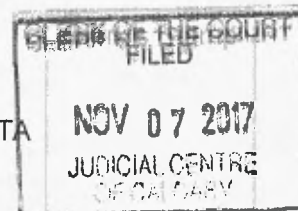


Clerk's stamp:

COURT FILE NO. 1601-06131

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY



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

**AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
CONNACHER OIL AND GAS LIMITED**

DOCUMENT **BOOK OF AUTHORITIES OF THE APPLICANT
APPROVAL OF ATB CREDIT FACILITIES**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
1000 Bankers Hall West
888 3rd Street SW
Calgary, Alberta T2P 5C5

Attn: Shayne Kukulowicz/Ryan Jacobs/Jeffrey Oliver
Tel: 403-351-2920
Fax: 403-648-1151
skukulowicz@casselsbrock.com
rjacobs@casselsbrock.com
joliver@casselsbrock.com

**Book of Authorities In Support of November 10, 2017 Application seeking approval of (i)
the ATB Agreement; (ii) the ATB Charge, and (iii) a Sealing Order over Confidential
Exhibit "1" to the Affidavit of Jeff Beeston sworn November 3, 2017**

INDEX

Tab	Document
1.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36, s. 11.2.
2.	<i>Re Pacific Exploration & Production Corporation et al.</i> , Order of Madam Justice Conway dated July 21, 2016, Court File No. CV-16-11363-00CL.
3.	<i>Re North American Tungsten Corporation et al.</i> , Order of Mr. Justice Butler dated August 13, 2015, No. S-154746.
4.	<i>Re Connacher Oil and Gas Limited</i> , Order of the Honourable Madam Justice Dario dated May 17, 2016, Court File No. 1601-06131.
5.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41 (SCC).

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.6)

R.S.C. 1985, c. C-36, s. 11.2

S 11.2

Currency

11.2

11.2(1) Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3) Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4) Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to October 18, 2017

Federal English Regulations are current to Gazette Vol. 151:20 (October 4, 2017)

TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

)

THURSDAY, THE 21ST

MADAM JUSTICE CONWAY

)

DAY OF JULY, 2016

)



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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF PACIFIC EXPLORATION & PRODUCTION
CORPORATION, PACIFIC E&P HOLDINGS CORP., META
PETROLEUM CORP., PACIFIC STRATUS INTERNATIONAL ENERGY
LTD., PACIFIC STRATUS ENERGY COLOMBIA CORP., PACIFIC
STRATUS ENERGY S.A., PACIFIC OFF SHORE PERU S.R.L., PACIFIC
RUBIALES GUATEMALA S.A., PACIFIC GUATEMALA ENERGY
CORP., PRE-PSIE COÖPERATIEF U.A., PETROMINERALES
COLOMBIA CORP. AND GRUPO C&C ENERGIA (BARBADOS) LTD.

Applicants

Hedging Approval Order

THIS MOTION, made by Pacific Exploration & Production Corporation, Pacific E&P Holdings Corp., Meta Petroleum Corp., Pacific Stratus International Energy Ltd., Pacific Stratus Energy Colombia Corp., Pacific Stratus Energy S.A., Pacific Off Shore Peru S.R.L., Pacific Rubiales Guatemala S.A., Pacific Guatemala Energy Corp., PRE-PSIE Coöperatief U.A., Petrominerales Colombia Corp. and Grupo C&C Energia (Barbados) Ltd. (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter Volk sworn July 15, 2016 and the Exhibits thereto, and the report of the Monitor dated July 19, 2016, and on hearing the submissions of counsel for the Applicants, the Monitor, and such other parties present, no one else appearing although

duly served as appears from the affidavit of service of Teresa Calaminici sworn July 18, 2016, filed,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. Capitalized terms that are used herein and not otherwise defined shall have the meaning given to them in the order granted by this Court on April 27, 2016 in respect of the Applicants (as amended, the **"Initial Order"**). This order shall constitute a supplement to the Initial Order dated April 27, 2016 and the endorsement of the Court to the Meeting Order dated June 30, 2016.

HEDGING AGREEMENTS AND SECURED HEDGING TRANSACTIONS

3. THIS COURT ORDERS that each of the Applicants are hereby authorized and empowered to execute, deliver and perform under one or more ISDA Master Agreements, including Schedules and Confirmations thereto, and/or collared commodity forward purchase and sale agreements or other similar agreements and any and all transactions thereunder, between them and one or more counterparties (each a **"Hedging Counterparty"**), including without limitation, to incur liabilities and obligations thereunder and to make any and all payments required to be made by them from time to time thereunder, all in accordance with the terms thereof, and all such agreements and transactions are hereby approved; provided, in each case, that such hedging agreements and transactions thereunder are Hedging Facilities as defined in the DIP Note Indenture and the DIP LC Facility, as each may be amended or waived from time to time in accordance with their terms, and permitted to be secured pursuant to the first lien collateral trust agreement dated June 22, 2016, including any amendment or waiver thereof (the **"First Lien Collateral Trust Agreement"**) and the Intercreditor Agreement dated June 22, 2016, including any amendment or waiver thereof (the **"Intercreditor Agreement"**) (the agreements and transactions authorized by this paragraph 3 and paragraph 4 being collectively referred to as the **"Hedging Agreements"** and the **"Secured Hedging Transactions"**, respectively).

4. THIS COURT ORDERS that the Applicants are hereby authorized, empowered and directed to execute and deliver any documents contemplated by the Hedging Agreements or in connection with the Secured Hedging Transactions, including any transaction confirmations, joinder agreements, security agreement supplements, guarantees or consents, or such other documents as may be reasonably requested by the Hedging Counterparty pursuant to the terms thereof, and that the Applicants are hereby authorized, empowered and directed to do all things necessary to pay and perform all of their obligations and liabilities to the Hedging Counterparty under and pursuant to the Hedging Agreements and the Secured Hedging Transactions entered into thereunder as and when the same become due or are to be performed, notwithstanding any provision of any order granted in these proceedings: provided that no security for the Hedging Agreements and the Secured Hedging Transactions shall be granted to the Hedging Counterparty except pursuant to and in accordance with the Definitive Documents, the Initial Order and paragraph 6 herein.

5. THIS COURT ORDERS AND DECLARES that the Hedging Agreements (including all security agreements, guarantees, and other credit support documents with respect thereto, but only insofar as they relate to obligations under the Hedging Agreements) are eligible financial contracts (as such term is defined in the CCAA), and for greater certainty, the Hedging Counterparty shall be entitled to all of the benefits and protections contained in the CCAA or any other applicable insolvency law as a counterparty to eligible financial contracts, including without limitation, and to the extent applicable, sections 11.3(2)(b), 32(9)(a), 34(7), 34(8) and 34(9) of the CCAA.

6. THIS COURT ORDERS AND DECLARES that (i) all Hedging Agreements constitute Definitive Documents and DIP Financing Documents as defined in paragraph 48 of the Initial Order, (ii) the DIP Note Charge shall secure amounts owing to the Hedging Counterparties pursuant to such Hedging Agreements, as more fully set out in the First Lien Collateral Trust Agreement, and (iii) the Hedging Counterparties shall be entitled to the benefit of the DIP Note Charge, and shall have the benefits that the DIP Note Purchasers and DIP Lenders have under the Initial Order (including without limitation paragraphs 55, 56 and 57) and shall constitute DIP Note Purchasers and DIP Lenders, as the case may be, solely for such limited purpose and no other (and for the avoidance of doubt without creating any new obligations of the Hedging Counterparties as a result thereof), all subject to the terms of the Hedging Agreements, the First Lien Collateral Trust Agreement and the Intercreditor Agreement.

7. THIS COURT ORDERS that, notwithstanding any provision of any order granted in these proceedings:

- (a) the stay of proceedings granted pursuant to paragraphs 17, 18, 19 and 20 of the Initial Order (as may be extended by this Court from time to time) shall have no application to the Hedging Counterparty with respect to the Hedging Agreements and any Secured Hedging Transactions entered into thereunder;
- (b) to the extent permitted by the First Lien Collateral Trust Agreement and the Intercreditor Agreement, upon the occurrence of any event of default, termination event or other similar event pursuant to the terms of the Hedging Agreements and any Secured Hedging Transactions entered into thereunder, the Hedging Counterparty shall be entitled to exercise any and all rights and remedies against the Applicants or the Property arising under or pursuant to the Hedging Agreements or under applicable law, including without limitation, ceasing to make payments thereunder, terminating the Hedging Agreements and any Secured Hedging Transactions thereunder, making demands for payments or giving any other notices, taking enforcement action in connection with realizing upon the security interest in the Property and exercising any set-off or netting rights against the Applicants or the Property, subject to the limitations set out in the First Lien Collateral Trust Agreement and the Intercreditor Agreement, in each case without further order of this Court. For greater certainty, notwithstanding any limitation contained in any Agreement (defined below) and subject to the provisions of the First Lien Collateral Trust Agreement and the Intercreditor Agreement, upon the occurrence of any event of default, termination event, additional termination event, or other similar event, the Hedging Counterparty shall be entitled to exercise its set off or netting rights (including, without limitation, any close out netting rights), and terminate the Hedging Agreements and any Secured Hedging Transactions thereunder in accordance with their terms; and
- (c) the foregoing rights and remedies of the Hedging Counterparty shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager *of the Applicants or the Property.*

8. THIS COURT ORDERS AND DECLARES that the Hedging Counterparty shall be treated as unaffected in any Plan filed by the Applicants under the CCAA, or any proposal filed

by any of the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any obligations of the Applicants under the Hedging Agreements and the Secured Hedging Transactions entered into thereunder.

