted by the Receiver and then to make a bid that is marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid."
>
> [8] The Third Offer, however, is 37% higher than the subject price.
>
> [9] While the Receiver, quite appropriately, stands by its submissions about the integrity of the process, and the worrisome precedent associated with giving effect to an offer received very late in the process (and in the face of the subject offer that the Receiver has accepted and recommended), 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.[25] [emphasis added]

29. The Motion Judge noted that the circumstances were unique, and set out his reasons for ultimately ordering a further bidding process as follows:

> [27] What is relevant, and the consideration that concerns and compels me, is the sheer size of the Third Offer.

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[25] Endorsement of Justice Black dated December 10, 2024 ("**December 10 Endorsement**"), ABCO, Tab 3(B), pp 35-36; Saad Compendium, Tab 14, p 171.

[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.

[29] As noted, despite its appropriately stated concerns about the integrity of the process, the 37% delta between the Third Offer and the subject price caused the Receiver to suggest, as an alternative to approval of the subject offer, a further process to ensure that the value of the Third Offer is captured and maximized.

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

[31] I do so without suggesting that the subject purchaser acted in anything other than good faith.

[32] I do so, also, with an appreciation of the need to preserve the integrity and predictability of the marketing and sale process within receiverships, and the reasonable expectation in the vast majority of cases that the process will yield a value-maximizing result that should not be subverted by late-breaking offers.

[33] As noted, I do not find that there are any flaws with the sale and marketing process undertaken here; to the contrary I find that the conduct of the Receiver, and those involved in the process, including Collier, was unassailable.

[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."

[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 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.
>
> [36] In the course of its submissions, acknowledging the regrettable lateness of its bids (including the Third Offer) AJGL offered that, if the subject purchaser does not remain the successful bidder following the Proposed Auction Process, AJGL will reimburse the subject purchaser for its reasonable legal costs associated with the process to date. I find that to be a fair proposal, and direct AJGL to do so if we end up in that scenario.[26] [emphasis added]

30. The proposed purchaser of the Islington Properties, 1001079582 Ontario Inc., is affiliated with AJGL.[27]

31. As noted in the Motion Judge's endorsement, this new bid was supported by all creditors (including AJGL, but also the senior secured creditor Cameron Stephens and the Saad Parties, as well as the debtor company).[28]

PART III - ISSUES

32. The issues on this appeal are:

(a) What is the Standard of Review?

(b) Did the Motion Judge err in principle, make an error of law, or exercise his discretion unreasonably in permitting the Sale Process to continue?

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[26] December 10 Endorsement, ABCO, Tab 3(B), pp 37-38; Saad Compendium, Tab 14, p 171.
[27] Aide Memorandum of AJGL Group Inc. and 1001079582 Ontario Inc., dated December 9, 2024, para 2, Appeal Record, Tab 7, p 593; Saad Compendium, Tab 12, p 144; December 10 Endorsement at para 18, ABCO, Tab 3(B), p 36; Saad Compendium, Tab 14, p 173.
[28] December 10 Endorsement, para 28, ABCO, Tab 3(B), p 37; Saad Compendium, Tab 14, p 174.

PART IV - LAW & ARGUMENT

33. Subsection 193(c) of the *Bankruptcy and Insolvency Act* provides for an appeal as of right "if the property involved in the appeal exceeds in value ten thousand dollars."[29] The Saad Parties do not dispute that the Islington Properties exceeds $10,000 in value and that this threshold has been met.

The Standard of Review Requires Considerable Deference to the Motion Judge

34. This Court will only interfere with a judgement considering a receiver's motion for approval of a sale where the judge 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."[30]

35. The Supreme Court of Canada, in the context of a proceeding under the *Companies' Creditors Arrangement Act*[31] ("***CCAA***") 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."[32] A deferential standard of review is appropriate because "supervision judges are steeped in the intricacies of the…proceedings they oversee."[33] Bankruptcy and insolvency proceedings are

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[29] Subsection 193(c), *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [***BIA***].
[30] *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713, at para 54, Saad BOA, Tab 14.
[31] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.
[32] *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10, at para 53 [***9354-9186 Québec inc.***]; Saad BOA, Tab 3, citing *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, at para 98; Saad BOA, Tab 7.
[33] *9354-9186 Québec inc.*, at para 54; Saad BOA, Tab 8.

