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SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5 AS AMENDED**

ONTARIO SECURITIES COMMISSION (Applicant) v. SEXTANT STRATEGIC OPPORTUNITIES HEDGE FUND L.P., SEXTANT CAPITAL MANAGEMENT INC. AND SEXTANT CAPITAL GP INC. (Respondents)

BEFORE: **MORAWETZ J.**

COUNSEL: **Susan Kushneryk, for Ontario Securities Commission**

Robert Brush and Anna K. Markiewicz, for the respondents Sextant Capital Management Inc. and Sextant Capital GP Inc.

David Bish, for PricewaterhouseCoopers Inc.

HEARD: **APRIL 30, 2009**

ENDORSEMENT

Introduction

[1] The Ontario Securities Commission (the "OSC" or the "Commission") moves for the appointment of a receiver and/or receiver and manager (collectively "receiver") over the assets and undertaking of Sextant Strategic Opportunities Hedge Fund L.P. ("Sextant Canadian Fund"), Sextant Capital Management Inc. ("SCMI") and Sextant Capital GP Inc. ("Sextant GP") (collectively, the "Sextant Canadian Entities") pursuant to s. 129 of the *Ontario Securities Act* (the "Act").

[2] The OSC takes the position that the Sextant Canadian Fund is a mutual fund in Ontario, managed by SCMI and Sextant GP. The OSC submits that nearly 250 Canadians have together invested just under $30 million in the Sextant Canadian Fund since 2006.

[3] The OSC submits that it has become aware of issues giving rise to what it considers to be significant concerns with respect to the Sextant Canadian Fund and its management, SCMI and

Sextant GP. The OSC submits that these problems include potential fraud, potential misappropriation of investor money, misrepresentations, self-dealing by the fund managers, and numerous and significant recordkeeping inaccuracies and apparent record manipulation.

[4] The OSC further submits that any one of the foregoing list of concerns would be sufficient to cause risk to investors' interests in the Sextant Canadian Fund and, taken together, these issues and the course of conduct which created them, have placed investors' interests at significant risk. The OSC submits that the only way to safeguard those interests and to adequately address the numerous deficiencies and irregularities associated the Sextant Canadian Fund and its management is to introduce an independent, third party to undertake a verifiable review and analysis of the fund and its management. They submit that the investors are entitled to a process that is reliable and that they can trust.

[5] Accordingly, the OSC seeks the appointment of a receiver pursuant to s. 129 of the Act, for the interests of the investors and for the due administration of Ontario securities law.

[6] The OSC submits that the respondents chose not file any responding material in this application, such that the evidence proffered by the OSC in the affidavit of Mr. Raymond Daubney sworn March 5, 2009 is uncontroverted.

[7] No party appeared on behalf of the Sextant Canadian Fund.

[8] SCMI and Sextant GP oppose the appointment of a receiver on the basis that:

(i) there are serious flaws in the evidentiary record underlying this application;

(ii) it is unnecessary to appoint a receiver for SCMI and Sextant GP for the due administration of Ontario securities law or to protect the interests of creditors and security holders; and

(iii) the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver.

[9] SCMI and Sextant GP take the position that limiting the receiver's appointment to the Sextant Canadian Fund, but on terms requiring SCMI and Sextant GP to cooperate with the receiver, will avoid this conflict of interest while, at the same time, ensure that the interests of stakeholders will be protected and Ontario securities law will be duly administered.

Motion of SCMI and Sextant GP

[10] SCMI and Sextant GP brought a separate motion to address what they consider to be serious flaws in the evidentiary record underlying the application. They sought an order striking out certain paragraphs of the affidavit of Mr. Daubney, in particular, paragraphs 78, 82, 88, 90, 121, 161, 175, 188 and 189 on the basis that all of these paragraphs contain either opinions or conclusions or legal argument. The moving parties also take the position that on April 9, 2009 they attempted to cross-examine Mr. Daubney on his affidavit but during the course of the examination, Mr. Daubney refused to answer or took under advisement questions respecting the

basis for his opinions and legal conclusions and the factual underpinnings of those opinions and conclusions. They further suggest that, as a result of Mr. Daubney's refusal to answer, they were unable to test what they consider to be the improper and highly prejudicial paragraphs of the affidavit of Mr. Daubney in defence of the application and, as a result, they were unable to make full answer and defence.

