(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 18

COURT FILE NO.: 04-CL-5306
DATE: 20060117

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: Geoff R. Hall, for the Stelco Applicants

Kyla Mahar, for the Monitor

Peter Jacobsen, for Globe & Mail

Kevin Zych, for the 8% and 10.4% Stelco Bondholders

Peter Jervis and Karen Kiang, for the Equity Holders

Sharon White, for USW Local 1005

HEARD: January 17, 2006

E N D O R S E M E N T

(Motion by Applications for permanent sealing order of confidential information)

[1] This Endorsement deals with two of the three issues, the third will be forthcoming.

[2] I am satisfied that there has been minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability (directly or implied) which would be ordinarily kept confidential as disclosure of such information to competitors, suppliers and customers would be injurious to Stelco's business activities. Reasonable alternative measures would not prevent the risk to Stelco. The salutory effects of a confidentiality order as to the elements redacted, including the ability of the participants in this CCAA proceeding to deal reasonably pursuant to Non-Disclosure Agreements with submissions related to such confidential financial information, outweigh the deleterious effects of such confidentiality order.

[3] I am satisfied that there has been a minimal effect negative to the concept of an open court. The Globe was not opposed to this redaction effort.

[4] It appears to me that the principles and tests involved in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.) has been met. See also *Re Air Canada* (S.C.J.) released September 26, 2004.

[5] There is to be a permanent sealing order subject to any interested party asking for a review of same upon notice to Stelco.

[6] The second issue relates to the inadvertence as to not blanking/blacking out three lines in an affidavit of one Fabrice Taylor. The first part of the paragraph, all on the preceding page, had been blacked out. Upon reasonable reflection, it would be obvious to a person receiving same that the part not so blacked out did not make any sense on any stand-alone basis. Unfortunately, the incompletely blacked-out affidavit was flipped over to a reporter at the Globe who was not permitted to review unredacted copy (Stelco and the Globe had worked out a very reasonable and common sense arrangement whereby unredacted copy could be reviewed by counsel for the Globe and a Globe employee who was restricted from using same or disclosing such to others). The flip-over by counsel for the Globe was "innocent" as he had not reviewed the material before doing the flip and he had not expected that there would have been a problem with the blacking out.

[7] The reporter has quite responsibly agreed to treat the three lines not previously blacked-out as having been blacked out *ab initio*.

[8] The remaining third issue is whether the portion of the affidavit and exhibits which were blacked out (including the subject 3 lines) and as agreed by Stelco and the equity holders' counsel were to be blacked-out qualify for such redaction. I will deal with that in a further endorsement.

J.M. Farley

DATE: January 17, 2006

TAB 19

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

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

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

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

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

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. 2*b*). 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

1 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. nº 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, 2*b*).
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. nº 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. nº 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 intervener 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.

2 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

3 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.

4 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.

5 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*.

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

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.

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.

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.

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.

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.

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

9 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.

10 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

11 *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

12 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

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.

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.

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.

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).

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

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.

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.

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.

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).

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.

17 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.

18 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.

19 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.

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.

24 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.

25 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'entâche 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.

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

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-divulgation 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. 2*b*). 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. 2*b*), 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.

37 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.

38 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.

39 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

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 accuseds' right to a fair trial.

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:

> A publication ban should only be ordered when:
>
> (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
>
> (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.]

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.

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;

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.

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 :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> 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) 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.]

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.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2*b*) 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.

43 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. 11*d*) 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.

44 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.

45 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.

46 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 assujetti 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.

47 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.

48 *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

49 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).

50 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. 1re inst.), p. 439, le juge Muldoon.

57 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

58 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.

59 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.

60 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. no 1850 (QL) (C.F. 1re 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.

64 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.

65 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.

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.

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.

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.

(2) The Proportionality Stage

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

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.

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.

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.

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) L'étape de la proportionnalité

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*

70 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.

71 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.

72 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

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.

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.

(b) *Deleterious Effects of the Confidentiality Order*

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.

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.

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.

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

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. 2*b*) 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.

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. 2*b*) 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.

76 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.

77 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'appelante 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.

78 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.

79 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.

80 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.

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.

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.

81 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.

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.

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.

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.

82 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.

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

83 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

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.

84 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.

85 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'accentue 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 accentue 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 ».

86

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.

87 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.

88 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.

89 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.

90 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

91 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.

92 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)*.

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.

TAB 20

See paras. 38, 86 and 97

SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate
Appellants

and

Kevin Donovan and Toronto Star Newspapers Ltd.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 108)	Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Indexed as: Sherman Estate *v.* Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

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By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General*), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public

importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that,

on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy

[1] As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an

[2] The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have

a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles.

This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive.

On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26).

Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a

fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing

orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise

than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test

was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant

flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example

by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the

necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional . . . harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is

pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733

("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective

[3] At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

(*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced,

alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect

of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at

p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong

presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule

and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of

openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in

particular, in order to protect the parties' privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial

proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as

fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its

preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from*

the Identity Trail: Anonymity, Privacy and Identity in a Networked Society (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to

other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this

Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the

structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a

result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious

risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude

further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a

restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception

to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the

Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might

well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is

worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious

risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the

Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis.

Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

TAB 21

See para. 21

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sunrise/Saskatoon Apartments Limited Partnership (re),* 2017 BCSC 808

Date: 20170421
Docket: S1611657
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended

In the Matter of the Plan of Compromise and Arrangement of Sunrise/Saskatoon Apartments Limited Partnership and Those Parties Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioners:	C.J. Ramsay K.G. Mak
Counsel for KingSett Mortgage Corporation:	P. Bychawski
Counsel for Community Trust:	M. Buttery
Counsel for Monitor, PricewaterhouseCoopers LLP:	J.R. Sandrelli
Counsel for MCAP Financial Corp.:	G.G. Plottel

Counsel for GMI Servicing Inc.:	M.C. Verbrugge
Counsel for Timbercreek Mortgage Servicing Inc.:	C.D. Brousson
Counsel for Steering Committee of Limited Partners (M. Rauch, C. Duidre, C. Cumming, F. Banducci and R. Gritten):	R.P. Wu
Counsel for New Summit Partners Corp., Oledale Management Services Inc. and H.C. Apartments LP:	B.R. Bennett
Counsel for Van Maren Group:	G.H. Dabbs
Counsel for Superior Millwork Ltd., Durabuilt Windows & Doors Inc. and Adler Firestopping Ltd.:	M. Russell
Place and Date of Hearing:	Vancouver, B.C. April 21, 2017
Place and Date of Judgment:	Vancouver, B.C. April 21, 2017

[1] **THE COURT:** This is a *Companies' Creditors Arrangement Act* proceeding. The petitioners are in the business of acquiring and developing various rental buildings in Regina and Saskatoon, Saskatchewan. The matter began with the granting of an initial order on December 19, 2016.

[2] At the outset, this restructuring proceeding had all the hallmarks of being a very contested matter. This arose largely from the concerns of the extensive secured creditor group, who hold different levels of security on the various projects or buildings.

[3] Fortunately, much of the stakeholders' differences were subsequently put aside as a result of extensive negotiations. Those negotiations led to the granting of the amended and restated initial order (the "ARIO") on February 3, 2017.

[4] The ARIO provides a general framework for dealing with the various properties. In broad terms, the ARIO provided for various properties to be immediately put up for sale. In addition, the ARIO allowed for the petitioners to continue with their construction activities towards completing certain buildings and finalizing the leasing of the various units in those buildings. The general idea is that, once the construction was finished, those buildings would similarly be put up for sale.