"dynamic" in nature.[34] Judges must "make quick decisions in complicated circumstances".[35] Supervising judges must "attempt to balance the interest of the various stakeholders during the reorganization process."[36] Given this, it will "often by inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests."[37]

36. While these receivership proceedings are not initiated under the *CCAA*, the context is analogous, and the rationale for deference applies equally. The Saskatchewan Court of Appeal has held that these principles apply "when an appellate court is reviewing the exercise of discretion by a supervising judge in the bankruptcy context": "Bankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which affords considerable deference to the Chambers judge."[38]

Overview of Applicable Principles on Sale Approval Motions

37. *Royal Bank of Canada v. Soundair Corp.*[39] ("***Soundair***") sets out 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.

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[34] *9354-9186 Québec inc.*, at para 54; Saad BOA, Tab 8.
[35] *9354-9186 Québec inc.*, at para 54; Saad BOA, Tab 8, citing *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, at para 20 [***Canadian Metropolitan***] ; Saad BOA, Tab 4.
[36] *9354-9186 Québec inc.*, at para 54; Saad BOA, Tab 8, citing *Canadian Metropolitan*, at para 20; Saad BOA, Tab 4.
[37] *9354-9186 Québec inc.*, at para 54; Saad BOA, Tab 3.
[38] *Re Harmon International Industries Inc.,* 2020 SKCA 95, at paras 40-41; Saad BOA, Tab 13.
[39] *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA) [***Soundair***] ; Saad BOA, Tab 16.

> 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.[40]

38. The applicable considerations are both procedural and substantive; the court should consider process and result. Before finding that a sale is provident, the court must be satisfied that "the marketing and sales process has been a fair and proper one for all, and that the proposed price reflects the fair market value for the property in question" [emphasis added].[41] Cases applying *Soundair* have considered factors such as the degree of the openness and transparency of the sales process, the extent of listing and marketing efforts, the extent to which the receiver engaged with relevant creditors and other stakeholders, how the purchase price compared to obtained valuations, the number of offers received, and the chosen method of sale.[42]

39. Although not directly applicable, s. 36 of the *CCAA* sets out a non-exhaustive set of factors for courts to consider in determining whether to approve a disposition of business assets outside the ordinary course, which Morawetz J. has noted overlap with the *Soundair* criteria:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;

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[40] *Soundair*; Saad BOA, Tab 13.
[41] *Farm Credit Canada v. Gidda*, 2015 BCSC 2188, at para 52-53 [***Farm Credit***] ; Saad BOA, Tab 6.
[42] *1117387 Ontario Inc. v. National Trust Company,* 2010 ONCA 340, at para 82; Saad BOA, Tab 1; *Canrock Ventures v. Ambercore Software*, 2011 ONSC 2308, at paras 33-34 [***Canrock***] ; Saad BOA, Tab 5.

> (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.[43]

The Appellant Misconstrues the Receiver's Position

40. The Appellant's factum is premised on an erroneous characterization of the Receiver's position and the Motion Judge's decision. The Appellant's core argument is that the Motion Judge misapprehended the applicable *Soundair* factors and improperly overruled the Receiver's recommendation. This is not accurate.

41. The Motion Judge did not 'overrule' the Receiver's recommendation. The Receiver specifically sought the court's advice and direction on whether the latest bids were sufficiently high as to warrant not accepting the Appellant's bid. The Court's conclusion was that they were.

42. The Receiver's position as set out in its Supplementary Factum dated December 3, 2024 – prior to an additional, even higher bid being submitted after the December 4th Decision – was always that even if a sale process was fair, it was appropriate for the Court to "refuse to approve the existing offer where the new offer is "substantially higher" than the existing offer."[44] As of December 3, 2024, the Receiver's position was that the bids were only "marginally higher" and that, as such, its recommendation that the APS with the Appellant be approved was not displaced.[45]

43. After receipt of a higher bid, the Receiver's position evolved. In its oral submissions that were noted in the Motion Judge's endorsement, the Receiver submitted that:

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[43] *Terrace Bay Pulp Inc. Re,* 2012 ONSC 4247, at para 43 [***Terrace Bay***] ; Saad BOA, Tab 18.
[44] Supplementary Factum of the Receiver, para 7, Appeal Record, Tab 4, p 367; Saad Compendium, Tab 11, p 138.
[45] Supplementary Factum of the Receiver, para 14, Appeal Record, Tab 4, p 369; Saad Compendium, Tab 11, p 140.

(a) "at a certain level, a late-breaking offer can and perhaps must be considered simply by dint of its value";

(b) the offer before the court "may be in that category"; and

(c) "if the court is persuaded that 37% is a sufficiently higher price to qualify as "substantially higher"" a further extension of the sale process would be appropriate.[46]

44. It was always the Receiver's position that: (a) the court had discretion to re-open the sale process; and (b) that if a new bid that was substantially higher, it would be appropriate for the court to accept it. The Motion Judge found that 37% higher was substantially higher and noted that this was higher than the less significant increases noted in previous cases cited by the Receiver as being insufficiently high to displace an existing bid.[47] This was a finding of fact that is subject to deference and is not disputed by the Appellant.