[11] In my view, the motion brought by SCMI and Sextant GP has no merit. To the extent that the moving parties complain about the refusal of Mr. Daubney to answer certain questions or to take certain questions under advisement, they should have challenged his response as opposed to bringing a motion to strike. Any complaints with respect to the conduct of the cross-examination were, in this respect, within the control of SCMI and Sextant. The moving parties made the decision not to challenge the refusals or taking questions under advisement.

[12] Counsel to SCMI and Sextant GP also challenge Mr. Daubney's evidence with respect to his statements on valuation on the basis that he is not a qualified expert valuator. Mr. Daubney is not an expert and his concluding opinion on valuation has not been considered. However, certain of his comments on the issue of value are factual in nature and go to the reasonableness of the factors that are considered in a valuation. These statements have been considered. The concerns of SCMI and Sextant GP go to weight.

[13] Certain of Mr. Daubney's statements are in the form of legal argument, and have been either disregarded or discounted to the point where they have been given, little or no weight.

Facts and Concerns

[14] A summary of the factual background to this application has been set out in the factum of the OSC and the factum of SCMI and Sextant Capital.

[15] At paragraph 72 of the OSC factum, counsel submits that there are a number of reasons why the appointment of a receiver is in the best interests of the Sextant Canadian Fund security holders and for the due administration of Ontario securities law. These reasons include:

(a) SCMI and Sextant GP have caused the Sextant Canadian Fund to pay each of them significant fees, including fees in excess of $3.5 million in 2008 alone, as a result of manipulation of the value of the fund – which purportedly increased by approximately 172% from the end of 2007 to the end of 2008 notwithstanding that the underlying assets are principally shares of companies that are not operating;

(b) there is a capital shortfall in the Sextant Canadian Fund based on outstanding redemption requests and the value of the Sextant RBC Accounts and the Sextant Canadian Fund New Edge account;

(c) the value of the assets held by the Sextant Canadian Fund is uncertain, such that the accurate net asset value per unit held by investors held in the Sextant Canadian Fund is not known;

(d) record keeping inaccuracies have to be investigated to determine the accurate shareholdings held in the Sextant Canadian Fund and to confirm the accuracy and propriety of the flow of money out of the fund;

(e) there is a history of mismanagement of the investments in the Sextant Canadian Fund;

(f) there has been significant regulatory non-compliance;

(g) investors' interests are not served by the status quo whereby SCMI and Sextant GP continue to manage the Sextant Canadian Fund;

(h) there is no evidence that SCMI or Sextant GP are in any better position than a receiver to protect investors' interests;

(i) there is no evidence of a tangible alternative to appointing a third party to step in and manage the Sextant Canadian Entities; and

(j) in light of the recordkeeping inconsistencies, questionable value of the assets of the Sextant Canadian Fund, evidence of forgery and other fraudulent activity, investors are entitled to an independent and verifiable claims process.

[16] The above list of reasons has been drawn from paragraph 188 of the affidavit of Mr. Daubney, which was one of the paragraphs challenged by SCMI and Sextant GP. It is, in my view, appropriate, to review the basis for some of these statements.

[17] Earlier in his affidavit, Mr. Daubney states that the Sextant Canadian Fund is structured as a limited partnership pursuant to a Limited Partnership Agreement between Sextant GP and the investors in the Sextant Canadian Fund dated February 17, 2006. There is also an Amended and Restated Limited Partnership Agreement dated July 28, 2008 which introduced a new class of units in the Fund but otherwise retained identical governance provisions. The initial and subsequent agreements together are referred to as the "LP Agreement".

[18] The LP Agreement includes, among others, the following provisions:

(i) the Sextant Canadian Fund will make investments in accordance with the disclosure in its offering document;

(ii) the Sextant Canadian Fund may not invest more than 20% of its portfolio, based on the net asset value at the most recent calculation date, in any single class of securities of an issuer as calculated at cost;

(iii) the Sextant Canadian Fund will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm in which any principle of SCMI may have a direct or indirect material interest; and

(iv) the Sextant Canadian Fund will pay a 2% advisory fee to SCMI and a 20% performance fee or "management allocation" to Sextant GP.

[19] The affidavit of Mr. Daubney at paragraph 21 also references a confidential offering memorandum which describes investment restrictions applicable to the Fund, including that Sextant Canadian Fund may not invest more than 20% of its portfolio in any single class of securities of an issuer and that it will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm which a principal of SCMI may have a direct or indirect material interest.