9. THIS COURT ORDERS that the Hedging Agreements and any Secured Hedging Transactions entered into thereunder shall not be rendered invalid or unenforceable and the rights and remedies of the Hedging Counterparty thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made in these proceedings; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions (including without limitation any restriction or cap on the amount of oil and gas production of the Applicants permitted to be hedged under any hedging facilities or the duration of any such hedges) with respect to borrowings, incurring debt, issuance of notes or the creation of Encumbrances, contained in the RSA, or any other existing loan documents, indenture, security agreements, lease, sublease, offer to lease or other agreement other than the DIP Note Indenture, the DIP LC Facility, the First Lien Collateral Trust Agreement and the Intercreditor Agreement (collectively, an "**Agreement**") which binds any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the granting of this Order nor the execution, delivery, perfection, registration or performance of the Hedging Agreements or any Secured Hedging Transactions entered into thereunder shall create or be deemed to constitute a breach by an Applicant of any Agreement to which it is a party;
- (b) the Hedging Counterparty shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into, delivering or performing the Hedging Agreements or any Secured Hedging Transactions entered into thereunder or the granting of this Order; and
- (c) the payments made by the Applicants pursuant to this Order, the Hedging Agreements or any Secured Hedging Transactions entered into thereunder, and the addition of the Hedging Counterparty as a beneficiary of the DIP Note Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue,

oppressive conduct, or other challengeable or voidable transactions under any applicable law.

AMENDMENTS TO THE INITIAL ORDER

10. THIS COURT ORDERS that the definition of DIP Note Purchasers in paragraph 44 of the Initial Order be amended by inserting the words "and any trustee, collateral trustee or agent acting on their respective behalves," in the second parenthetical, after the words "Plan Sponsor,".

11. THIS COURT ORDERS that the definition of L/C Providers in paragraph 46 of the Initial Order be amended by inserting the words "and with any trustee, collateral trustee or agent acting on their respective behalves," in the second parenthetical after the word "collectively,".

12. THIS COURT ORDERS that the definition of DIP Lenders in paragraph 46 of the Initial Order be amended by inserting the words "and with any trustee, collateral trustee or agent acting on their respective behalves," in the third parenthetical after the words "L/C Providers,".

GENERAL

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

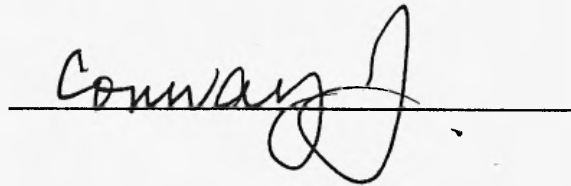
14. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

15. THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary, stay, modify, amend, reverse, vacate or alter in whole

or in part this Order (collectively, a "**Variation**"); provided, however, that such Variation shall not affect the validity of any obligations or liabilities incurred by the Applicants to the Hedging Counterparty prior to the Hedging Counterparty being given written notice of the Variation, and the Hedging Counterparty may rely on this Order, including the benefit of the DIP Note Charge, as issued prior to any such Variation coming into effect.

16. THIS COURT ORDERS AND DECLARES that any motion for a Variation by this Court of the provisions of this Order in respect of the Hedging Agreements or any Secured Hedging Transactions entered into thereunder may only be brought by a party that has not been served with notice of the within motion and any such motion must be brought and returnable no later than ten (10) days after the date of this Order and on not less than seven (7) days' notice to the Applicants, Monitor, the Hedging Counterparty and any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

17. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

A handwritten signature in black ink, appearing to read "Conway", is written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 21 2016

PER / PAR: 

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

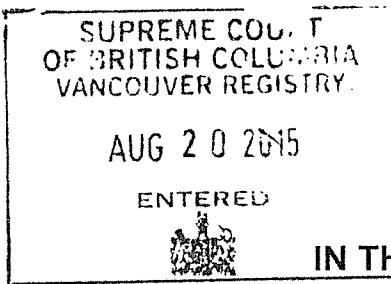
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PACIFIC
EXPLORATION & PRODUCTION CORPORATION, PACIFIC E&P HOLDINGS CORP., META
PETROLEUM CORP., PACIFIC STRATUS INTERNATIONAL ENERGY LTD., PACIFIC
STRATUS ENERGY COLOMBIA CORP., PACIFIC STRATUS ENERGY S.A., PACIFIC OFF
SHORE PERU S.R.L., PACIFIC RUBIALES GUATEMALA S.A., PACIFIC GUATEMALA
ENERGY CORP., PRE-PSIE COOPÉRATIEF U.A., PETROMINERALES COLOMBIA CORP.
AND GRUPO C&C ENERGIA (BARBADOS) LTD.

Applicants

Court File No.: CV-16-11363-00CL

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST Proceeding commenced at Toronto	
HEDGING APPROVAL ORDER (Returnable July 21, 2016)	
NORTON ROSE FULBRIGHT CANADA LLP Royal Bank Plaza, South Tower, Suite 3800 200 Bay Street, P.O. Box 84 Toronto, Ontario M5J 2Z4 CANADA Tony Reyes LSUC #28218V Tel: 416.216.4825 tony.reyes@nortonrosefulbright.com Virginie Gauthier LSUC #41097D Tel: 416.216.4853 virginie.gauthier@nortonrosefulbright.com	
Alexander Schmitt LSUC #63860F Tel: 416.216.2419 alexander.schmitt@nortonrosefulbright.com	
Lawyers for the Applicants	

TAB 3



NO. S-154746
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985 c. C-44, as amended

AND

IN THE MATTER OF NORTH AMERICAN TUNGSTEN CORPORATION LTD.

PETITIONER

ORDER MADE AFTER APPLICATION

	)	THE HONOURABLE	)	
BEFORE	)		)	13 / Aug / 2015
	)	MR. JUSTICE BUTLER	)	

ON THE APPLICATION of North American Tungsten Corporation Ltd. coming on for hearing at Vancouver, British Columbia on August 6 and 13, 2015, and on hearing John Sandrelli and Jordan Schultz, counsel for North American Tungsten Corporation Ltd., and those counsel listed in **Schedule "A"** hereto;

THIS COURT ORDERS that:

Notice

1. The time for service of the Notice of Application herein be and is hereby abridged such that the Notice of Application is properly returnable today and service upon any interested party, other than those parties on the service list maintained by the Petitioner and Alvarez & Marsal Canada Inc. (the "**Monitor**") in these proceedings is hereby dispensed with.

AR Facility

2. The Petitioner is hereby authorized and empowered to borrow under a credit facility (the "**AR Facility**") from Callidus Capital Corporation (the "**AR Lender**") in order to finance accounts receivable owed by Global Tungsten & Powders Corp., provided that borrowings authorized under the AR Facility shall not exceed \$2,500,000, unless permitted by further Order of this Court.
3. The AR Facility shall be made on the terms and conditions set forth in the term sheet between NATC and the AR Lender dated as of July 21, 2015 (the "**AR Term Sheet**"), attached to the Affidavit #9 of Dennis Lindahl, sworn July 21, 2015, as Exhibit "A". All draws under the AR Facility shall be approved by the Monitor before being advanced by the AR Lender.
4. The Petitioner is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, blocked account agreements, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the AR Term Sheet or as may be reasonably required by the AR Lender pursuant to the terms thereof, and the Petitioner is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the AR Lender under and pursuant to the AR Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
5. The AR Lender shall be entitled to the benefit of and is hereby granted a charge (the "**AR Lender's Charge**") on the Property (as such term is defined in the Amended and Restated Initial Order made July 9, 2015, herein the "**ARIO**") in an amount equal to \$2,500,000 plus all interest, fees, costs and other amounts payable under the AR Term Sheet and the Definitive Documents. The AR Lender's Charge shall only secure the obligations, if any, of the Petitioner to the AR Lender pursuant to the AR Term Sheet, and shall not secure any other obligation of the Petitioner to the AR Lender. The AR Lender's Charge shall not secure an obligation that exists before this Order is made. The AR Lender's Charge shall have the priority set out in paragraphs 41 and 43 of the ARIO.
6. Notwithstanding any other provision of this Order:
 - (a) the AR Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the AR Lender's Charge or any of the Definitive Documents;

- (b) upon the occurrence of an event of default under any of the Definitive Documents or the AR Lender's Charge, the AR Lender, upon ten days' notice to the Petitioner and the Monitor and subject to any further order of this Court, may exercise any and all of its rights and remedies against the Petitioner or the Property under or pursuant to the AR Term Sheet, the Definitive Documents and the AR Lender's Charge, including without limitation, to cease making advances to the Petitioner and set off and/or consolidate any amounts owing by the AR Lender to the Petitioner against the obligations of the Petitioner to the AR Lender under the AR Term Sheet, the Definitive Documents or the AR Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioner and for the appointment of a trustee in bankruptcy of the Petitioner; and
 - (c) the foregoing rights and remedies of the AR Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.
7. The AR Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioner under the CCAA, or any proposal filed by the Petitioner under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.
8. The AR Lender's Charge shall terminate when the AR Facility is repaid in full.