The Motion Judge Appropriately Exercised his Discretion in Accordance with *Soundair*

45. The Appellant's other core argument is that the Motion Judge erred by misapprehending what they suggest is a "conjunctive" test in *Soundair.* The Appellant suggests that, as a matter of law, the court can "only" consider a higher bid if: (a) the price contained in the offer accepted by the Receiver was unreasonably low at the time it was accepted; and (b) the Receiver was improvident in accepting the earlier offer.[48]

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[46] December 10 Endorsement, paras 9-10, 29, ABCO, Tab 3(B), pp 35-36; Saad Compendium, Tab 14, p 172.
[47] December 10 Endorsement, para 10, ABCO, Tab 3(B), pp 35-36; Saad Compendium, Tab 14, p 172.
[48] See e.g. para 8-9, Appellant's Factum.

46. The Appellant's argument is based on a parsed and incomplete reading of *Soundair* and ignores both the other *Soundair* criteria (including the need for the court to assess the impact on creditors) and the court's overriding discretion to control the process before it.

a) The Court's Discretion to Oversee and Control the Sale Process

47. There is a distinction between circumstances where a creditor acts privately in appointing a receiver, and thus controls any sale process, and where a receiver is appointed by a court. In the latter situation, such as in this case, the "process of a sale of assets by a court-appointed receiver *is within the control of the Court*" [emphasis in original].[49] The court plays an important role in overseeing the integrity of the process.[50]

48. Here, as noted above, it was clear from the Appointment Order that any sale would need to be approved by the court. This was also specifically set out in the APS.

49. While *Soundair* sets out guiding principles, even where a monitor or receiver prefers one offer, the court may exercise its discretion to re-open the sales process where there is a real possibility that a new offer would lead to an "improved return" for creditors.[51] As Morawetz J. noted in *Terrace Bay*, where proposed consideration under a court-ordered sale process is "unreasonably low" a court may want to consider competing bids.[52]

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[49] *Laurentian Bank of Canada v. World Vinters Corp.*, 2002 CanLII 49605 (ONSC) at para 26, 28-31 [***Laurentian Bank***] ; Saad BOA, Tab 10, citing *Soundair*, at para 27; Saad BOA, Tab 16.
[50] *Soundair,* at para 53; Saad BOA, Tab 16.
[51] *1587930 Ontario Ltd., v. 2031903 Ontario Ltd.*, 2006 CanLII 34994 (ONSC), at paras 19-20 [***1587930 Ontario***]; Saad BOA, Tab 2.
[52] *Terrace Bay*, at para 53; Saad BOA, Tab 18.

50. *Soundair* itself expressly contemplates that higher bids should be considered, even if late-breaking: "[i]f a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate" [emphasis added].[53] *Soundair* holds the existence of "substantially higher offers" may itself "tend to show that the sale was improvident" and that "the receiver has not conducted the sale property" such that the court should "withhold approval".[54]

b) The Appellant Does Not Accurately Describe the Soundair *Test*

51. The Appellant appears to be suggesting that any party seeking to oppose any receivership motion must satisfy what they suggest is a "conjunctive" two-part test derived from the 'first' *Soundair* factor ("It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently") and an out-of-context reading of paragraph 30 of *Soundair*.[55]

52. First, *Soundair* does not set out a "conjunctive" test, or a series of specific criteria that any party seeking to challenge a receiver's decision must meet. It sets out a non-exhaustive list of four relevant factors that ought to inform a court's discretion, each of which can be independently considered.

53. Second, the use of "and" in the first part of the *Soundair* test does not mean that any party seeking to challenge a receiver's recommendation must show both that: (a) the receiver has not

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[53] *Soundair*, at para 27; Saad BOA, Tab 16.
[54] *Soundair*, at para 28. See also, paras 27, 29, 31; Saad BOA, Tab 16.
[55] "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": *Soundair*, para 30; Saad BOA, Tab 16.

made a sufficient effort to get the best price and (b) that the receiver has acted improvidently. Both (a) and (b) are simply components of one factor that is to be considered. Either, or both, of an insufficient effort to get the best price or improvidence are relevant, but not determinative.