[20] At paragraph 22, Mr. Daubney addresses the relationship between Mr. Otto Spork and the Sextant Canadian Entities. Mr. Daubney states that Mr. Spork is the directing mind behind these three entities and various related entities, including those invested in by the Sextant Canadian Fund. Mr. Daubney states that Mr. Spork created an elaborate structure with three main components:

(a) the investment component which solicits investors and includes three investment funds, one in Canada (i.e. the Sextant Canadian Fund) and two in the Cayman Islands;

(b) the management component including SCMI and Sextant GP in Toronto and Sextant Capital Management, an Islandi chf ("Sextant Iceland"), which manages the investment funds in exchange for fees paid by the funds from investors' money; and

(c) the glacier company component, consisting of two private Luxembourg companies and their Icelandic subsidiaries which were the primary investments for the three investment funds.

[21] Mr. Daubney goes on to state that through this structure, Mr. Spork was able to take investors' monies in at least two ways. First, he could take investors' money through management fees, in the management component and, second, through direct investment in his own Luxembourg companies. Further, Mr. Spork has significant ownership and management roles in the various entities relevant to this matter, including SCMI, Sextant GP, Sextant Iceland, the Sextant Strategic Hybrid 2 Hedge Resource Fund Offshore Ltd. ("Sextant Hybrid Fund"), the Sextant Strategic Global Water Fund Offshore Ltd. ("Sextant Water Fund"), Iceland Glacier Products S.A. ("IGP") and Iceland Global Water 2 S.A. ("IGW").

[22] Mr. Daubney goes on to state that in addition to the Sextant Canadian Fund, the Sextant investment structure includes the Sextant Hybrid Fund and the Sextant Water Fund (together, the "Sextant Offshore Funds") two investments funds incorporated under the laws of the Cayman Islands. Further, although the Sextant Offshore Funds are incorporated in the Cayman Islands, their custodial accounts are held at New Edge in Canada and IAS is the net asset calculation agent for the Funds.

[23] Mr. Daubney further states that the net asset value of the Sextant Offshore Funds in December 2008, as stated on the IAS Portfolio Valuation Statement for those funds, was just

over U.S. $100 million. Those statements also indicate that their respective investment holdings essentially mirrored the investments held by the Sextant Canadian Fund for the same month, in that the portfolios of all three funds were just over 90% invested IGP and just over 2.5% invested in IGW, as calculated by IAS.

[24] Mr. Daubney also states that the Sextant Offshore Funds were not isolated but rather were an integral part of the structure created by Mr. Spork.

[25] With respect to Sextant funds management, SCMI was incorporated in Ontario in August 2005. It is registered under the Act as an investment counsel, portfolio manager and limited market dealer and is the principle distributor of the Sextant Canadian Fund.

[26] Sextant GP was incorporated in Ontario in December 2005.

[27] Mr. Daubney is of the view that the only purpose for SCMI and Sextant GP apparent in the records available to staff of the OSC, is to manage the Sextant Canadian Fund.

[28] Mr. Daubney further states that the management of the Sextant Canadian Fund and the Sextant Offshore Funds, in addition to SCMI and Sextant GP, includes Sextant Iceland.

[29] Mr. Daubney goes on to describe the third component of the investment structure created by Mr. Spork which is comprised of two limited Luxembourg companies, IGP and IGW, and their Icelandic subsidiaries. Mr. Daubney states that Mr. Spork has ownership interests and management roles in each of IGP and IGW. IGP and IGW are limited Luxembourg companies. IGP has a wholly-owned subsidiary called Iceland Glacier Products ehf ("IGP Iceland") and IGW has a wholly-owned subsidiary called Iceland Global Water EHF ("IGW Iceland").

[30] Mr. Daubney further states that IGP Iceland is intended to operate, in the future, as a bottled water business that extracts and bottles glacier water, as set out in its business plan. Mr. Daubney states that OSC staff have not been able to confirm the details of any glacier rights held by IGP, although there is some indication that IGP does have some rights to at least one glacier in Iceland. A plant is being constructed in the town in connection with the lease but the plant is not yet operating.

[31] The relationship of the Sextant Canadian Entities to Mr. Spork to IGP and IGW raises concerns in the areas outlined in the LP Agreement referenced at [18] above. It also raises concerns in respect of the mandated prohibition against self dealing by mutual funds (Section 111); and the standard of care of investment funds (Section 116).

[32] Section 2 of the factum is entitled *Misconduct: Manipulation of Value, Mismanagement of Investments and Manipulation of Records*. In my view, the submissions in this section raise very serious issues.