Validity and Priority of Charge

9. Paragraphs 41, 42 and 44 of the ARIO shall be deleted in their entirety and replaced with the following:

"41. The priorities of the Administration Charge, the Interim Lender's Charge, the AR Lender's Charge (as defined in the Order made in these proceedings on July 24, 2015) and the Directors' Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$500,000);

Second – Interim Lenders’ Charge and the GSA (to the maximum amount of \$2,500,000 plus all interest, costs, fees and expenses as provided in the Term Sheet);

Third – the AR Lender’s Charge (to the maximum amount of \$2,500,000 plus all interest, costs, fees and expenses as provided in the AR Term Sheet); and

Fourth - Directors’ Charge (to the maximum amount of \$500,000)

42. Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge, the Interim Lenders’ Charge, the GSA, the AR Lender’s Charge and the Directors’ Charge (collectively, the “**Charges**”) shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

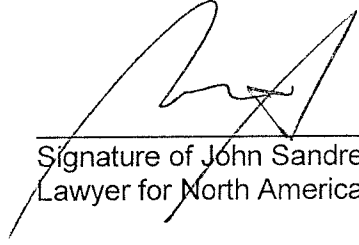
...

44. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioner shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or pari passu with the Charges, unless the Petitioner obtains the prior written consent of the Monitor, the Interim Lender, the AR Lender and the beneficiaries of the Administration Charge and the Director’s Charge.”

10. If for any reason Global Tungsten Powders Corp. fails to pay any invoice issued by NATC in whole or in part, as and when it becomes due in the ordinary course of business, as contemplated in the AR Term Sheet, NATC will within 24 hours provide notice to Wolfram Bergbau und Hütten AG, the Government of the Northwest Territories and the AR Lender of such failure.

11. Endorsement of this Order by counsel appearing on this application is hereby dispensed with.

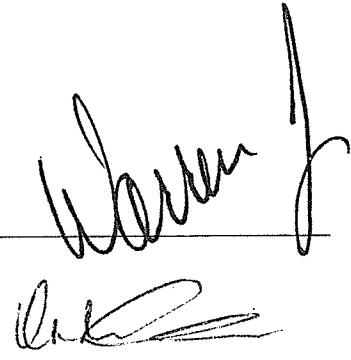
THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of John Sandrelli
Lawyer for North American Tungsten Corporation Ltd.

By the Court.

Registrar



Schedule "A"

(List of Counsel)

Name of Counsel	Appearing For
John Sandrelli and Jordan Schultz	North American Tungsten Corporation Ltd.
Kibben Jackson	Alvarez & Marsal Canada Inc. ("Monitor")
William E. J. Skelly	Callidus Capital Corporation
Lance Williams	Government of Northwest Territories
Jonathan McLean	Wolfram Bergbau and Hütten AG
Kieran Siddall	Global Tungsten Powders Corp.

NO. S-154746
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

AND

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT,
R.S.C. 1985 c. C-44, as amended

AND

IN THE MATTER OF NORTH AMERICAN TUNGSTEN CORPORATION LTD.

PETITIONER

ORDER MADE AFTER APPLICATION

DENTONS CANADA LLP
BARRISTERS & SOLICITORS
250 Howe Street, 20th Floor
Vancouver, BC V6C 3R8
Tel.: (604) 687-4460
Attention: John Sandrelli

File No. 508753-89

TAB 4

Clerk's stamp:



COURT FILE NO. 1601-06131

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

**AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
CONNACHER OIL AND GAS LIMITED**

DOCUMENT **INITIAL ORDER**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
1000 Bankers Hall West
888 3rd Street SW
Calgary, Alberta T2P 5C5

Attn: Shayne Kukulowicz/Ryan Jacobs/Jeffrey Oliver
Tel: 403-351-2920
Fax: 403-648-1151
skukulowicz@casselsbrock.com
rjacobs@casselsbrock.com
joliver@casselsbrock.com

DATE ON WHICH ORDER WAS PRONOUNCED: May 17, 2016

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Madam Justice Dario

LOCATION OF HEARING: Calgary, Alberta

I hereby certify this to be a true copy of
the original Order

Dated this 18 day of May 2016

[Signature]
for Clerk of the Court

UPON the application of Connacher Oil and Gas Limited (the "Applicant"); **AND UPON** having read the Originating Application, the Affidavit of Merle Johnson sworn on May 16, 2016 (the "Johnson Affidavit"), the Pre-Filing Report of Ernst & Young Inc. ("E&Y"), and the Affidavit of Service of Richard Comstock sworn on May 16, 2016, filed; **AND UPON** reading the consent of E&Y to act as Monitor; **AND UPON** noting that Wilmington Trust, National Association, in its capacity as Administrative Agent (the "First Lien Agent") under that certain First Lien Credit Agreement dated as of May 23, 2014 and in its capacity as Trustee under that certain convertible note Indenture dated as of May 8, 2015 and Computershare Trust Company of Canada in its capacity as Collateral Agent under that certain Collateral Trust and Intercreditor Agreement dated as of December 3, 2017, each of whom are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the charges created herein; **AND UPON** hearing counsel for the Applicant, E&Y, Wilmington Trust, National Association, in its capacity as proposed Administrative Agent (the "Interim Financing Agent") under the Interim Financing Credit Facility (as hereinafter defined) and in its capacity as First Lien Agent; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicant is authorized to engage in discussions with its creditors with respect to a plan of compromise or arrangement (hereinafter referred to as the "Plan") and shall have the authority to file and may, subject to further order of this Court, file with this Court a Plan.

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

- (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");
 - (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property;
 - (c) be authorized and empowered to commence or continue any proceedings as applicant or plaintiff as considered advisable by the Applicant, including without limitation an action or application against IDE Technologies Ltd.; and
 - (d) be authorized and empowered to continue to retain and employ the employees, independent contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
5. To the extent permitted by law, the Applicant shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:
- (a) all outstanding and future wages, salaries, employee benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
 - (b) the fees and disbursements of any Assistants retained or employed by the Applicant, at their standard rates and charges.
6. Except as otherwise provided to the contrary herein, and subject to the Definitive Documents (as hereinafter defined), the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

- (b) payment for goods or services actually supplied to the Applicant following the date of this Order.
7. The Applicant shall remit, in accordance with legal requirements, or pay:
- (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:
 - (i) employment insurance,
 - (ii) Canada Pension Plan, and
 - (iii) income taxes,but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;
 - (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
 - (c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.
8. With the consent of the Monitor (which consent may only be given after consultation with the financial advisor to the Interim Financing Agent), the Applicant shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicant prior to the date of this Order up to a maximum aggregate amount of \$750,000 if, in the opinion of the Applicant, the contractor, supplier or vendor that provided such

goods and services is critical to the preservation of the Property or the continuation of the Business following the date of this Order.

9. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("Rent"), but shall not pay any rent in arrears.
10. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:
 - (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;
 - (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and
 - (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. The Applicant shall, subject to such requirements and restrictions as are imposed by the CCAA and the Definitive Documents, have the right to:
 - (a) with the consent of the Monitor, permanently or temporarily cease, downsize or shut down any of its Business or operations or to dispose of redundant or non-material assets not exceeding \$100,000 in any one transaction or \$500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA on an application brought on no less than seven (7) days' notice;
 - (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon

between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

- (c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business.

12. The Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA) and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.
13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA in respect of the Applicant's leased premises, then:
 - (a) during the pendency of the CCAA proceedings the tenancy of any direct sub-tenant of the Applicant shall continue notwithstanding the disclaimer or resiliation on the same terms as its existing sub-lease agreement so long as (i) as of the effective time of the disclaimer or resiliation, the sub-tenant is current in respect all rent payable to the Applicant and (ii) following the effective time of the disclaimer or resiliation, the sub-tenant pays rent (at the same rate paid to the Applicant) directly to the landlord; provided that nothing herein shall prohibit the landlord and the sub-tenant from agreeing to other terms of lease;

- (b) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the non-subleased portion of the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice; and
- (c) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any non-subleased portion of such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease non-subleased portion of such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

14. Until and including June 16, 2016, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:
- (a) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on;

- (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;
 - (c) prevent the filing of any registration to preserve or perfect a security interest; or
 - (d) prevent the registration of a claim for lien.
16. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:
- (a) statutory or regulatory mandates for the supply of goods and/or services; or
 - (b) oral or written agreements or arrangements with the Applicant, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, camp housing, administration, housekeeping and catering services, transportation, trucking, services, utility or other services to the Business or the Applicant

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicant or exercising any other remedy provided under such agreements or arrangements. The Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with the payment practices of the Applicant, or such other practices as may be agreed

upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

19. No person that is a party to any oral or written contract or agreement with the Applicant may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right or make any demand under or in respect of any such contract or agreement, and no automatic termination or exercise of rights or remedies provided for therein will have any validity of effect, including by reason of any event that occurred on or prior to the date hereof that would entitle such person to enforce those rights and remedies (including, without limitation, the Applicant being or having admitted to being insolvent, or it having commenced the within proceedings, or it having obtained any statutory or judicial relief in the within proceeding).