54. Third, as noted in paragraph 50 above, *Soundair* itself also shows that these considerations are connected. Where "substantially higher" bids emerge, as the Motion Judge found occurred here, that may be evidence of improvidence even if the receiver has done what would appear in isolation to be an adequate job marketing the property.[56]

c) The Appellant Ignores Relevant Soundair *Factors*

55. The Appellant focuses on the first and third of four elements of the *Soundair* criteria, which are four "duties" of a court in in "deciding whether a receiver who has sold a property acted properly": 1) "whether the receiver has made a sufficient effort to get the best price and has not acted improvidently"; and 3) the "efficacy and integrity" of the process (though they focus principally on integrity, as arguably the most efficacious process is the one that reaches the best result).

56. The Appellant mentions, but broadly does not engage with in any depth, the second and fourth *Soundair* factors, which must also be considered: 2) the interests of all parties; 4) whether there has been unfairness in the working out of the process.[57] However, the Appellant does concede that relevant considerations include whether the offer accepted is "so low in relation to the

[56] *Soundair,* at para. 31; Saad BOA, Tab 16.
[57] *Soundair*; Saad BOA, Tab 16.

appraised value as to be unrealistic" [emphasis in original] and "whether it can be said that the proposed sale is not in the best interest of the creditors or the owner."[58]

57. Here, the Motion Judge's concern was that the Appellant's bid was so low as compared to the new bid price that it reflected an unrealistic assessment of value, and that consequently the proposed sale was not in the best interest of creditors or the debtor (who all supported a reopening of the bid process). This court has held that the interest of creditors is the primary consideration in a situation such as this, although not the only one.[59] The only party adversely affected by this decision is the Appellant: a single party with a much more remote stake in this receivership than the other parties.

58. To mitigate any such unfairness, the Motion Judge accepted AJGL's submission that it pay the reasonable costs of the Appellant to the motion date; this is consistent with how courts in previous cases have awarded compensation to a disappointed bidder in order to maintain the fairness and integrity of a sale process.[60]

59. He also expressly found that the Appellant could put in a higher bid, if it wished to do so, as part of the re-opened bidding process. The Appellant declined to do so.

60. The Appellant's argument focuses on the 'process' rather than on a fair result for creditors and the debtor. The fairness of the process is only one factor for the court to consider, and in any event here that process was always subject to the control of the court.

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[58] Appellant's Factum, at para 43 citing *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, 2010 ABCA 16, at para 13; Saad BOA, Tab 15.
[59] *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization,* 2018 ONCA 713, at para 56; Saad BOA, Tab 14.
[60] *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 3887 at paras 13-15, aff'd in part 2024 ONCA 584; Saad BOA, Tabs 11 and 12.

61. The Appellant put in a bid that was subject to judicial approval. A higher bid came forward closer to the approval date. They were made whole for their costs thrown away and not deprived of an opportunity to match or exceed a higher bid. The Motion Judge appropriately found that the interest of a stranger to the receivership's interest in acquiring a property for under-value ought not trump creditors' rights in realizing value through a substantially higher bid. This delicate and commercially nuanced balancing of interests is precisely the sort of fact-specific decision that falls within a Commercial List judge's expertise and attracts deference.

d) The Motion Judge's Approach is Consistent with Other Cases

62. To the extent that the Appellant is suggesting that the best or only way to run a sale process is a blind tender process, that is incorrect as a matter of law (and common sense). As the Alberta Court of Appeal has noted, courts should look for "new and imaginative ways to get the highest possible price".[61] The answer is not always "sale by tender" in any context.[62]

63. Courts have re-opened sale processes in other circumstances. For example, in *1587930 Ontario Ltd. v. 2031903 Ontario Ltd.,* which involved the insolvency of a hotel, Campbell J. noted that the court had three options: (1) to approve one offer from a proposed purchaser (which that purchaser – analogous to the position of the Appellant in this case – urged, along with the Monitor); (2) to accept a more "uncertain" offer from another purchaser (but which was less firm as to time and amount); or (3) to "re-open the opportunity to any party to put in a further offer on the understanding that the timeline should be" short.[63] Campbell J. decided that the third option was

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[61] *Salima Investments Ltd. v. Bank of Montreal*, 1985 ABCA 191, at para 11 [***Salima Investments***] ; Saad BOA, Tab 17.
[62] *Salima Investments*, at para 11; Saad BOA, Tab 17.
[63] *1587930 Ontario*; Saad BOA, Tab 2.

the most appropriate, and that "the process should be re-opened for a very short timeframe".[64] He found that "this is a CCAA proceeding, not an auction process", and that "unsecured creditors should not be deprived of the possibility of Court consideration of an improved…offer" that would "offer the potential for greater recovery" for them.[65]

64. Courts have also refused to approve sales in other circumstances. For example, where a bidding process was not competitive, fair or commercially reasonable, the court decided that it should be kept open for a further six days so as to permit a larger group of prospective purchasers to participate.[66] In a British Columbia case, the court declined to approve a sale proposed by a receiver in circumstances where there was no updated valuation for the property and inadequacies in the breadth of the marketing process.[67]

65. Contrary to paragraph 3 of the Appellant's factum, the Motion Judge did not find that the sales process itself was "unassailable", he found that "the conduct of the Receiver and those involved in the process, including Colliers, was unassailable."[68] The finding did not preclude the Motion Judge's decision to attempt to avoid an improvident price.