[5] Another circumstance which the petitioners had in mind leading up to the granting of the ARIO was that, with the exception of the phase 1 properties, which were to be put up for sale, there remained the possibility of a restructuring with respect to some or all of the other buildings.

[6] A fundamental aspect of the stakeholder's intentions regarding the ARIO was to recognize and respect the various interests that applied to each individual property, which have different encumbrances (what the Monitor describes as the "capital stack"). Generally speaking, each property or building has different and different levels of lenders, beginning with the first secured creditor and continuing down to the limited partners or equity interests that apply to each of the properties.

Accordingly, from the outset of these proceedings, the stakeholders have agreed to a concept of "ring fencing", which preserves the cash flows and costs associated with each of the individual properties and allows an orderly assessment of the viability of the properties on that basis.

[7] Since the ARIO was granted, there have been substantial continuing efforts by all of the stakeholders toward finalizing the "go forward" path, all with the involvement of the Monitor. Those efforts are principally outlined in the Monitor's Fourth Report dated April 13, 2017, and in particular at paragraph 8 and following. The Monitor reports that five properties were put up for sale and agreements are anticipated in early May. The sixth property, being CILO, has now been added to that sales process, and definitive agreements on that property are expected on May 23, 2017.

[8] In addition, substantial work has been completed on the construction front, with various budgets being prepared. Arbutus has been retained to take that process forward. The necessary financing for that construction has been secured with KingSett Mortgage Corporation through a syndicated process. Therefore, the funding is in place with respect to the construction which is anticipated to take between six to eight months, or to the end of 2017.

[9] The Monitor outlines that there have been extensive discussions between the various stakeholders. Stakeholders participating in the discussions concerning the need for construction financing have included the limited partners. Even so, it appears that they have declined to provide that financing, leading to KingSett agreeing to do so.

[10] I have also been assisted on this application by the Monitor's Supplemental Report dated April 19, 2017, on one particular issue, which I will address in these reasons.

[11] The two applications before me today are as follows: firstly, the petitioners apply to extend the stay to August 31, 2017; secondly, KingSett applies for an order

approving various loans. These loans include an initial loan of $50,000 in respect of the CILO project. That loan was superseded by a second loan of $502,000, which paid out the $50,000 loan. Finally, KingSett applies for approval of a $17.5 million loan with respect to the construction on the various Sunrise projects. To some extent, KingSett's application is brought *nunc pro tunc* because, working within the general framework under the ARIO, the petitioners have already received initial draws under that financing.

[12] There is no opposition to the application by KingSett to approve the loans. In fact, the Monitor supports the order being granted, as do the petitioners. I have no hesitation in concluding that the order should be granted. I find that the evidence establishes that the relevant test under the *CCAA* is met in the circumstances.

[13] Accordingly, the order as sought by KingSett in its notice of application dated April 18, 2017, is granted, with the minor amendment addressed by KingSett's counsel during submissions.

[14] The petitioners' application to extend the stay of proceeding to August 31 has invited some opposition. Counsel for the petitioners has made submissions as to their reasoning for the August 31 date. In broad terms, those reasons relate to both the sales process and the construction process which are underway. It is anticipated that the sales process will bring forward applications either in June or possibly early July. In addition, the construction schedule anticipates a process of six to eight months from today, which leads us into the December 2017 time frame. Counsel also point out that there is a cost of coming back to court for further extension. Given the number of faces that I see in this courtroom, it cannot be doubted that that is a significant cost arising from every court appearance.

[15] The proposed extension date of August 31 is not opposed by many of the secured creditors. These secured creditors take no position on that issue, although they all indicated that they reserved their rights in the sense that they will see how the process plays out. If matters do not proceed to their liking, they all indicate that they may apply to the Court to propose another course of action.

[16] The proposed extension date is opposed by two secured creditors: Community Trust, a senior secured creditor on the Nutana property with debt of approximately $15 million; and, the Van Maren Group, a junior secured creditor (mostly in third position) on the Sunset properties. Both creditors seek an extension date earlier than August 31.

[17] Community Trust submits that the more appropriate date is the end of June. Its opposition is advanced on the basis that in the normal course a *CCAA* extension date is tied to what is called a threshold date. Further, Community Trust submits that since it is somewhat unclear in terms of how the sales and construction process will unfold, an earlier date is appropriate. Counsel for Community Trust also suggests that by granting the extension date to August, it will effectively reverse the onus by requiring any secured creditor who opposes the continuation of the proceeding to bring its own application to set a different course.

[18] The Monitor has expressly addressed the issue as to extension date in its Supplemental Report at paragraph 3.3. Essentially, the Monitor says that there has been positive momentum to these proceedings and that much has been accomplished in terms of achieving consensus between the various stakeholders as to a process going forward. The Monitor also notes that the agreed upon process not only involves the sales, but also a construction process that requires some stability in terms of retaining trades without the sword of Damocles being held over people's heads and worrying about having to justify further extensions.

[19] Finally, the Monitor concludes that, given the CILO sales process, which is somewhat further delayed, that sales process might well only result in a sale to be addressed in early July.

[20] Accordingly, the Monitor concludes that the August 31 extension date provides a reasonable date given the overall circumstances.

[21] The decision as to what an appropriate extension date is requires that the Court allow some flexibility to the parties. It remains a matter of exercising my discretion in terms of what I think is the most appropriate in the circumstances.

[22] In my view, there is no doubt that there will be further court attendances between now and August, particularly given the sales process that is underway. In my view, those applications will provide more than ample opportunity for any secured creditor, including Community Trust and Van Maren, to voice any concerns or disagreement about the process going forward.

[23] I agree that I see no need to put the petitioners to the extra cost of making further applications for extensions of the stay. The costs of doing so will, of course, redound to the prejudice of the overall stakeholder group given the significant costs that are involved.

[24] I have in mind too that there will be ongoing oversight by the Monitor. If anything untoward should happen, I would expect that the Monitor would file a report to that effect and alert the stakeholders so that the matter can be brought back before the court to be addressed in the usual fashion.

[25] Overall, I am satisfied that the Monitor has appropriately analyzed the various moving parts that are in play in this proceeding at this time. Accordingly, I grant the order allowing the extension date to August 11, 2017. I have chosen this date because it accords with my rota when I will be sitting in Vancouver and the calendars of counsel.

"Fitzpatrick J."

TAB 22

See para. 44

2017 ONSC 6800
Ontario Superior Court of Justice

Tan-Jen Ltd. v. Di Pede

2017 CarswellOnt 18048, 2017 ONSC 6800, 285 A.C.W.S. (3d) 529

TAN-JEN LTD (Plaintiff, Defendant to the Counterclaim) and LISA DI PEDE A.K.A. ELISA DI PEDE, TONY DI PEDE and DI PEDE DESIGN GROUP INC. (Defendants, Plaintiffs by Counterclaim)

P.J. Monahan J.

Heard: October 17, 2017
Judgment: November 15, 2017
Docket: CV-08-00360246-0000

Counsel: Monique Jilesen, Margaret Robbins, Jeffrey Silver, for Plaintiff
Gordon Hearn, James Manson, for Defendants

***P.J. Monahan J.*:**

1 The parties have been engaged in litigation since 2008 (the "Underlying Litigation") over the rights to certain custom-built moulds that were used in the construction of the home of the Defendants Lisa and Tony Di Pede (the "Di Pedes"). The parties settled the Underlying Litigation in 2016 when the Defendants accepted the Plaintiff's settlement offer. However the Defendants subsequently brought a motion seeking to find the Plaintiff in contempt (the "Contempt Motion") for allegedly violating certain interlocutory orders that had been issued during the course of the Underlying Litigation. The present motion (the "Motion to Strike") is brought by the Plaintiff, seeking an order striking the Contempt Motion pursuant to Rules 21.01(1)(b) and 25.11(b) and (c) of the *Rules of Civil Procedure.*

2 For the reasons that follow, I would grant the relief sought by the Plaintiff, strike the Defendants' Contempt Motion pursuant to Rule 25.11, without leave to amend, on grounds that it is frivolous and vexatious and an abuse of process.