[33] At paragraph 78 of his affidavit, Mr. Daubney states that there is no evidence supporting the purported value of IGP and, to the contrary, it appears that the value of those shares has been fraudulently manipulated by or to the knowledge of SCMI and Sextant GP, for purposes including allowing SCMI and Sextant GP to collect significant management and performance

fees that they did not earn. This paragraph was also the subject of challenge by counsel to SCMI and Sextant GP. Again, it is appropriate to review the basis for these statements.

[34] At paragraph 79, Mr. Daubney states that the value of the Sextant Canadian Fund is tied almost exclusively to the value of its shares in IGP and with over 90% of the market value of the Sextant Canadian Fund held in shares of IGP, the fund's holdings are materially over concentrated in IGP.

[35] Mr. Daubney also states that IGP shares held by the Sextant Canadian Fund are over concentrated even on the basis of the initial cost of the shares. He states that even at the cost or book value recorded on the IAS portfolio valuation statement, at $6,131,347 out of a total portfolio book value of $10,516,509.06, the Sextant Canadian Fund holds 58.3% of its assets in shares of IGP. The IAS portfolio valuation statement for July 2007 lists the book value for those shares of $1,758,405 out of a total portfolio book value of $3,002,841.65, or 59% of the total portfolio book value. Mr. Daubney states that, even on a cost-base calculation, the IGP shares represent more than half the value of the Fund. This evidence is objective in nature and it can properly be considered.

[36] Mr. Daubney goes on to question the stated value of IGP as not being reliable or supportable. He states that the IGP shares purportedly increased in value from their initial cost of €0.163 in July 2007 to a market value of €2.450 in January 2009. He states that this a 1400% increase from the purchase price to the stated market value a year and one-half later, notwithstanding that this is a non-operating business and there have been no material developments that would explain the surging value of these shares. The calculations were challenged by Mr. Brush on Mr. Daubney's cross-examination, and using different variables, the percentage of the fund's total portfolio that was invested in a single security in July 2007 was 31.5%, which I note is still more than 50% greater than the permitted maximum of 20%. Mr. Daubney also stated that the purported increase in value over time resulted in millions of dollars in management fees being paid from investors' money. He also states that there is no evidence that neither of the mandated valuation procedures was followed by Sextant GP in respect of the value of IGP for the purpose of the Sextant Canadian Fund. Rather, he states that the value of IGP shares was set from time to time by the Board of Directors of Sextant Iceland, which consists of Mr. Spork and two other individuals.

[37] Mr. Daubney went on to state that in determining the value of IGP, the directors of Sextant Iceland relied on purported independent valuations of IGP Iceland at December 31, 2007, as prepared by companies called Hempstead and Spardata (together, the "Purported Valuations"). Mr. Daubney is of the view that the Purported Valuations do not constitute independent or reliable valuations and cannot be reasonably relied upon to support the value assigned by Sextant Iceland Board of Directors.

[38] Mr. Daubney further refers to a letter dated September 29, 2008 from Canacord Capital Corporation ("Canacord") to Mr. Spork (the "Canacord Letter"). The Canacord Letter indicates that it is a financing proposal, not a valuation.

[39] Mr. Daubney states that among the materials that Mr. Spork provided to Canacord in connection with the Canacord Letter were purported letters of intent for the purchase of water (the "LOIs"). He states that at least three of those LOIs are fraudulent insofar that three of the LOIs purport to be agreements with, respectively, the Los Angeles Department of Water and Power, the San Diego County Water Authority and Division 4, Orange County Water District. Mr. Daubney states that the purported counter parties to each of these LOIs has confirmed that they did not, in fact, execute these agreements; moreover, none of them had any previous dealings with Sextant, IGP or their related entities, or had so much as heard of Sextant, IGP or Mr. Spork. The statements of Mr. Daubney are corroborated by the affidavits of Mr. Philip Anthony of the Orange County Water District, Mr. Wally Knox of the Board of the Los Angeles Department of Water and Power and Mr. Barry Martin of the San Diego Water Authority.

[40] Mr. Daubney went on to state that there was no basis for the claimed market value in excess of $160 million in December 2008. Similarly, he stated that without operations, there was no basis for the claimed returns on their shares from July 2007 to November 2008.

[41] Mr. Daubney also made the point that OSC staff had written to counsel for the Sextant Canadian Fund, SCMI and Sextant GP and counsel for Mr. Spork and Sextant Iceland, inviting them to provide some explanation or basis for the extraordinary value and purported rate of return for IGP. No substantive response has been received.