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

20. Notwithstanding anything else contained in this Order, no creditor of the Applicant shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

22. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicant after the commencement

of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

23. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall initially not exceed an aggregate amount of \$1,000,000 (which amount shall be increased to \$2,000,000 automatically without further order of this Court upon the first advance being made under the Interim Financing Credit Facility) as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 41 and 43 herein.
24. Notwithstanding any language in any applicable insurance policy to the contrary:
 - (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and
 - (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 22 of this Order.

APPOINTMENT OF MONITOR

25. E&Y is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;
- (c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the Interim Financing Agent and its counsel on a weekly basis of financial and other information as agreed to between the Applicant and the Interim Financing Agent which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Financing Agent;
- (d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the Interim Financing Agent, which information shall be reviewed with the Monitor and delivered to the Interim Financing Agent and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the Interim Financing Agent;
- (e) assist the Applicant with the implementation of the SISP (as hereinafter defined);
- (f) advise the Applicant in its development of the Plan and any amendments to the Plan;
- (g) advise the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicant to the extent that is necessary to adequately assess the Applicant's Property, Business and financial affairs or to perform its duties arising under this Order;
- (i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

- (j) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicant and any other Person;
 - (k) respond to inquiries of the Interim Financing Agent and/or the First Lien Agent (or their counsel or financial advisor) with respect to the CCAA proceedings, including, without limitation, in connection with each of the sub-paragraphs above, with or without the presence or the consent of the Applicant; however copies of any written reports provided to the Interim Financing Agent and/or the First Lien Agent (or their counsel or financial advisor) by the Monitor shall be concurrently provided to the Applicant or its counsel; and
 - (l) perform such other duties as are required by this Order or by this Court from time to time.
27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.
28. The Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this Order. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.
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29. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.
30. The Monitor, counsel to the Monitor and Canadian and U.S. counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and Canadian and U.S. counsel for the Applicant on a bi-weekly basis.
31. The Monitor and its legal counsel shall pass their accounts from time to time.
32. The Monitor, counsel to the Monitor, and the Applicant's Canadian and U.S. counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$1,500,000 as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 41 and 43 hereof.

INTERIM FINANCING

33. The interim financing term sheet (the "Interim Financing Term Sheet") between the Applicant, the Interim Financing Agent and the lenders party thereto (the "Interim Lenders") dated as of May 16, 2016 as attached at Exhibit "F" to the Johnson Affidavit is hereby approved, and the Applicant is authorized and empowered without further order of this Court to enter into and borrow under an interim financing credit agreement (the "Interim Financing Credit Agreement", and the credit facility created thereby being the "Interim Financing Credit Facility") with the Interim Financing Agent and the Interim Lenders on terms materially consistent with the Interim Financing Term Sheet, in order to finance the Applicant's working capital requirements, the costs of these proceedings, and other general corporate purposes and capital expenditures, provided that

borrowings under the Interim Financing Credit Facility shall not exceed the principal amount of US\$20,000,000 unless permitted by further order of this Court.

34. The Applicant is hereby authorized and empowered to execute and deliver such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, and together with the Interim Financing Credit Agreement, the "Definitive Documents"), as are contemplated by the Interim Financing Term Sheet and/or the Interim Financing Credit Agreement or as may be reasonably required by the Interim Financing Agent pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations under and pursuant to the Interim Financing Credit Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
35. The Interim Financing Agent and the Interim Lenders shall be entitled to the benefits of and are hereby granted a charge (the "Interim Lenders' Charge") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lenders' Charge shall have the priority set out in paragraphs 41 and 43 hereof.
36. Notwithstanding any other provision of this Order:
 - (a) the Interim Financing Agent may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lenders' Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lenders' Charge, the Interim Financing Agent, upon three (3) days' notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Interim Financing Credit Agreement, the other Definitive Documents and the Interim Lenders' Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lenders to the Applicant against the obligations of the Applicant to the Interim Lenders under the Interim Financing Credit Agreement, the other Definitive

Documents or the Interim Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

- (c) the foregoing rights and remedies of the Interim Financing Agent shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.

- 37. The Interim Financing Agent and the Interim Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

KERP/LTIP AND KERP/LTIP CHARGE

- 38. The key employee retention plan (the "KERP") described at paragraphs 92 to 95, Exhibit "G", and Confidential Exhibit "2" of the Johnson Affidavit is hereby authorized and approved and the Applicant (and any other person that may be appointed to act on behalf of the Applicant, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) is authorized and directed to perform the obligations under the KERP and to make the payments contemplated by the KERP in accordance with the terms of the KERP.
- 39. The Applicant (and any other person that may be appointed to act on behalf of the Applicant, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) is authorized and directed to perform the obligations under the Applicant's existing employee long term cash incentive plan as described at paragraph 36 and Confidential Exhibit "1" of the Johnson Affidavit subject, to the extent applicable to any individual employee, to the amended payment terms set out in Exhibit "H" and Confidential Exhibit "2" of the Johnson Affidavit (the "Amended LTIP") and to make the payments contemplated thereby.
- 40. The beneficiaries of the KERP and the Amended LTIP are hereby granted a charge (the "KERP/LTIP Charge") on the Property, which shall not exceed an aggregate amount of

\$1,929,000, to secure all obligations under the KERP and the Amended LTIP. The KERP/LTIP Charge shall have the priority set out in paragraphs 41 and 43 hereof.

VALIDITY AND PRIORITY OF CHARGES

41. The priorities of the Administration Charge, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$1,500,000);

Second – Interim Lenders' Charge

Third – Directors' Charge (to the maximum amount of \$2,000,000 subject to paragraph 23); and

Fourth – KERP/LTIP Charge (to the maximum amount of \$1,929,000).
42. The filing, registration or perfection of the Administration Charge, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge (collectively, the "Charges") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
43. Each of the Administration Charge, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person, except for Encumbrances the holders of which did not receive notice of the application for this order. The Applicant and the beneficiaries of the Charges are hereby granted leave to make further application should it deem necessary or advisable to have the Charges rank ahead of such Encumbrances, on notice to the holders thereof.
44. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge, unless the Applicant also obtains the

prior written consent of the Monitor, the Interim Financing Agent and the beneficiaries of the Administration Charge, the Directors' Charge, or the KERP/LTIP Charge, or further order of this Court.

45. The Administration Charge, the Interim Financing Credit Agreement, the other Definitive Documents, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the Interim Lenders thereunder shall not otherwise be limited or impaired in any way by:
- (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
 - (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
 - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) the provisions of any federal or provincial statutes; or
 - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Interim Financing Credit Agreement or the other Definitive Documents, shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;
 - (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicant entering into the Interim Financing Credit Agreement, or execution, delivery or performance of the Definitive Documents; and

- (iii) the payments made by the Applicant pursuant to this order, including the Interim Financing Credit Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

- 46. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate one or more of the Administration Charge, the Interim Lenders' Charge, the Directors' Charge and the KERP/LTIP Charge amongst the various assets comprising the Property.

USE OF RESTRICTED CASH

- 47. Notwithstanding anything else contained in this Order, the Interim Financing Credit Agreement or any other Definitive Documents, in the event of any circumstances in which there will be a hibernation or shut down of the Applicant's Business or operations, including a shut in of its producing wells, or otherwise a cessation of the Applicant's Business or operations, the Applicant (and any other person that may be appointed to act on behalf of the Applicant, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) is authorized and directed to use the "Shut Down Costs" set out as restricted cash (the "Shut Down Restricted Cash") in the Applicant's cash flow projections attached as Exhibit "I" to the Johnson Affidavit (the "Budget") for such purposes without obtaining a further order of this Court. For greater certainty, the Shut Down Restricted Cash may not be used for any purposes other than the purposes identified in this paragraph unless ordered by this Court on an application brought on no less than three (3) Business Days' notice to any interested parties.
- 48. Notwithstanding anything else contained in this Order, the Interim Financing Credit Agreement or any other Definitive Documents, until the first advance is made under the Interim Financing Credit Facility, the amount identified as restricted cash for "Employee Liabilities" (the "Employee Restricted Cash") in the Budget shall only be used by the Applicant (and any other person that may be appointed to act on behalf of the Applicant,

including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) to pay employee wages, benefits and expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, including amounts which are required to be deducted from employees' wages and remitted or paid to the Crown in Right of Canada or of any Province thereof or any other taxation authority, to the extent that such amounts are not paid pursuant to the terms of this Order, unless ordered otherwise by this Court on an application brought on no less than three (3) Business Days' notice to any interested parties. Once the first advance is made under the Interim Financing Credit Facility, this provision shall not apply, and the Employee Restricted Cash shall not be restricted cash, and instead may be used for any purpose.