Background Facts

3 The Plaintiff Tan-Jen Ltd. ("Tan-Jen") designed a number of a number of pre-cast moulds (the "Moulds") used in the construction of the Di Pedes' residence. After the completion of the project, Tan-Jen remained in possession of the Moulds. In 2006, the Di Pedes borrowed a number of the Moulds in order to finish elements of the interior of the residence. These Moulds remained in the possession of the Di Pedes.

4 In July 2008, a dispute arose between the parties with respect to a claim by the Di Pedes that some of the Moulds had been used by Tan-Jen to produce pre-cast elements on another home. When the parties could not resolve this dispute, Tan-Jen commenced the Underlying Litigation, bringing an action for damages, injunctive relief, the return of the Moulds in the Di Pedes' possession and claiming copyright in all of the Moulds. The Di Pedes subsequently delivered a statement of defence and a counterclaim in which they sought an injunction preventing Tan-Jen from using the Moulds in any other project, damages and copyright in the Moulds.

5 During the course of the Underling Litigation, a number of interlocutory orders were made in relation to the Moulds. On September 2, 2008, Justice Echlin signed an Endorsement on consent (the "Echlin Order"), directing that "the moulds in each parties' possession shall be stored and not used prior to determination of [the] motion." Pursuant to the Echlin Order, on September 4, 2008, representatives of Tan-Jen attended at the Di Pedes' residence to wrap and seal the Moulds in the Di Pedes'

possession. On September 5, 2008, representatives of the Di Pedes attended at the premises of Tan-Jen to wrap and seal the Moulds in Tan Jen's possession.

6 On November 13, 2008, Kelly J. signed an order on consent directing the following (the "Kelly Order"):

> That the moulds in each party's possession shall continue to be stored and not used and that they shall remain wrapped and sealed pending the determination of the motions or until such further order of the court.

7 On May 25, 2010, Tan-Jen made an offer to settle the proceedings. The offer to settle proposed two options, the first whereby the Moulds in the possession of the Di Pedes would be returned to Tan-Jen, the second whereby the Moulds in possession of Tan-Jen would be delivered to the Di Pedes. Under the second option, in return for receiving the Moulds from Tan-Jen, the Defendants would pay Tan-Jen the sum of $92,500. The Defendants would also pay the Plaintiff's costs on a partial indemnity basis. The offer to settle did not require any representations or warranties from either party with respect to the condition of the Moulds.

8 On April 28, 2016, six years after the offer to settle was made and eight years after the Moulds had been wrapped and sealed, the Di Pedes accepted the offer and elected option two, whereby they would be entitled to possession of all the Moulds in return for a payment of $92,500. On June 24, 2016, Morgan J. signed an order finalizing the settlement agreement (the "Settlement Agreement") and, on July 26, 2016, the Di Pedes obtained the Moulds in Tan-Jen's possession and made the required payment.

9 On August 19, 2016, the Defendants brought the Contempt Motion, alleging that Tan-Jen had deliberated violated the terms of the Echlin Order and/or the Kelly Order (collectively, the "Orders"). In addition to a finding of contempt against Tan-Jen, the Contempt Motion also sought the imprisonment of Stephen Latanville ("Latanville"), the principal of Tan-Jen, payment of a fine, both general and punitive damages, and costs of both the Contempt Motion as well as the Underlying Litigation.

10 On February 14, 2017, Tan-Jen brought the Motion to Strike on the basis that the Contempt Motion discloses no reasonable cause of action under Rule 21.01(1)(b), that it is frivolous or vexatious under Rule 25.11(b), and an abuse of process under Rule 25.11(c). Tan-Jen accepts that for purposes of the Motion to Strike it must assume the facts as alleged in the Contempt Motion to be true but maintains that, even on this assumption, it is plain and obvious that the Contempt Motion cannot succeed and should be struck in its entirety without leave to amend.

11 On June 6, 2017, the parties attended a case conference before Morgan J. to determine the order of proceedings and, in particular, whether the Motion to Strike should be heard in advance of the Contempt Motion. Morgan J. agreed with Tan-Jen that the fair and efficient way to proceed would be for the Motion to Strike to be argued first. [1] Given the long and hard fought nature of the litigation, Morgan J. observed that "it is in everyone's interest that this not be any more protracted than need be." If Tan-Jen is correct in its argument that there is no possibility of the Contempt Motion succeeding, this should be determined first since this will resolve the dispute and spare the parties further time and treasure.

The Law of Civil Contempt

12 The rule of law depends upon voluntary compliance with court orders. If defiance of court orders were tolerated or ignored, the inevitable result would be a loss of respect for judicial authority, an increasing resort to self-help and, ultimately, the rule of might rather than right. Thus courts have for centuries sought to maintain their dignity and respect through exercising the power to punish for contempt of court. [2]

13 At the same time, courts have recognized that the power to punish for contempt must be approached as an exceptional remedy and utilized only as a last resort. [3] Courts contemplating a contempt order must be wary of "tiring by its overuse". [4] If the use of contempt is not "most jealously and carefully watched and exercised", [5] a court's outrage "might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect." [6] Thus courts have insisted that the requirements for civil contempt are *strictissimi juris*, that other remedies be exhausted before holding

a party in contempt, that the underlying court order be clear and unambiguous, and that the complainant bear the burden of proving the contempt on the criminal standard of proof beyond a reasonable doubt. [7]

14 It is well established that there is a three-part test for a finding of contempt of court, as set out by the Supreme Court of Canada in *Carey v. Laiken*: [8]

> (i) The order that was breached must clearly and unequivocally state what should or should not be done;
>
> (ii) The party who disobeyed the order must have had actual knowledge of it; and
>
> (iii) The party alleged in breach intentionally did the act the order prohibits or intentionally failed to do the act the order compels (collectively, the "*Carey v. Laiken* test").

15 The *strictissimi juris* approach that must be followed on a contempt motion requires close adherence to procedural requirements, including precision in pleadings, procedure and evidence. [9] The notice of motion in a contempt proceeding must set out the particulars of the alleged contempt, including the date, place and other facts sufficient to identify the particular acts alleged to constitute contempt. [10] The power to punish for contempt should be used sparingly and only in serious cases, as "its usefulness depends on the wisdom and restrain with which it is exercised." [11]

Positions of the Parties

16 Tan-Jen argues that on the face of the record the Defendants cannot possibly meet the burden on the first and third elements of the *Carey v. Laiken* test. With respect to the first element - that the order alleged to have been breached be clear and unequivocal - Tan-Jen argues that the Echlin and Kelly Orders merely require the Moulds to be stored and not used, but do not specify the manner in which the Moulds are to be stored. For example, there is no requirement that the Moulds be stored indoors or, indeed, in any particular manner. The Contempt Motion alleges that Tan-Jen breached the Orders by failing to properly store the Moulds, but the Order is at best ambiguous with respect to the method of storage required, and this ambiguity must be resolved in favour of Tan-Jen.