[42] A number of the statements made by Mr. Daubney raise issues that comment on the value of the IGP, but they are not, in my view, valuations. Obvious examples would be the three LOIs with Los Angeles, San Diego and Orange County. The remarkable sworn responses from these municipal officials casts considerable doubt on the *bona fides* and operations of Mr. Spork and by extension, the Sextant Canadian Entities.

[43] Mr. Daubney also comments about recordkeeping inaccuracies or manipulation. He states that records for the Sextant Canadian Fund and related entities contain a number of material inaccuracies and there is evidence that those records have been manipulated. As a result, he states that the records relating to the fund are unreliable. Further, as the general partner and investment advisor, Sextant GP and SCMI are responsible for the records of the Sextant Canadian Fund.

[44] According to Mr. Daubney, the material of recordkeeping inaccuracies include the following:

(a) the number of IGP shares held by the Sextant Canadian Fund does not reconcile between the IGP share register book and the IAS records for the Fund;

(b) based on the IGP share register book, the IAS portfolio valuation statements have overstated the Sextant Canadian Fund's ownership of IGP shares and, therefore, the Fund's value by an amount between €3,080,463.40 and €6,755,463.40;

(c) the cost of IGP shares as reported on the IAS portfolio valuation statements or the Sextant Canadian Fund is inconsistent, in that the IAS portfolio valuation statements and portfolio valuation detailed statements show variances over time

among the number of shares held, the average cost of those shares and the total cost of those shares, without the valuations correlating consistently;

(d) the value of the initial investment in IGP shares by the Sextant Canadian Fund and the Sextant Offshore Funds is recorded on the IAS portfolio valuation statements does not match the value of the shareholders' investment in IGP as recorded in the annual accounts for IGP as at December 31, 2007;

(e) there appears to have been a transfer of US $1.2 million to Riambel, a holding company owned by Mr. Spork, out of funds paid by the Sextant Canadian Fund and the Sextant Offshore Funds for IGP shares and there is no apparent basis or justification for this transfer; and

(f) there are no share certificates and there is no share register for IGW, such that those shares held in the Sextant Canadian Fund and the Sextant Offshore Funds are not evidenced anywhere.

[45] At paragraphs 46 – 53 of the factum, the section is entitled, *Investments not in Accordance with Offering Memoranda or LP Agreement*. The submissions in this section raise very serious issues with respect to the role of the investment advisor, SCMI and the basis on which the advisory and performance fees were calculated.

[46] At paragraph 54 of the factum, the submission is made that the manipulation of value, manipulation of records and mismanagement of investments by SCMI and Sextant GP, as managers of the Sextant Canadian Fund, have cost investors millions in invalid fees, caused the net asset value of the Sextant Canadian Fund to be unreliable, created a capital shortfall in the fund and otherwise compromised the value of the fund and that the actions of SCMI and Sextant GP have thereby materially compromised and diminished the value of investors' investments in the Sextant Canadian Fund.

[47] The above submission is based on statements in the affidavit of Mr. Daubney at paragraphs 156 – 174.

[48] It is noted that in excess of $3.5 million was charged to the Sextant Canadian Fund in 2008 in respect of the advisory and performance fees, combined. The statement is made that these fees are based almost entirely on the purported value of the fund's IGP shares.

[49] Serious questions are raised as to whether the shares hold anything more than a nominal value, and certainly not the purported value in the tens of millions of dollars as listed on the IAS portfolio valuation statements. In my view, the statement of Mr. Daubney again raises very serious questions about the operation of the fund.

[50] It is not surprising that the submission is made that the recordkeeping inaccuracies and manipulations, as described in Mr. Daubney's affidavit, have caused the net asset value of the Sextant Canadian Fund, therefore the value of the individual investor's investments, to be uncertain.

[51] Counsel to SCMI and Sextant GP at paragraphs 30 – 85 of their factum raise what they consider to be serious flaws in the evidentiary foundation for the application. I cannot give effect to this submission. In my view, there is ample objective evidence to establish that serious issues have been raised and that there are serious areas of concern with respect to all three respondents. These areas of concern relate not only to the protection of the position of the investors but also with respect to the due administration of securities law in Ontario. In my view, the basis for the application of the OSC has, beyond any doubt, been established.