SALE AND INVESTMENT SOLICITATION PROCESS

49. The sale and investment solicitation process (the "SISP") attached as Schedule "A" to this Order be and is hereby approved and the Applicant and the Monitor are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.
50. The Monitor and its respective affiliates, partners, directors, employees and agents shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the SISP, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Monitor in performing its obligations under the SISP (as determined by this Court).
51. In connection with the SISP and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Applicant and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or bidders and to their advisers, but only to the extent desirable or required to negotiate and attempt to complete one or more transactions (each, a "Transaction"). Each prospective purchaser or bidder to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction and if it does not complete the Transaction, shall: (i) return all such information to the Applicant; (ii) destroy all such

information; or (iii) in the case of such information that is at electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in any manner which is in all respects identical to the prior use of such information by the Applicant, and shall return all other personal information to the Applicant or ensure that all other personal information is destroyed.

EXTENSION OF TIME FOR ANNUAL GENERAL MEETING

52. The time for the Applicant to call an annual general meeting of its shareholders is extended until further order of this Court.

SEALING

53. Confidential Exhibits "1" and "2" to the Johnson Affidavit (the "Confidential Materials") shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential Materials shall be kept confidential and shall not form part of the public record, but rather shall be placed, separate and apart from all contents in the Court file to be shown only to a Justice of this Court, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

SERVICE AND NOTICE

54. The Monitor shall (i) without delay, publish in the *Calgary Herald* and the *Daily Oil Bulletin* a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.
55. The Applicant and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicant's creditors or other interested Persons at their respective addresses as last shown on the records of the Applicant and that any such

service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at www.ey.com/ca/connacheroilandgas and shall post there as soon as practicable:

- (a) all materials prescribed by statute or regulation to be made publically available; and
- (b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

GENERAL

- 56. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
- 57. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.
- 58. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.
- 59. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

60. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
61. The Applicant is hereby authorized, as the foreign representative of itself and of the within proceedings, to apply for foreign recognition of the within proceedings, as necessary, in any jurisdiction outside of Canada, including the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code, and to take such actions necessary or appropriate in furtherance of the recognition of these proceedings in such jurisdiction.
62. Any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.
63. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

Procedures for the Sale and Investment Solicitation Process

1. On May 17, 2016, Connacher Oil and Gas Limited ("**Connacher**" or the "**Company**") obtained an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* ("**CCAA**") from the Alberta Court of Queen's Bench (the "**Court**") which, among other things, approved the Sale and Investment Solicitation Process ("**SISP**") set forth herein.
2. The purpose of the SISP is to identify one or more purchasers of and/or investors in the Company's Business and/or Property (each as defined herein).
3. Set forth below are the procedures (the "**SISP Procedures**") to be followed with respect to the SISP and, if there is a Successful Bid (as defined herein), to complete the transactions contemplated by the Successful Bid.

Defined Terms

4. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Initial Order. In addition, capitalized terms used but not otherwise defined in these SISP Procedures shall have the following meaning:

"Certain Convertible Noteholders" means that certain group of unaffiliated Convertible Noteholders.

"Business Day" means a day, other than a Saturday, Sunday, or a day on which banks in Calgary, Alberta are authorized or obligated by applicable law to close or otherwise are generally closed.

"Consultation Parties" means, as applicable in the circumstances, (a) the Monitor, (b) the Interim Financing Agent, (c) the First Lien Agent, and (d) Certain Convertible Noteholders, provided that (other than in the case of the Monitor) such parties are subject to confidentiality arrangements with the Company that are satisfactory to the Company and the Monitor.

"Convertible Notes Claim Amount" means the aggregate of all amounts owing to the holders of the 12% convertible second lien notes due 2018 (the "**Convertible Noteholders**") under an indenture dated May 8, 2015 between Connacher and Wilmington Trust, National Association, as trustee (the "**Convertible Note Trustee**").

"Credit Bid" means a bid for the purchase of some or all of the Property and/or an investment in the Company and its Business, pursuant to which the consideration offered includes an exchange for, and in full and final satisfaction of, all or a portion of a secured claim against the Company.

"Interim Financing Agent" means Wilmington Trust, National Association, as administrative agent for those certain lenders (the "**Interim Lenders**") under the Interim Financing Credit Agreement.

"Interim Financing Claim Amount" means the aggregate of all amounts owing under Interim Financing Credit Agreement.

"Interim Financing Credit Agreement" means the interim financing credit agreement between Connacher, the Interim Financing Agent and the Interim Lenders.

"First Lien Claim Amount" means the aggregate of all amounts owing under the first lien credit agreement dated May 23, 2014 between, among others, Connacher, the lenders party thereto (the **"First Lien Lenders"**), and Wilmington Trust National Association, as successor administrative agent for the lenders (the **"First Lien Agent"**), as amended by amendment no. 1 dated as of May 8, 2015, and all related loan documents.

"Monitor" means Ernst & Young Inc., in its capacity as Court-appointed monitor pursuant to the Initial Order, and not in its personal or corporate capacity.

Solicitation Process and Timeline

5. The SISP Procedures set forth herein describe the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Company, its business and operations (the **"Business"**) and its assets, undertakings and properties (collectively, the **"Property"**), the manner in which a bid becomes a Qualified Phase I Bid or a Qualified Phase II Bid (each as defined herein), the receipt and negotiation of bids received, the ultimate selection of a Successful Bid, if any, and the approval thereof by the Court.

6. The Company shall implement these SISP Procedures with the assistance and supervision of the Monitor. In the event that there is disagreement as to the interpretation or application of these SISP Procedures, the Court will have jurisdiction to hear and resolve any such dispute.

7. The following table sets out the key milestones under this SISP, subject to extension by the Company pursuant to and in accordance with these SISP Procedures:

Milestone	Deadline
Phase I Bid Deadline	June 30, 2016
Phase II Bid Deadline	July 27, 2016
Court Approval of Successful Bid(s)	August 8, 2016
Closing of Transaction(s)	August 31, 2016

Solicitation of Interest

8. As soon as practicable following the issuance of the Initial Order, the Monitor shall cause a notice of the SISP, substantially in the form attached at **Appendix "A"** hereto, to be published in the *Calgary Herald* and the *Daily Oil Bulletin*. At the same time, the Company shall issue a press release setting out relevant information from the notice with Canada Newswire designating dissemination in Canada and major financial centres in the United States.

9. A non-confidential teaser letter prepared by the Company (**"Teaser"**) describing the opportunity to acquire or invest in Connacher or to acquire some, all or substantially all of the Property will be made available by the Monitor to prospective purchasers or prospective

strategic or financial investors and will be posted on the Monitor's website as soon as practicable following the issuance of the Initial Order.

10. In order to participate in the SISP, each person (a "**Potential Bidder**") must deliver to the Company and the Monitor at the addresses specified in **Appendix "B"** hereto (including by email or fax transmission), and prior to granting of access to the electronic data room containing confidential information concerning the Company, the Business and the Property (the "**Data Room**") and the distribution of any such confidential information by the Company or the Monitor to a Potential Bidder, an executed confidentiality agreement in form and substance satisfactory to the Company and the Monitor, which shall inure to the benefit of any Successful Bidder that is a purchaser of the Property or an investor in the Company.

Phase I

11. All Potential Bidders that are parties to a confidentiality agreement with the Company in accordance with these SISP Procedures shall be deemed to be a qualified phase I bidder (a "**Qualified Phase I Bidder**") and will be promptly notified of such classification by the Monitor.

12. Qualified Phase I Bidders shall be provided with access to the Data Room and, if requested by the Qualified Phase I Bidder and deemed appropriate by the Company and the Monitor, a management presentation, together with such further information as the Company and the Monitor may deem appropriate. The Company and the Monitor make no representation or warranty as to the accuracy and completeness of the information contained in the Teaser or in the Data Room, except to the extent expressly provided in any definitive sale or investment agreement with a Successful Bidder executed and delivered by the Company (a "**Definitive Agreement**").

13. If requested by a Qualified Phase I Bidder, the Company shall arrange for a site visit by such Qualified Phase I Bidder, subject to compliance with health, safety and security measures reasonably required by the Company.

14. A Qualified Phase I Bidder, if it wishes to submit a bid, must deliver written copies of a non-binding letter of intent (a "**Phase I Bid**") to the Company and the Monitor at the addresses specified in **Appendix "B"** hereto (including by email or fax transmission) so as to be received by them no later than 12:00 p.m. (Mountain Time) on June 30, 2016, or such other date or time as may be agreed by the Company and the Interim Financing Agent, in consultation with the other Consultation Parties (the "**Phase I Bid Deadline**").