17 With respect to the third element of the *Carey v. Laiken* test — that the alleged contemnor must have intentionally performed the acts prohibited by an unambiguous order — Tan-Jen argues that there are no material facts pleaded which demonstrate or allege intention. There is no evidence suggesting that the Moulds were used by Tan-Jen and the only particularized allegation is that certain of the Moulds have deteriorated. This is insufficient to found a finding that Tan-Jen deliberated breached the Echlin or Kelly Orders.

18 Tan-Jen argues that the Contempt Motion is, in reality, a disguised attempt to re-litigate the Underlying Action, which has been settled, and to seek damages from both Tan-Jen and Latanville for breach of contract. Tan-Jen claims that this improper intention is disclosed by the fact that, in addition to a finding that Tan-Jen is in contempt of the Orders, the Defendants seek: (i) to have Latanville imprisoned; (ii) a writ of sequestration against Tan-Jen and Latanville, to be enforced against all of their real and personal property; (iii) general damages from Tan-Jen and/or Latanville compensating for the loss of use of the Moulds and for the costs of their repair or replacement; (iv) punitive damages from Tan-Jen and/or Latanville: (iv) costs of the Contempt Motion; and (v) costs of the Underlying Litigation.

19 In response, the Defendants argue that Rule 21.01(1)(b) has no application on this motion since Rule 21 only applies to "pleadings". The goal of Rule 21.01(1)(b) is to discern whether an alleged pleading fails to disclose a cause of action. They argue that in the case of the Contempt Motion such an analysis is meaningless since a notice of motion is not a "pleading" and civil contempt is not a "cause of action".

20 The Defendants further argue that there is no basis for striking the Contempt Motion under Rules 25.11(b) or (c). They note that the Court of Appeal has stated that a court will strike out a claim only in the clearest of cases, where it is plain and obvious that the case cannot succeed. Courts must guard against converting such motions into summary judgment motions. [12]

Here, Tan-Jen has been provided with ample notice of the alleged contempt, namely, that Tan-Jen and/or Latanville violated the Orders by deliberately allowing some of the Moulds to deteriorate such that they were ultimately destroyed. They object in particular to the fact that Latanville stored two of the Moulds where they were exposed to the elements, in direct violation of the Orders. In the alternative, if the Contempt Motion is lacking in particulars, the Defendants say they should be granted leave to amend rather than have the motion struck out in its entirety.

21 The Defendants further claim that the court has wide discretion in a contempt proceeding under Rule 60.11 to award such relief as is "just". This includes general and punitive damages, as well as directions to the costs assessment officer who ultimately disposes of costs in the Underlying Litigation. As such, all of the relief sought in the Contempt Motion is available at law, and cannot serve as the basis for striking out the Motion at this preliminary stage.

Analysis

22 The Contempt Motion is framed in broad terms, alleging that the Moulds in Tan-Jen's possession were never wrapped or sealed, were allowed to become unwrapped or unsealed, and/or had been used. But the Defendants acknowledge that their own representatives sealed and wrapped the Moulds in the Tan-Jen's possession, and there is no evidence suggesting that Tan-Jen unwrapped or unsealed any of the Moulds. Accordingly, counsel for the Defendants conceded in argument that the essence of the complaint against Tan-Jen is that Tan-Jen failed to properly store the Moulds. The Defendants object in particular to the fact that two of the Moulds were stored in such manner that they were exposed to the outdoor elements, which led to their deterioration and eventually rendered them useless. The Defendants claim that the improper storage of these two Moulds was a deliberate and intentional act that breached the Orders, and that Tan-Jen's conduct cries out for the court's attention.

(a) Do the Orders Clearly and Unequivocally State What Should or Should Not be done?

23 The key threshold question on this motion is whether the Orders clearly and unequivocally required Tan-Jen to store the Moulds in a particular way. If the Orders did not so require, this conclusion is fatal to the Contempt Motion, which is founded upon the alleged improper storage of the Moulds.

24 As noted above, the Eichlin Order stated that the Moulds in each parties' possession shall be "stored and not used prior to determination of [the] motion", while the Kelly Order required that the Moulds "shall continue to be stored and not used and they shall remain wrapped and sealed pending the determination of the motions . . . "

25 What is clear from the Orders is the following:

(i) The Moulds are to be stored and not used by either party; and

(ii) The Moulds are to remain wrapped and sealed, in accordance with the wrapping and sealing undertaken by the parties on September 4 and 5, 2008.

26 My reading of the Orders is that, provided the parties comply with these two requirements, they do not expressly mandate any particular procedure or standards to be met in terms of the storage of the Moulds. This interpretation of the Orders is consistent with and supported by the circumstances surrounding their issuance. When the Underlying Litigation was commenced, each party had moved for injunctive relief with respect to the Moulds, which motions were initially to be heard on September 2, 2008. However, on September 2, 2008, the injunction motions were adjourned on consent to November 13, 2008. It was for this reason that the Eichlin Order required the Moulds to be stored and not used "prior to the determination of [the] motion", the "motion" in question being the motion for interim relief originally scheduled for September 2, 2008.

27 Thus at the time the Eichlin Order was issued, it was contemplated that the Moulds would remain in storage for approximately two months. This explains why the only requirement in respect of their storage was that they be "stored and not used."

28 As the November 13, 2008 date approached, the parties exchanged correspondence in which they agreed that they were not in a position to argue the injunction motions on that date. Accordingly, they agreed to adjourn the motions until sometime

early in 2009 and, in the meantime, maintain the status quo by consenting to an order requiring the Moulds to be stored and not used. It was with this timetable in mind that the Kelly Order required that the Moulds remain stored, wrapped and sealed, "pending determination of the motions", namely, the motions for interim relief.

29 What this indicates is that, at the time the Orders were made, it was contemplated that the Moulds would remain in storage for a limited period of time, months rather than years, and certainly not for up to eight years. It was thus understandable that the Orders did not mandate any particular procedure or method to be employed in the storage of the Moulds, apart from the fact that they remain wrapped and sealed and not used by either party.

30 I further find that nothing in the Orders expressly required that either of the parties take positive steps to ensure that the Moulds would not deteriorate over time. The Di Pedes had wrapped and sealed the Moulds in the possession of Tan-Jen, and vice versa. Any inadequacy in the wrapping/sealing was the responsibility of the party who had performed the wrapping/sealing in question. The Orders required the parties not to disturb the wrapping or sealing as performed by the other party, but there was no additional obligation to take positive steps to ensure that the Moulds in their respective possession did not deteriorate over time.

31 In fact, this reading of the Orders was conceded by counsel for the Defendants on the argument of this motion. Following eight years of storage, a number of the Moulds in the possession of Tan-Jen had deteriorated and could not be used. However, in oral argument, Counsel for the Defendants abandoned any claim for contempt based on the mere fact that certain Moulds in Tan-Jens' possession had deteriorated and could no longer be used. Counsel argued, instead, that the contempt consisted of the improper storage of two of the Moulds, specifically the fact that these two Moulds had been stored outdoors and/or exposed to the elements.

32 This amounted to a concession that there was no requirement to store the Moulds in such manner as to ensure that they would not deteriorate. Tan-Jen's alleged contempt of the Orders consisted of the deliberate storage of two of the Moulds outdoors, which resulted in their deterioration. But because other Moulds in Tan-Jen's possession which were similarly deteriorated did not give rise to a contempt of court, there can be no requirement that the parties store the Moulds in such manner as to prevent their deterioration.