Law

[52] Section 129 of the Act permits the Commission to apply to court for an order appointing a receiver. Such an order shall be made if the court is satisfied that such an appointment is:

(i) in the best interests of the company's creditors or the security holders or of subscribers to the company; or

(ii) it is appropriate for the due administration of Ontario securities law.

[53] I am in agreement with the submissions set out at paragraphs 89 – 98 of the factum submitted by counsel to the OSC which address the criteria to be considered on a s. 129 application.

[54] The criteria for determining what is in the best interests of creditors, security holders or subscribers for the purpose of the appointment of a receiver under the Act is broader than a solvency trust. The criteria should taken into consideration all the circumstances and whether, in the context of those circumstances, it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders. See *British Columbia (Securities Commission) v. Di Cimbriani* (1996), 138 D.L.R. (4th) 263 (B.C.C.A.) and *Ontario (Securities Commission) v. Factorcorp Inc.*, [2007] O.J. No. 4496 (S.C.J.).

[55] Further, where there is a history of mismanagement, no evidence of a tangible alternative resolution, evidence that investors' interests will not be served by maintaining *status quo* and evidence that the company is not in a better position than a receiver to protect investors' interests, it is appropriate to appoint a receiver. See *Factorcorp, supra*, and *Ontario Securities Commission v. C & M Financial Investments Ltd.* (1979), 23 O.R. (2d) 378 (H.C.J.).

[56] In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of assets purchased with investor funds has been compromised, it is in investors' best interests, that a receiver be appointed so that such investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely upon. See *Factorcorp, supra*, and *Ontario (Securities Commission) v. ASL Direct* (November 14, 2008),Toronto (CV-08-7793-00CL (S.C.J.).

Conclusion

[57] The evidence of Mr. Daubney and others raises many serious and troubling concerns. I am satisfied that the investors' interest will not be served by maintaining the *status quo*. There are also a number of troubling concerns that have been raised relating to regulatory non-compliance that justify the appointment of a receiver on the basis of it being appropriate for the due administration of Ontario securities law.

[58] I accept the submission at paragraph 72 of the factum which is referenced at [15]. The situation, in my view, justifies the appointment of a receiver for SCMI, Sextant GP and the Sextant Canadian Fund as being in the best interests of the Sextant Canadian Fund security holders (its investors) and it is also appropriate for the due administration of Ontario securities law.

[59] I have been satisfied that the requirements for the appointment of a receiver under both parts of s. 129 have been met.

[60] In my view, in order to protect investors, the appointment of a receiver is necessary for each of the Sextant Canadian Entities. A receiver is necessary for SCMI and Sextant GP because, among other things:

(i) these are the entities to which fees were paid from the Sextant Canadian Fund and these payments should be reviewed;

(ii) SCMI and Sextant GP are responsible for certain conduct as outlined in the affidavit of Mr. Daubney and, in my view, cannot be entrusted with the continuing responsibility for investors' interests; and

(iii) as the managers of the Sextant Canadian Fund, SCMI and Sextant GP are responsible for the books and records of the fund to which the receiver will require access.

[61] Further, a receiver is necessary for the Sextant Canadian Fund to ensure that investors' assets in the fund are managed, and potentially distributed, in an orderly fashion.

[62] The records are such that investors' funds are not completely accounted for and identified shortcomings in the operations of SCMI and Sextant GP require an independent review. In these circumstances, investors are entitled to an independent and verifiable reporting process and to treatment on which they can rely more generally.

[63] It seems to me that anything less than the appointment of a receiver would not permit the overview or control of the financial affairs of the company.

[64] I note that counsel to SCMI and Sextant GP submitted that the Sextant Canadian Fund is not a mutual fund and therefore not in breach of s. 111 of the Act. No submission was made by the Sextant Canadian Fund.

[65] To the extent that this is an issue, the OSC, in my view, has provided a full response to this position at paragraphs 107 and 108 of its factum.

[66] Counsel to SCMI and Sextant GP also raised the issue that the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver. In my view, it is premature to consider this issue. The interests of the investors can be best served, it seems to me, if there is one receiver who coordinates the mandated activities of the receiver. To the extent that the receiver identifies issues of conflict, these can be addressed at a future time.

Disposition

[67] In the result, the application is granted. PricewaterhouseCoopers Inc. ("PwC") is appointed as Receiver and Manager over the property, assets and undertakings of each of SCMI, Sextant GP and the Sextant Canadian Fund. The consent of PwC has been filed.

[68] An order shall issue in the form of the draft order presented.

MORAWETZ J.

DATE: July 17, 2009