15. A Phase I Bid will be deemed to be a "**Qualified Phase I Bid**" only if the Phase I Bid complies with all of the following:

(a) it includes:

- (i) in the case of an offer to purchase the Business or any or all of the Property, a term sheet describing the terms and conditions of the proposed transaction, including identification of the Business or the Property (including any liabilities to be assumed) proposed to be acquired, the purchase price for the Business or Property proposed to be acquired expressed in Canadian dollars (the "**Purchase Price**"), and the structure and financing of the proposed transaction; or

- (ii) in the case of an offer to make an investment in the Company, a term sheet describing the terms and conditions of the proposed transaction, including details regarding the proposed equity and debt structure of the Company following completion of the proposed transaction, the direct or indirect investment target and the aggregate amount of equity and debt investment (including the sources of such capital, the underlying assumptions regarding the pro forma capital structure, as well as anticipated tranches of debt, debt service fees, interest and amortization) to be made in the Company, the debt, equity or other securities, if any, proposed to be allocated to any secured or unsecured creditors of the Company, and whether and what portion, if any, of the Interim Financing Claim Amount, the First Lien Claim Amount and the Convertible Notes Claim Amount is proposed to be paid on closing of the proposed transaction;
- (b) it includes written evidence of the financial ability to consummate the proposed transaction that will allow the Company, in consultation with the Consultation Parties, to make a reasonable determination as to the Qualified Phase I Bidder's financial and other capabilities to consummate the transaction contemplated by the Phase I Bid;
- (c) it contains a description of the conditions and approvals required for a final and binding offer, including any anticipated corporate, security holder, internal or regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals;
- (d) it contains an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;
- (e) it fully discloses the identity of each person (including any person that controls such person) that will be directly or indirectly sponsoring or participating in the bid and the complete terms of any such participation;
- (f) it does not include any request for or entitlement to any break or termination fee, expense reimbursement or similar type of payment;
- (g) it contains such other information as may reasonably be requested by the Company, the Monitor, or the Interim Financing Agent, in consultation with the other Consultation Parties; and
- (h) it is received by the Phase I Bid Deadline.

16. Following the Phase I Bid Deadline, the Company shall distribute copies of the Phase I Bids received to the Consultation Parties. The Company, in consultation with the Consultation Parties, will assess the Phase I Bids received by the Phase I Bid Deadline and determine whether such bids constitute Qualified Phase I Bids. The Company, in consultation with the Consultation Parties, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Phase I Bids.

17. The Company, with the consent of the Interim Financing Agent and in consultation with the other Consultation Parties, may reject any Phase I Bid if it is determined that such bid does not constitute a Qualified Phase I Bid, is otherwise inadequate or insufficient, or is otherwise contrary to the best interests of the Company and its creditors and other stakeholders.

18. If it is determined by the Company, with the consent of the Interim Financing Agent (unless one or more Qualified Phase I Bids are sufficient to repay all obligations under the Interim Financing Credit Agreement in full in cash) and in consultation with the Consultation Parties, that a party that has submitted a Qualified Phase I Bid (including where compliance with the bid requirements had been waived) has a bona fide interest in completing a transaction pursuant to these SISP Procedures and such bid has not been rejected pursuant to Section 17, then such party shall be deemed to be a **"Phase II Bidder"**.

19. The Company or the Monitor shall notify (a) each party that submits a Phase I Bid in writing (including by email or fax transmission) as to whether such party has been determined to be a Phase II Bidder and therefore shall be permitted to proceed to Phase II, and (b) the other Consultation Parties of the list of Phase II Bidders, each within five (5) Business Days after the Phase I Bid Deadline.

20. The First Lien Agent, the Convertible Note Trustee, and each First Lien Lender and Convertible Noteholder shall notify the Company and the Monitor, in writing at the addresses specified in **Appendix "B"** hereto (including by email or fax transmission) so as to be received by them no later than 12:00 p.m. (Mountain Time) on the date that is three (3) Business Days after receipt by such parties of the list of Phase II Bidders pursuant to Section 19, if such party intends to participate in Phase II of the SISP, including in connection with a potential Credit Bid. Failure to provide such notice shall render such party ineligible of participating in Phase II of the SISP, including in connection with a potential Credit Bid. Notwithstanding anything to the contrary in these SISP Procedures, if any of the First Lien Agent, the Convertible Note Trustee or any of the First Lien Lenders or Convertible Noteholders notifies the Company or the Monitor of its intention to participate in Phase II of the SISP, including in connection with a potential Credit Bid (such party, a **"Notifying Party"**), such Notifying Party and their legal and financial advisors shall not receive any further information concerning Phase II of the SISP, including any Phase II Bids (as defined herein), and shall not be entitled to any further consultation rights pursuant to these SISP Procedures.

Phase II

21. The Company, in consultation with the Consultation Parties, shall allow each Phase II Bidder such further access to due diligence materials and information, management presentations and site visits as the Company deems appropriate in its reasonable business judgement and subject to competitive and other business considerations.

22. A Phase II Bidder that wishes to make a formal offer to purchase or make an investment in the Company or its Property and Business shall submit a binding offer (a **"Phase II Bid"**) to the Company and the Monitor at the addresses specified in **Appendix "B"** hereto (including by email or fax transmission) so as to be received by them no later than 12:00 p.m. (Mountain Time) on July 27, 2016, or such other date or time as may be agreed by the Company and the Interim Financing Agent, in consultation with the other Consultation Parties (the **"Phase II Bid Deadline"**). Such Phase II Bid shall be a **"Qualified Phase II Bid"** (and such Phase II Bidder shall be a **"Qualified Phase II Bidder"**) only if the Phase II Bid meets all of the following criteria:

- (a) it complies with all of the requirements in respect of Qualified Phase I Bids, other than the requirements set out in Sections 15(c), 15(d) and 15(h);
- (b) it includes a letter stating that the offer is irrevocable until the earlier of (i) the approval of a Successful Bid (as defined herein) by the Court in accordance with these SISP Procedures and (ii) thirty (30) calendar days following the Phase II Bid Deadline, provided that if such bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;
- (c) it includes written evidence of a firm commitment for all required financing, or other evidence of the financial ability to consummate the proposed transaction, that will allow the Company, in consultation with the Consultation Parties, to make a reasonable determination as to the Qualified Phase II Bidder's financial and other capabilities to consummate the transaction contemplated by the bid;
- (d) it is not conditioned on (i) the outcome of unperformed due diligence and/or (ii) obtaining financing;
- (e) it includes an acknowledgement and representation that the Phase II Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property to be acquired and liabilities to be assumed in making its bid; and (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Property to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly provided in a Definitive Agreement;
- (f) it includes evidence, in form and substance reasonably satisfactory to the Company and the Monitor, of authorization and approval from the Phase II Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid, and identifies any anticipated shareholder, regulatory or other approvals outstanding, and the anticipated time frame and any anticipated impediments for obtaining such approvals;
- (g) except in the case of a Credit Bid, it is accompanied by a refundable deposit (the "**Deposit**") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Company and the Monitor, payable to the order of the Monitor, in trust, (i) if the total consideration is quantifiable, in an amount equal to 10% of that total consideration in the Phase II Bid; or (ii) if the total consideration is unquantifiable, in an amount to be determined by the Company, in consultation with the Consultation Parties, which Deposit is to be held and dealt with in accordance with these SISP Procedures;
- (h) the bid is in the form of duly authorized and executed transaction agreements, and in the case of:

- (i) a purchase proposal, the bid includes an executed Definitive Agreement, including all exhibits and schedules contemplated thereby (other than exhibits and schedules that by their nature must be prepared by the Company), together with a blackline against the draft form of Definitive Agreement which shall be prepared by the Company and posted in the Data Room; and
- (ii) an investment proposal, the bid includes the draft transaction documents contemplated to effect the investment proposal, including all exhibits and schedules contemplated thereby (other than exhibits and schedules that by their nature must be prepared by the Company);
- (i) it contains such other information as may reasonably be requested by the Company, the Monitor, or the Interim Financing Agent, in consultation with the other Consultation Parties; and
- (j) it is received by the Phase II Bid Deadline.

Selection of Successful Bid(s)

23. Following the Phase II Bid Deadline, the Company shall distribute copies of the Phase II Bids received to the Consultation Parties, subject to the terms of Section ~~Error! Reference~~ ²⁹ ~~source not found~~. The Company, in consultation with the Consultation Parties, will assess the Phase II Bids received by the Phase II Bid Deadline and determine whether such bids constitute Qualified Phase II Bids. The Company, in consultation with the Consultation Parties, may waive compliance with any one or more of the requirements specified herein and deem such non-compliant bids to be Qualified Phase II Bids. The Company, in consultation with the Consultation Parties, also reserves the right to (i) request that certain Qualified Phase II Bidders who have submitted Qualified Phase II Bids revisit their proposals in the event that multiple Qualified Phase II Bids are competitive, or (ii) commence an auction process with respect to multiple Qualified Phase II Bids, pursuant to procedures approved by the Company, with the consent of the Interim Financing Agent and in consultation with the other Consultation Parties, that shall be distributed to Qualified Phase II Bidders selected by the Company, with the consent of the Interim Financing Agent and in consultation with the other Consultation Parties, to participate in such auction at least five (5) Business Days in advance of the proposed start time for the auction.