33 This concession merely reinforces the conclusion that it is plain and obvious that the Contempt Motion cannot possibly succeed. I have already found that the Orders do not mandate any particular storage method for the Moulds. It goes without saying that the Orders make no reference whatsoever to a requirement that the Moulds be stored indoors versus outdoors. Thus the claim that the Orders "clearly and unequivocally" mandate a storage method for the Moulds, whether indoors, outdoors, or otherwise, has no basis in the wording of the Orders or the context in which they were issued, and must fail.

(b) The Appropriate and Inappropriate Use of the Contempt Power

34 Apart from concerns that the Orders lack the clarity required to support a finding of contempt, this motion also raises broader issues regarding the appropriate use of the court's contempt power.

35 As discussed above, the contempt power must be approached as an exceptional remedy and utilized only as a last resort. It should be reserved for serious cases which threaten the dignity or legitimacy of the courts. It is not merely a tool to be utilized by litigants to secure their private advantage in the context of civil litigation.

36 Here, the parties engaged in hard fought litigation, extending over eight years, regarding their respective rights in and to the Moulds. The value of the Moulds themselves was relatively modest and the parties undoubtedly spent many times that amount pursuing the Underlying Litigation. The parties voluntarily entered into the Settlement Agreement in 2016 with the intention that it would bring the Underlying Litigation to an end.

37 In entering into the Settlement Agreement, the Di Pedes assumed that the Moulds in the possession of Tan-Jen would still be usable. But the Di Pedes did not attempt to verify the accuracy of this assumption by, for example, seeking to inspect the Moulds in advance, or requiring Tan-Jen to represent or warrant the condition of the Moulds. They simply accepted an offer

to settle that had been made by Tan-Jen six years previously which contemplated, in effect, that the Moulds be delivered to the Di Pedes "as is".

38 In fact, the Di Pedes were aware back in 2008 that the Moulds in Tan-Jen's possession were at risk of deterioration. At that time, counsel for the Di Pedes had raised concerns that a number of the Moulds in Tan-Jen's possession did not have a fiberglass backing and that certain of the Moulds showed signs of wear. On the record before me, it does not appear that anything further came of this correspondence at the time. In any event, it is clear that, despite this knowledge, the Di Pedes did not take steps prior to accepting Tan-Jen's offer to ascertain the current condition of the Moulds.

39 The Di Pedes indicate that they would never have entered into the Settlement Agreement if they had known of the condition of the Moulds. But because they had entered into a binding agreement which did not include representations or warranties as to the condition of the Moulds, the Di Pedes had no basis to claim that Tan-Jen had breached the Settlement Agreement.

40 Instead, they commenced the Contempt Motion. Although the Motion is framed as one invoking the dignity and respect of the court, it is evident that the Defendants' primary concern is to obtain monetary and other relief directly from Tan-Jen and/or Latanville. In particular, the Defendants seek compensation for the loss of use of the Moulds, the cost of repairing or replacing them, punitive damages, and costs of the Underlying Litigation. They further seek the imprisonment of Latanville, who was not a party to the Underlying Litigation, as well as a writ of sequestration enforceable against all of the real and personal property of both Tan-Jen and Latanville.

41 The Defendants claim entitlement to this expansive and intrusive relief due to the improper storage by Tan-Jen of two of the Moulds. But there is simply no connection between the loss of these two particular Moulds, which on the record before me have a modest value, and the expansive relief claimed by the Defendants. For example, there is no nexus between the improper storage of these particular Moulds and the Defendants' claim for damages flowing from their loss of use of all the Moulds, or for their entire costs of the Underlying Litigation.

42 In reality, the Defendants are attempting to leverage the alleged improper storage by Tan-Jen of two of the Moulds into a re-opening of the entire Underlying Litigation. The effect, if not the purpose, of the Contempt Motion is to avoid the binding effect of the Settlement Agreement.

43 The courts are rightly wary of the overuse of the contempt power, for fear that this would trivialize the very dignity and legitimacy that the power is intended to protect. I find this concern of particular relevance here, where the Defendants invoke the court's contempt power to accomplish indirectly what could not be done directly. This ignores the public law dimension of the court's civil contempt power, reducing it to a mere instrument to be deployed in civil litigation in furtherance of private rather than public ends.

Conclusion

44 For these reasons, I would strike the Contempt Motion, on the basis that; (i) it is plain and obvious that it has no prospect of success, and therefore is frivolous and vexatious in accordance with Rule 25.11(b); and (ii) it is an attempt to accomplish indirectly what cannot be done directly, namely, to reopen the Underlying Litigation despite the Settlement Agreement, and is therefore an abuse of process in accordance with Rule 25.11(c).

45 On this basis, it is unnecessary for me to consider whether the Contempt Motion should also be struck on the basis of Rule 21.01(1)(b).

46 The Plaintiff's Bill of Costs indicates that a substantial amount of time was spent in the preparation of this Motion to Strike. I find this appropriate in light of the significance of the motion and, in particular, the attempt by the Defendants to have Latanville imprisoned. I further have regard to the fact that I have found the Contempt Motion to be frivolous and vexatious and an abuse of process. I therefore award Tan-Jen its costs of the motion on a partial indemnity basis in the amount of $41,476.32, inclusive of H.S.T. and disbursements.

Motion granted.

Footnotes

1 See *Tan-Jen Ltd. v. Di Pede*, 2017 ONSC 3476 (Ont. S.C.J.) at para. 6.

2 See *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.) at para. 20.

3 *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182 (Ont. C.A.) at para. 42 (per Sharpe J.A.).

4 Karen Jolley, "Sanctions for Civil Contempt — A National Survey and a Critique", in Archibald and Echlin (eds) *Annual Review of Civil Liigation 2013* (Thomson Canada 2013) 361 at p. 366.

5 *Clements, Re* (1877), 46 L.J. Ch. 375 (Eng. C.A.).

6 *Centre commercial Les Rivières ltée c. Jean bleu inc.*, 2012 QCCA 1663 (C.A. Que.) ("Centre commercial") at para. 7.

7 *Centre commercial*, at para. 7.

8 2015 SCC 17 (S.C.C.) ("Carey v. Laiken") at paras. 33-35.

9 *Friedlander v. Claman*, 2016 BCCA 434 (B.C. C.A.) at para.26.

10 *Toronto Transit Commission v. Ryan*, [1998] O.J. No. 51 (Ont. Gen. Div.) at para. 29.

11 *Parashuram Detaram Shamdasani v. R.*, [1945] A.C. 264 (Bombay P.C.) at 70.

12 See *Baradaran v. Alexanian*, 2016 ONCA 533 (Ont. C.A.) at paras. 15-17.

TAB 23

See para. 54

2011 NBQB 211
New Brunswick Court of Queen's Bench

Tepper Holdings Inc., Re

2011 CarswellNB 417, 2011 NBQB 211, 205 A.C.W.S. (3d) 624, 376 N.B.R. (2d) 64, 80 C.B.R. (5th) 339, 970 A.P.R. 64

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: July 18, 2011
Oral reasons: July 18, 2011
Written reasons: July 22, 2011
Docket: E/M/4/2011

Counsel: R. Gary Faloon, Q.C., James L. Mockler for Applicants
Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
Stephen J. Hutchison for Monitor, Paul A. Stehelin of A.C. Poirier & Associates Inc.
Ronald J. LeBlanc, Q.C., Renée Cormier for National Bank of Canada

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 On June 27, 2011, this Court issued an *ex parte* Initial Order ("Initial Order") pursuant to section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*" or "*Act*") granting a Stay Period, until and including July 18, 2011, to the applicant companies, namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd., and Agri-Tepper & Sons Ltd. ("Companies"). Mr. Paul A. Stehelin of A.C. Poirier & Associates Inc. was appointed monitor ("Monitor"). The Initial Order provided that a comeback hearing would be held on July 18, 2011, to determine whether the Order should be supplemented or otherwise varied and the Stay Period extended or terminated.