66. The Appellant suggests that the Motion Judge's decision would create commercial uncertainty. First, there are as noted above a number of decisions where receivers' recommendations have not been accepted.

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[64] *1587930 Ontario*, at para. 26; Saad BOA, Tab 2.
[65] *1587930 Ontario*, at para 19-20; Saad BOA, Tab 2.
[66] *Laurentian Bank*, at paras 24 – 29; Saad BOA, Tab 10. See also *Lash v. Lash Point Association Corp.*, 2022 ONCA 361 at paras 40-44 and 53-54; Saad BOA, Tab 9.
[67] *Farm Credit* at paras 21-31 and 57-60; Saad BOA, Tab 6.
[68] December 10 Endorsement at para 33, ABCO, Tab 3B, p 38; AJGL Compendium, Tab 14, p 175.

67. Second, the Motion Judge's ruling was quite clear that the circumstances of the case were "unique" and unlikely to be repeated. These were findings of fact. The Appellant has not articulated any palpable or overriding error in this finding; beyond baselessly asserting that it was "erroneous", the Appellant has not in any way articulated how this finding was wrong.

No Misuse of Confidential Information

68. The Appellant alleges, for the first time on this appeal[69], that the process below was tainted because of the alleged use of confidential information by competing bidders. This argument should be dismissed.

69. First, there is no evidence that the information disclosed by the Receiver regarding the delta in price between the Appellant's offer and the late bids which had been submitted prior to the Third Offer, that "the late offers are only marginally (6.7%- 14.2%) higher", was confidential information.

70. Second, the decision of the Receiver to disclose information about competing bids is a matter of its discretion and fully within the Receiver's authority as an officer of the court charged with conducting the sales process. As set out in the Appointment Order, the Receiver was authorized "to share information, subject to terms as to confidentiality as the Receiver deems advisable."[70] The Receiver's decision to do so was consistent with the objective of soliciting higher bids.

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[69] Notice of Appeal dated January 16, 2025, ABCO, Tab 1, p 1; Saad Compendium, Tab 16, p 181.
[70] Appointment Order, paras 3(m), Appendix A to the Third Report, RMR, Tab 2A, p. 42; ABCO, Tab 6, p 69; Saad Compendium, Tab 2, p 31.

71. Third, there is, in any event, no evidence that any confidential information was misused by any party.

PART V - ORDER REQUESTED

72. Saad and 285 Corp. request that the Court dismiss the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24 day of March, 2025.

Michael L. Byers

March 24, 2025

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Court of Appeal File No. COA-24-CV-1328
Court File No. CV-23-0070167200CL

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 thirty minutes 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 7,283 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.

Michael L. Byers

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SCHEDULE "A"

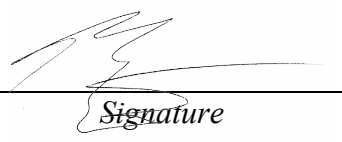
LIST OF AUTHORITIES

1. *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340
2. *1587930 Ontario Ltd., v. 2031903 Ontario Ltd.*, 2006 CanLII 34994 (ONSC)
3. *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10
4. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40
5. *Canrock Ventures v. Ambercore Software*, 2011 ONSC 2308
6. *Farm Credit Canada v. Gidda*, 2015 BCSC 2188
7. *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570
8. *KingSett Mortgage Corporation v. 30 Roe Investments Corp.,* 2023 ONCA 219
9. *Lash v. Lash Point Association Corp.*, 2022 ONCA 361
10. *Laurentian Bank of Canada v. World Vinters Corp.*, 2002 CanLII 49605 (ONSC)
11. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 584
12. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 3887
13. *Re Harmon International Industries Inc.,* 2020 SKCA 95
14. *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713
15. *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, 2010 ABCA 16
16. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA)
17. *Salima Investments Ltd. v. Bank of Montreal*, 1985 ABCA 191
18. *Terrace Bay Pulp Inc. Re* 2012 ONSC 4247

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

1. Subsection 193(c), *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENTS, ISSAM A. SAAD AND 2858087 ONTARIO INC.

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