24. The Company, with the consent of the Interim Financing Agent (unless one or more Qualified Phase II Bids are sufficient to repay all obligations under the Interim Financing Credit Agreement in full in cash) and in consultation with the Consultation Parties, shall determine the most favourable of the Qualified Phase II Bids (the "**Successful Bid**"). The Company, with the consent of the Interim Financing Agent (unless one or more Qualified Phase II Bids are sufficient to repay all obligations under the Interim Financing Credit Agreement in full in cash) and in consultation with the Consultation Parties, shall then proceed to negotiate and settle the terms and conditions of a Definitive Agreement in respect of a Successful Bid, all of which shall be conditional upon Court approval and also conditional on the Successful Bid closing within thirty (30) calendar days after the Bid Phase II Deadline, or such longer period as shall be agreed to by the Company, with the consent of the Interim Financing Agent and in consultation with the other Consultation Parties. For greater certainty, the Company, with the consent of the Interim Financing Agent (unless any Successful Bid is sufficient to repay all obligations under

the Interim Financing Credit Agreement in full in cash) and in consultation with the Consultation Parties, may select more than one Qualified Phase II Bid as a Successful Bid to the extent possible based on the nature of such Qualified Phase II Bids.

25. Once a Definitive Agreement has been negotiated and settled in respect of a Successful Bid, with the approval of the Interim Financing Agent (not to be unreasonably delayed or withheld), the person(s) who made the Successful Bid shall be the "**Successful Bidder**" hereunder.

26. The Company shall be under no obligation to accept the highest or best offer or any offer and the selection of a Successful Bidder pursuant to this SISP shall, subject to the terms hereof, otherwise be entirely in the discretion of the Company, after consultation with the Consultation Parties.

Court Approval

27. The Company shall apply to the Court (the "**Approval Motion**") for an order approving a Successful Bid and authorizing the Company to enter into a Definitive Agreement with the Successful Bidder and any and all necessary further instruments and agreements with respect to the Successful Bid, as well as an order, if applicable, vesting title to purchased property in the name of the Successful Bidder. The Approval Motion will be held on or about August 8, 2016 upon application by the Company and may be adjourned or rescheduled by the Company without further notice.

28. All Qualified Phase II Bids (other than a Successful Bid) shall be deemed rejected on and as of the date of approval of the Successful Bid by the Court.

Deposits

29. All Deposits shall be retained by the Monitor and deposited in a trust account. If there is a Successful Bid, the Deposit paid by the Successful Bidder whose bid is approved at the Approval Motion shall be applied to the Purchase Price to be paid or investment amount to be made by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits of Qualified Phase II Bidders not selected as a Successful Bidder shall be returned to such bidders within five (5) Business Days of the date upon which the Successful Bid is approved by the Court. If there are no Successful Bids, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which the SISP is terminated in accordance with these SISP Procedures.

Approvals

30. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA, or any other statute or as otherwise required at law in order to implement or complete a Successful Bid.

No Amendment

31. There shall be no amendments to this SISP, including for greater certainty the process and procedures set out herein, without the consent of the Company, the Interim Financing Agent and the Monitor, in consultation with the other Consultation Parties.

"As Is, Where Is"

32. Any sale of Property or any investment in the Company will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Company or the Monitor or any of their employees, agents or estates, except to the extent otherwise provided under a Definitive Agreement with a Successful Bidder executed and delivered by the Company. Neither the Company nor the Monitor make any representation or warranty as to the accuracy or completeness of the information contained in the Teaser or in the Data Room, except to the extent otherwise provided under a Definitive Agreement with a Successful Bidder executed and delivered by the Company.

Free Of Any And All Claims And Interests

33. In the event of a sale of Property, to the extent permitted by law, all of the rights, title and interests of the Company in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests on or against the Property (collectively, the "**Claims and Interests**") pursuant to a Court order made under section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in a Definitive Agreement with a Successful Bidder.

34. An investment in the Company may include one or more of the following: a restructuring, refinancing, recapitalization or other form of reorganization of the business and affairs of the Company as a going concern, a sale of all or some of the Property to a newly formed entity on terms contemplated in the above paragraph or a plan of compromise or arrangement pursuant to the CCAA or any applicable corporate legislation which compromises the Claims and Interests as set out therein.

No Obligation to Conclude a Transaction

35. The Company has no obligation to agree to conclude a sale or investment arising out of the SISP, and it reserves the right and unfettered discretion to reject any offer or other proposal made in connection with the SISP. In addition, at any time during these SISP Procedures, the Company, with the consent of the Interim Financing Agent and in consultation with the other Consultation Parties, may determine to terminate these SISP Procedures, and shall provide notice of such a decision to any Qualified Phase I Bidders or Qualified Phase II Bidders, as applicable.

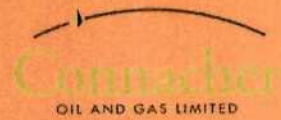
Further Orders

36. At any time during the SISP, the Monitor may, following consultation with the Company and the other Consultation Parties, apply to the Court for advice and directions with respect to the discharge of its powers and duties hereunder.

Appendix "A" Form of SISP Notice

Connacher Oil and Gas Limited

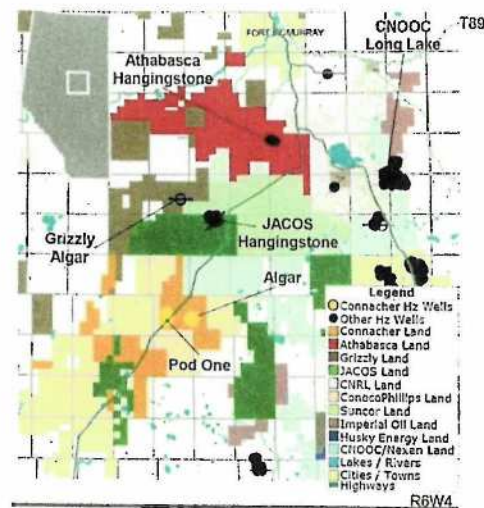
Oil Sands Assets for Sale



On May [], 2016, Connacher Oil and Gas Limited ("Connacher") obtained court protection under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to an initial order granted by the Alberta Court of Queen's Bench. Ernst & Young Inc. was appointed as the Monitor (the "Monitor") of Connacher for the CCAA proceedings. Connacher and the Monitor are seeking parties interested in acquiring or investing in the business or the assets of Connacher.

Connacher's primary assets include a 100% working interest in 87,000 net acres of oil sands leases located southwest of Fort McMurray, Alberta, with estimated gross 2P reserves of 435,000 Mbbl. Connacher has two producing SAGD projects at Great Divide, Pod One and Algar, currently producing 8,000 bbl/d, with the opportunity for medium term development to increase capacity to 20,000 bbl/d. Pod One and Algar have been producing since 2008 and 2010, respectively.

- 41 SAGD well pairs (23 at Pod One, 18 at Algar), and 13 infill wells (Pod One);
- 435,000 Mbbl of 2P reserves (gross);
- 87,000 net acres of oil sands leases;
- Adjacent to Highway 63 and key infrastructure corridors; and
- ~40 year reserve life at current production rates.



The deadline for delivery of initial non-binding letters of Intent is 12:00 p.m. (Mountain Time) on June 30, 2016

Interested parties are invited to contact the Monitor by phone or email or to go to the Monitor's website at www.ey.com/ca/connacheroilandgas for further information on Connacher's sale and investment solicitation process.

Ernst & Young Inc., in its capacity as Court-appointed Monitor of Connacher Oil and Gas Limited

2200, 215 2nd Street SW, Calgary, Alberta T2P 1M4

+1 403 206 5600

connacher.salesprocess@ca.ey.com

Appendix "B"
Addresses for Notices

If to the Company:

Connacher Oil and Gas Limited
Suite 900, 332 – 6 Avenue SW
Calgary, Alberta, Canada
T2P 0B2
Attention: Suzanne Loov
Email: SLoov@Connacheroil.com

With a copy to:

Cassels Brock & Blackwell LLP
1000 Bankers Hall West
888 3rd Street SW
Calgary, Alberta, Canada
T2P 5C5
Attention: Ryan Jacobs and Jeffrey Oliver
Email: rjacobs@casselsbrock.com and joliver@casselsbrock.com

If to the Monitor:

Ernst & Young Inc.
Suite 2200, 215 2Nd Street SW
Calgary, Alberta, Canada
T2P 1M4
Attention: Christopher Hibberd
Email: christopher.hibberd@ca.ey.com

TAB 5

**Atomic Energy of Canada
Limited** *Appellant*

v.