2 The Companies filed a motion asking the Court to extend the Initial Order until October 18, 2011 ("Extension Motion").

3 The Bank of Montreal ("BMO") filed a motion seeking an order terminating the Initial Order. In the alternative, BMO suggests that the Stay Period not be extended beyond August 31, 2011, and it seeks a variation of several provisions of the Initial Order, namely the provisions dealing with the disposition of property by the Companies, the interim financing, the Administration Charge, the retainers, and the Director's Charge ("Variation Motion").

4 The Monitor filed with the Court his first report dated July 13, 2011 ("Report"). He recommends an extension of the Stay Period until September 30, 2011, but agrees that several provisions of the Initial Order should be varied.

5 All creditors were notified of these proceedings and other than the BMO, the only creditor who attended the hearing of the motions was the National Bank of Canada and it supports the position of BMO.

6 Pursuant to the July 18th hearing, the Court reserved its decision on the Extension Motion and the Variation Motion, but granted an Order extending the Stay Period until July 29, 2011, and varying other provisions of the Initial Order while considering these motions.

II. Background

7 The Companies are closely held companies engaged in the business of farming in northwestern New Brunswick in a small rural community called Drummond. The Companies are controlled by Hendrik Tepper and his father Berend Tepper. The Tepper family is from the Netherlands and the Teppers have been farming since the 1960's. In 1980, Berend Tepper relocated his family to Drummond and joined other Dutch farmers in northwestern New Brunswick. The Companies have grown an average of 1,400 acres of potatoes and 2,000 acres of grain per year. They own approximately 1,700 cleared acres of land, 400 to 500 acres of woodlot and pasture land, as well as machinery, equipment, and inventory. They have developed a good relationship with McCain Foods Limited. and have multiple contracts with them. They also sell to foreign markets such as Cuba, Lebanon, Turkey, and Russia.

8 From May 2010 to May 2011, the Companies employed 18 persons on average, reaching a maximum of 40 employees during harvesting season in the fall of 2010. The total salaries paid to the employees by the Companies during this period was approximately $495,000.

9 Berend Tepper had retired from managing the operations of the Companies approximately five years ago, and since then, his son Hendrik had been responsible for all aspects of the day-to-day management of the Companies and for resolving the problems of the Companies. The Companies are involved in proceedings, some provincial, some foreign, concerning, amongst others, the collection of receivables, the pursuance of insurance claims, and the enforcement of contracts. Hendrik Tepper was the person who handled these matters and therefore he has the personal knowledge needed to resolve a number of these disputes. He was the chief operations officer and primary salesman for the Companies. Without him it is very difficult to settle or otherwise resolve the outstanding litigation.

10 Unfortunately, Hendrik Tepper has been incarcerated in Lebanon since March 23, 2011 as a result of being arrested while attempting to clear Lebanese customs, under an Interpol warrant on behalf of the government of Algeria in relation to potatoes shipped to Algeria by one of the Companies in 2007. Algerian officials allege that Mr. Tepper was part of a scheme to falsify documents concerning the quality of the potatoes arriving in Algeria and they want him extradited to Algeria. This, of course, has caused a crisis in the Tepper family and has put tremendous pressure on the Companies. Efforts are continuing on a daily basis to return Hendrik Tepper home soon.

11 Berend Tepper has come out of retirement and is back to managing the Companies. The 2011 crop is in the ground, it is healthy and the Companies estimate that the realization at harvest will be about $2.2 million.

III. The Companies' Financial Situation

12 The Monitor, with the assistance of the Companies and their external accountants, has prepared an unaudited balance sheet of the Companies on a consolidated basis. The balance sheet gives us an overall view of the potential assets and potential liabilities of the Companies on an accounting basis. It shows assets of $7.7 million and liabilities of $11.2 million. It is not an estimate of realizable or fair market values for the assets. The Monitor has received preliminary estimates of values for the land, the equipment, and the machinery. These have not been placed in the public domain but they have been shared with BMO and the Monitor states that the values are significantly greater than the book value.

13 The Companies' largest creditor is BMO who is owed in excess of $8 million. It seems that discussions between BMO and the Companies had been open and frequent in the period leading up to the filing of the *CCAA* proceedings. Berend Tepper and BMO have been working together closely since Hendrik Tepper's incarceration. BMO encouraged the Companies to plant potatoes this year even if Hendrik Tepper was absent.

14 On July 11, 2011, BMO and its advisor PriceWaterhouseCoopers, the Monitor, Berend Tepper, and the Companies' external accountant, Denis Ouellette, met to discuss various issues and share information. I was not left with the impression that BMO has lost confidence in the Companies' management.

15 BMO informed the Court that they have no immediate plan to enforce its security. They are understanding of the predicament that the Tepper family and the Companies are in. It supported the Companies' efforts thus far and was optimistic that they could get through these difficult times. It is now worried that if the *CCAA* process burdens the Companies with the extra debts and charges as requested by the Companies and provided for in the Initial Order, it will cause the demise of the Companies.

16 BMO alleges that the Companies cannot continue to operate in the long term because they have insufficient revenue to meet their obligations. It submits that if the relief sought is granted, BMO's security will be eroded and its ability to recover its losses will be further jeopardized.

17 Since the Initial Order, part of the 2010 crop has been sold for a total of $446,400. The cash flow statements show a cash requirement of approximately $166,000 by the end of July with a cash surplus of approximately $267,000 by the end of September 2011. This included estimates for administrative expenses of $260,000 to the end of September, but does not include interest on DIP financing.

18 The $2 million operating line of credit with BMO is fully advanced. BMO has offered to advance the DIP financing should this Court extend the Initial Order and provide for DIP financing.

19 Section 6 of the *CCAA* requires that for a plan to be successful, it must be approved by a majority in number representing two thirds in value of the creditors, or the class of creditors. BMO holds approximately 82 % of the secured claims and therefore the Companies cannot present a successful plan without BMO's support.

20 BMO has made it very clear that the possibility that they will approve any Plan of Compromise and Arrangement is close to nil unless such plan provides for the complete payment of BMO's advances.

IV. The Monitor

21 A Monitor is in place, which, as noted in *Rio Nevada Energy Inc., Re* (Alta. Q.B.), should provide comfort to the creditors that assets are not being dissipated and current operations are being supervised.

22 The Monitor in the present case recommends the extension of the stay until September 30, 2011 and is of the opinion that the Companies have been acting in good faith and with due diligence, and that an extension of the stay is appropriate.

23 At page 4 of his report, the Monitor states that: "...the Companies, their accountant, and counsel have provided the Monitor with their full cooperation and unrestricted access to the Companies' books and records and other information to permit the Monitor to fulfill its responsibilities".

24 At page 9, he adds:

> a) The companies have and continue to act in good faith and have been forthcoming with information, books, and records, and unrestricted access to their premises.
>
> b) The monitor is satisfied that the companies will be forthcoming to both the monitor and the companies' major creditor with respect to any significant events which might adversely affect the various stakeholders in the these proceedings.
>
> c) Time is needed for the companies with the assistance of the monitor, their counsel, and the Court to try to deal with the foreign issues and contingent liabilities and to permit a plan to be presented which maximizes the recovery to all stakeholders.

d) An extension will permit an orderly sale of the existing inventory and the harvesting of the 2011 crops.

e) The cash flow statement reflects that the companies will be able to finance operations from cash flow with a requirement for debtor and possession financing in the approximate amount of $210,000 before servicing existing debt. The projections indicate that the DIP financing will be repaid by the end of September 2011.

V. First Issue: Should the Court Grant an Extension Order?

(1) Burden of Proof

25 The onus is on the Companies to justify the continued existence of the provisions of the Initial Order. The Initial Order was granted without notice to persons who may be affected and without any proper debate, therefore the Court will always be willing to adjust, amend, vary, or delete any term or terminate such an order if that is the appropriate thing to do: see *Ravelston Corp., Re*, 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]).

(2) Purpose of the CCAA

26 When determining whether a stay ought to be extended it is important to consider the overall purpose of the *CCAA*.

27 As was stated by Professor Janis Sarra in the first paragraph of her book entitled *Rescue! The Companies' Creditors Arrangement Act* (2007):

> [...] The statute's full title, *An Act to Facilitate Compromises and Arrangements between Companies and Their Creditors*, precisely describes its purpose; providing a court-supervised process to facilitate the negotiation of compromises and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors.

28 Justice Blair of the Ontario Court of Appeal discussed the purpose of the *CCAA* in *Stelco Inc., Re* (Ont. C.A.), at paragraph 36, where he states:

> In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditor, shareholders, employees and other stakeholders.

29 In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), McFarlane J. at paragraph 27, quoted with approval the following statements made by the trial judge, Justice Brenner:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency, which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

30 In my view, the above quoted statement sums up the principles to consider in applications under the *CCAA*.

(3) Applicable Sections of the CCAA

31 Subsection 11.02(2) of the *CCAA* provides as follows:

(2) A court may, on an application in respect of a company other than an initial application, make an order on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

32 As stated, the burden of proof on an application to extend a stay rests on the debtor company.

33 To have a stay extended past the period of the initial stay, the company must meet the test set out in subsection 11.02(3) of the *CCAA*. It states that:

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

34 When deciding whether to terminate or extend a stay, a court must balance the interests of all affected parties, including secured and unsecured creditors, preferred creditors, contractors and suppliers, employees, shareholders, and the public generally. I must consider the Companies and all the interests its demise would affect. I must consider the interests of the shareholders who risk losing their investments and the employees of this small community who risk losing their jobs.

(4) Farm Debt Mediation Program

35 BMO has stated that it will not support a plan under the *CCAA* proceedings. It doubts that the *CCAA* approach to the insolvency is the appropriate one in the circumstances. It has suggested and will support a restructuring of the Companies under the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"), which provides free mediation services by the Federal Department of Agriculture and Agri-Food Canada, while the Companies can still have the benefit of a stay of proceedings and save on professional fees.

36 The Monitor feels that the *FDMA* process does not have all of the necessary tools. The Companies allege that the *FDMA* process does not lend itself to the present circumstances. It is argued that although a mediator is involved in this process with the objective of arriving at a settlement, there is no one to provide the type of professional service that the Monitor provides in guiding the debtor company through the *CCAA* process. The Companies chose to apply for a stay period under the *CCAA*

hoping to gain the benefit of professional advice on how best to restructure this business. This professional advice is made possible under the *CCAA* with the interim financing and the Administrator's Charge in aid.

37 I have no evidence that the relief sought under the *CCAA* is more drastic to all constituencies than a process under the *FDMA* would be or that it is less beneficial.

(5) Ending the Protection for Two of the Companies

38 BMO has expressed concern as to whether the purpose of the *CCAA* in this matter is to fund litigation against some of the Companies. BMO suggests that the Court should at the very least consider terminating *CCAA* protection for two of the Companies that do not own any assets and are potential liabilities as there are lawsuits or claims pending against them. BMO argues that these companies will drag the others down because of the costs associated with the litigation. The Monitor is alive to these issues but is concerned that such a move at this time may be premature; he needs more time to investigate before deciding whether these companies should be allowed to continue. It should be easier to assure that undue time and costs are not spent on these litigations if those companies are left under the protection of the *CCAA* while the Monitor obtains the information to make a proper decision.

(6) Conclusion Concerning the Extension Order

39 The extension sought is not unduly long. As with the Initial Order, the extension of the stay would only be a temporary suspension of creditors' rights. There is no evidence that the assets are being liquidated. The Companies have continued their farming business and are continuing as going concerns.

40 There is no indication that the secured creditors' security is being dissipated. Notwithstanding BMO's assertion that it will not support a plan under the *CCAA* proceedings, there is hope that the Companies can restructure and refinance and come up with a plan that could eventually be accepted by BMO. They have been working closely thus far.

41 The extension is supported by the independent Monitor and the shareholders. I cannot conclude at this point in time, that the plan is doomed to fail or that the *CCAA* proceeding is being used to delay inevitable liquidation. I am satisfied that progress is being made, however on the evidence, I find that the Companies require additional time to compile information, assess their situation, and file their Plan of Arrangement.

42 The Companies made an application under the *CCAA* for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the *CCAA*. The legislative remedies within the *CCAA* for a stay must be understood to acknowledge the hope that the eventual, successful reorganization of a debtor company will benefit the different stakeholders and society in general: see *Stelco Inc., Re*.

43 The assets of the Companies have a greater value as part of an integrated system than individually.

44 The extension of the stay and the granting of certain charges will allow the Companies to continue operations and harvest its potato crops and fulfill their obligation to customers.

45 The Companies directly employ from seven to 40 people at different times throughout the year and thereby make a significant contribution to the local and regional economy.

46 The Companies have to find a way to restructure their indebtedness and the *CCAA* can be used to do this practically and effectively. The Companies need to be able to focus and concentrate its efforts on negotiating a compromise or arrangement.

47 It is essential that the Companies be afforded a respite from its creditors. The creditors must be held at bay while the Companies attempt to carry on as a going concern and to negotiate an acceptable restructuring arrangement with the creditors.

48 I do not share BMO's position that the Companies are doomed. I feel that there is a real prospect of a successful restructuring under the *CCAA*. This is an attempt at a legitimate reorganization. I do not feel that the continuance of the *CCAA* proceedings is simply delaying the inevitable.

49 I do not find that the position of the objecting creditors will be unduly prejudiced by the stay. The value of the harvest and therefore the Companies' overall value increases the closer we get to harvest time.

50 The Court finds that the requirements of subsection 11(6) of the *CCAA* have been satisfied. The extension of the stay is supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim.

51 The Court is satisfied that the circumstances are such that an extension order is appropriate. I am satisfied that the Companies have acted and continue to act in good faith and that they have acted and continue to act with due diligence.

52 I conclude that this is a proper case to exercise the Court's discretion to grant an extension order.

(7) Length of the Extension

53 BMO argues that given the nature of the operations, a stay until the end of August should be sufficient to allow the Companies to reorganize and come up with a viable plan, if possible. The Companies argue that the stay should be long enough to allow the Companies to go through the harvesting season without having to come back to Court. They are suggesting October 18th. The Monitor recommends September 30th.

54 There is no standard length of time provided in the *CCAA* for an extension of the Stay Period, and therefore it depends on the facts of the case. David Baird, Q.C., in his text, Baird's Practical Guide to the Companies' Creditors Arrangement Act (Toronto: Thompson Reuters, 2009) at page 155 summarizes the factors to be considered as follows:

> a) The extension period should be long enough to permit reasonable progress to be made in the preparation and negotiation of the plan of arrangement.
>
> b) The extension period should be short enough to keep the pressure on the debtor company and prevent complacency.
>
> c) Each application for an extension involves the expenditure of significant time on the part of the debtor company's management and advisors, which might be spent more productively in developing the plan, particularly when the management team is small.
>
> d) With respect to industrial and commercial concerns as distinguished from "bricks and mortar" corporations, it is important to maintain the goodwill attributable to employee experience and customer and supplier loyalty, which may erode very quickly with uncertainty.
>
> e) In British Columbia, the standard extension order is for something considerably longer than 30 to 60 days. While each business will have its own financing possibilities, generally large loans, significant equity injections or large sales required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement.