Sierra Club of Canada *Respondent*

and

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

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

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

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

**Énergie atomique du Canada
Limitée** *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

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

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act* (“CEAA”), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club’s application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL’s application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

l’autorisation d’aide financière du gouvernement déclenche l’application de l’al. 5(1)b) de la *Loi canadienne sur l’évaluation environnementale* (« LCÉE ») exigeant une évaluation environnementale comme condition de l’aide financière, et que le défaut d’évaluation entraîne l’annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d’information technique concernant l’évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s’oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu’ils sont la propriété des autorités chinoises et qu’elle n’est pas autorisée à les divulguer. Les autorités chinoises donnent l’autorisation de les communiquer à la condition qu’ils soient protégés par une ordonnance de confidentialité n’y donnant accès qu’aux parties et à la cour, mais n’imposant aucune restriction à l’accès du public aux débats. La demande d’ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d’appel fédérale confirme cette décision.

Arrêt : L’appel est accueilli et l’ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d’expression, la question fondamentale pour la cour saisie d’une demande d’ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d’expression. La cour doit s’assurer que l’exercice du pouvoir discrétionnaire de l’accorder est conforme aux principes de la *Charte* parce qu’une ordonnance de confidentialité a des effets préjudiciables sur la liberté d’expression garantie à l’al. 2b). On ne doit l’accorder que (1) lorsqu’elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d’un litige, en l’absence d’autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l’emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d’expression qui, dans ce contexte, comprend l’intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l’analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l’intérêt commercial en question. Deuxièmement, l’intérêt doit pouvoir se définir en termes d’intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s’il existe d’autres options raisonnables, il doit aussi restreindre l’ordonnance autant qu’il est raisonnablement possible de le faire tout en préservant l’intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés :** *AB Hassle c.*

Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and Peter Chapin, for the appellant.

Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada.

Graham Garton, Q.C., and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. n° 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)b), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. n° 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. n° 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et Peter Chapin, pour l'appelante.

Timothy J. Howard et Franklin S. Gertler, pour l'intimé Sierra Club du Canada.

Graham Garton, c.r., et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

issues of when, and under what circumstances, a confidentiality order should be granted.

For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

The appellant, Atomic Energy of Canada Limited (“AECL”) is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervenor with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada (“Sierra Club”). Sierra Club is an environmental organization seeking judicial review of the federal government’s decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

Pour les motifs qui suivent, je suis d’avis de rendre l’ordonnance de confidentialité demandée et par conséquent d’accueillir le pourvoi.

II. Les faits

L’appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d’État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l’intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d’emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l’appelante. Les réacteurs sont actuellement en construction en Chine, où l’appelante est entrepreneur principal et gestionnaire de projet.

L’intimé soutient que l’autorisation d’aide financière du gouvernement déclenche l’application de l’al. 5(1)(b) de la *Loi canadienne sur l’évaluation environnementale*, L.C. 1992, ch. 37 (« LCÉE »), qui exige une évaluation environnementale avant qu’une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d’évaluation entraîne l’annulation des ententes financières.

Selon l’appelante et les ministres intimés, la LCÉE ne s’applique pas à la convention de prêt et si elle s’y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L’article 8 prévoit les circonstances dans lesquelles les sociétés d’État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu’elles soient compatibles avec les dispositions de la LCÉE.

Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l’appelante a

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filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the “Confidential Documents”). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL’s experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang’s evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the “EIRs”), a Preliminary Safety Analysis Report (the “PSAR”), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l’affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d’ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu’il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L’appelante s’oppose pour plusieurs raisons à la production des documents, dont le fait qu’ils sont la propriété des autorités chinoises et qu’elle n’est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l’autorisation de communiquer les documents à la condition qu’ils soient protégés par une ordonnance de confidentialité, l’appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

Aux termes de l’ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l’accès du public aux débats. On demande essentiellement d’empêcher la diffusion des documents confidentiels au public.

Les documents confidentiels comprennent deux Rapports d’impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d’analyse sur la sécurité (« RPAS ») ainsi que l’affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S’ils étaient admis, les rapports seraient joints en annexe de l’affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l’appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l’évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. *Federal Court, Trial Division, [2000] 2 F.C. 400*

Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought

Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

Règles de la Cour fédérale (1998), DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance, [2000] 2 C.F. 400*

Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

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interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. *Federal Court of Appeal*, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b) which the appellant proposed to raise if s. 5(1)(b) of the *CEAA* was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the *CEAA*. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)(b) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la LCÉE, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entache pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

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reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

He observed that, in the area of commercial law, when the information sought to be protected concerns “trade secrets”, this information will not be disclosed during a trial if to do so would destroy the owner’s proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is “necessary” to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l’imputabilité dans l’exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l’emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

Il fait observer qu’en droit commercial, lorsque les renseignements qu’on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d’annihiler les droits du propriétaire et l’exposerait à un préjudice financier irréparable. Il conclut que, même si l’espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d’une ordonnance de confidentialité (au par. 13) :

1) les renseignements sont de nature confidentielle et non seulement des faits qu’une personne désire ne pas divulguer; 2) les renseignements qu’on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l’octroi d’une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l’intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l’ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l’ordonnance de confidentialité. Pour le septième critère, c’est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgaration doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l’ai dit au tout début, je ne crois pas que le degré d’importance qu’on croit que le public accorde à une affaire soit une considération pertinente.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

- 35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the *Federal Court Rules, 1998*?
- B. Should the confidentiality order be granted in this case?

VI. Analysis

A. *The Analytical Approach to the Granting of a Confidentiality Order*

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the

Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

- A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?
- B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt Dagenais

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2b). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in *Dagenais*, although it must be tailored to the specific rights and interests engaged in this case.

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2b), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

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religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accused's right to a fair trial.

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

A publication ban should only be ordered when:

Une ordonnance de non-publication ne doit être rendue que si :

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33;

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2b) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;

b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et

c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11d) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le

accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

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The Court emphasized that under the first branch of the test, three important elements were subsumed under the “necessity” branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase “proper administration of justice” must be carefully interpreted so as not to

droit de l’accusé à un procès public et équitable tout autant que la liberté d’expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l’intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l’efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d’ordonner des interdictions de publication n’est pas assujéti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l’essence de l’article premier de la *Charte* et le critère *Oakes* dans l’analyse applicable aux interdictions de publication. Comme le même objectif s’applique à l’affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l’accusé à un procès équitable) de manière à fournir un guide à l’exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l’absence d’autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l’accusé à un procès public et équitable, et sur l’efficacité de l’administration de la justice.

La Cour souligne que dans le premier volet de l’analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l’expression « bonne administration de la justice » doit être interprétée

allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflec[t] the substance of the *Oakes* test”, we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

Mentuck is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles.

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [...] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

Mentuck illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

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Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l’analyse, les tribunaux doivent avoir pleinement conscience de l’importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1^{re} inst.), p. 439, le juge Muldoon.

Enfin, l’expression « autres options raisonnables » oblige le juge non seulement à se demander s’il existe des mesures raisonnables autres que l’ordonnance de confidentialité, mais aussi à restreindre l’ordonnance autant qu’il est raisonnablement possible de le faire tout en préservant l’intérêt commercial en question.

B. *Application de l’analyse en l’espèce*

(1) Nécessité

À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l’appelante, et s’il existe d’autres solutions raisonnables que l’ordonnance elle-même, ou ses modalités.

L’intérêt commercial en jeu en l’espèce a trait à la préservation d’obligations contractuelles de confidentialité. L’appelante fait valoir qu’un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l’analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

Le juge Pelletier souligne que l’ordonnance sollicitée en l’espèce s’apparente à une ordonnance conservatoire en matière de brevets. Pour l’obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. n° 1850 (QL) (C.F. 1^{re} inst.), par. 29-30. J’ajouterais à cela

by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant’s commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL’s competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal’s assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant’s case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

l’exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu’ils ont été « recueillis dans l’expectative raisonnable qu’ils resteront confidentiels », par opposition à « des faits qu’une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l’appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l’appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu’il s’agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d’ÉACL (par. 16). Par conséquent, l’ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

Le premier volet de l’analyse exige aussi l’examen d’options raisonnables autres que l’ordonnance de confidentialité, et de la portée de l’ordonnance pour s’assurer qu’elle n’est pas trop vaste. Les deux jugements antérieurs en l’espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l’appelante en vertu de la *LCÉE*, et cette conclusion n’est pas portée en appel devant notre Cour. De plus, je suis d’accord avec la Cour d’appel lorsqu’elle affirme (au par. 99) que vu l’importance des documents pour le droit de présenter une défense pleine et entière, l’appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l’appelante, il ne reste qu’à déterminer s’il existe d’autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

Deux options autres que l’ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

authorities require prior approval for any request by AECL to disclose information.

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) The Proportionality Stage

(2) L'étape de la proportionnalité

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the *CEAA* is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

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permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

(b) *Deleterious Effects of the Confidentiality Order*

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2b) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2b) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appellante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

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As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

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In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

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The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

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principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

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This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

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However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accroît lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accroît le besoin de transparence, et cette nature publique ne se reflète

I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, “we must guard carefully against judging expression according to its popularity”.

Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

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In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

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In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the *CEAA*, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the *CEAA*, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the *CEAA* are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

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In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the *CEAA*, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the *CEAA*, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the *Federal Court Rules, 1998*.

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

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Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.