55 The Companies need to continue farming and bring their crops to harvest in the fall for the benefit of all the stakeholders. The purpose of the stay is to give them time to reorganize and do what needs to be done. They need to come up with a plan and try to sell it to their creditors. This takes time. I feel that August 31st is not realistic, and to require the Companies to come up with an acceptable plan by that date would be setting them up for failure.

56 The Monitor is an officer of the Court. He is to remain neutral in this process and if in a month's time he realizes that there is no way to put a viable plan together, then I expect him to forthwith advise the parties and the Court accordingly. In the circumstances, I am satisfied that it is appropriate to extend the Stay Period to September 30, 2011 at 11:59 p.m.

57 Hopefully, this is long enough to allow the parties to find a solution but short enough to prevent complacency so that the various creditors rights and remedies not be sacrificed any longer than necessary.

VI. Second Issue: Should any Other Provision of the Initial Order be Amended or Varied?

(1) The Administration Charge

58 The Court may order an Administration Charge for fees and expenses related to the *CCAA* process pursuant to section 11.52.

59 The appointment of a monitor is mandatory when the courts grant *CCAA* relief. If this *Act* is to have any effect, then there has to be some assurance and money available to pay the professionals that will be working on the restructuring, that is the Monitor, his counsel as well as the Companies' counsel. The *CCAA* proceeding is for the benefit of all stakeholders, including all creditors.

60 The goal of a *CCAA* Stay Period is to provide the Companies with access to the time and expertise needed to develop both a plan of arrangement and to restructure its businesses. This is not possible if those professionals, including the Monitor, are not paid proper fees.

61 The Initial Order provided for an Administration Charge not to exceed $500,000. The Companies are suggesting that it continues at that amount. BMO is suggesting $150,000 while the Monitor in his report felt that it could be reduced somewhere between $200,000 and $300,000. The original projections included payments of $130,000 for legal fees, $85,000 for the Monitor's fees, and $45,000 for accounting fees to the end of September. The Monitor has now had an opportunity to assess the time required and feels that the Monitor's fees and the accounting fees should be no more than $90,000 to the end of September provided no additional proceedings are initiated.

62 I find that an amount not exceeding $250,000 would be appropriate, fair, and reasonable for the Administration Charge.

(2) The Retainer

63 The Initial Order provided retainers for the Monitor, counsel to the Monitor, and counsel to the Companies of $200,000 collectively. These professionals are already protected under the Administration Charge. BMO suggests $30,000 each as a retainer for a total amount of $90,000. The Monitor agrees with this suggestion and would make accounts payable within 15 days instead of 30 days as it now stands.

64 On the evidence now before the Court, I find the $200,000 unreasonable and unnecessary. I find that a retainer of $30,000 each for a total amount of $90,000 is warranted and I so order with accounts made payable within 15 days.

(3) The DIP Lender's Charge

65 Subsection 11.2(1) of the *Act* deals with interim financing. DIP financing, as we know, alters the existing priorities in the sense of placing encumbrances ahead of those presently in existence, and it may therefore prejudice BMO's security. It follows that the DIP Lender's Charge should be fair, reasonable, and appropriate in the circumstances.

66 The Companies' expected cash flows without an order being made exceed existing credit facilities and presently available funds. If an order is not made, the Companies' viability as a going concern is doubtful.

67 The Initial Order provided for DIP financing to a maximum of $1 million. In retrospect, based on the Companies' cash flow statements, there was no need for such a large DIP financing. No creditor was prejudiced as no DIP financing is yet in

place. The Monitor recommends DIP financing to a maximum of $300,000 and sees no reason why BMO could not be the DIP Lender for this amount if it is so inclined.

68 It is understandable that BMO is not prepared to have their position affected by DIP financing. It suggests that the maximum amount needed is no more than $150,000. However, if the Court provides for a maximum amount of $300,000 in DIP financing, BMO is ready to advance this amount to the Companies. The Companies have obtained a proposal from another lender but is not opposed to BMO being the DIP Lender as long as the terms of the financing are comparable to what they have been able to secure elsewhere.

69 I am satisfied that the Companies need the special remedy of DIP financing, however I conclude that the amount presently provided for in the Initial Order is greater than what is required by the Companies having regard to their cash flow statements. The Companies' request is therefore excessive and inappropriate in the circumstances. I must balance the benefit of such financing with the potential prejudice to the existing secured creditors whose security is being eroded.

70 I am satisfied that the DIP financing is necessary to assist the Companies in restructuring their operations and coming up with a plan of arrangement during the stay. I am satisfied on the evidence before me that the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring, and an urgent need for some interim financing; however I will restrict the amount to what is necessary to meet the short-term needs until harvest, at which time revenues will be realized. I therefore authorize a DIP Lender's Charge in an amount not to exceed $300,000 with BMO as the DIP Lender.

71 I am satisfied that the quantum of the Administration Charge and the DIP Lender's Charge fall well within the range of what is usually ordered considering the magnitude and complexity of the Companies' operations, and the debts to be incorporated into a plan of arrangement.

(4) The Director's Charge

72 Section 11.51 of the *CCAA* deals with the indemnification of Directors and the Director's Charge. The Initial Order provided a Director's Charge not to exceed $500,000 and stipulated that this Charge would only apply if the Directors' did not have the benefit of coverage pursuant to an insurance policy. Subsection 11.52(3) of the *CCAA* prohibits the Court from making such an order if it is convinced that the Companies could obtain adequate indemnification insurance.

73 The Directors of the Companies are Berend and Hendrik Tepper. I realize that certain liabilities may be imposed upon the directors during the stay. The Companies are closely held family entities and BMO submits that the directors should be required to accept the risks that come with the position because they are the main decision makers. The directors have not applied for insurance coverage. There is no evidence to show that the companies cannot obtain adequate indemnification insurance for their directors or officers at a reasonable cost.

74 The Director's Charge will not be granted at this time. The Directors are to explore the possibility of getting insurance coverage and may reapply to the Court at a later time for this charge if absolutely necessary.

(5) The Disposition of Property

75 If the Companies want to sell or otherwise dispose of assets outside of the ordinary course of business, they must obtain authorization from the Court. The Initial Order provided that the Companies could dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate. They presently have two pieces of equipment that they would like to sell, namely a bailer and a combine. It is estimated that each is worth approximately $50,000. It would seem that there is a buyer for the bailer which has become redundant. It is expected that this sale could generate revenues of $50,000 and the Companies are suggesting that these proceeds be deposited in the general accounts and it would therefore increase the cash flow of that amount. BMO does not agree; it argues that the sale of these equipments will erode their security. The Monitor suggests that if a buyer is found for one or the other piece of equipment before the end of September, the Companies should be allowed to sell this equipment for which they no longer have any utility, subject to the consent of BMO and provided that the funds be kept in trust.

76 In deciding whether to grant an authorization to dispose of an asset, the Court must consider the factors set out in subsection 36(3) of the *CCAA*. It must consider:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

77 The Companies have not presented evidence of an actual "proposed sale or disposition" or evidence in relation to the factors including the "process", the "effects of the proposed sale or disposition on the creditors", the "market value" of the assets to be disposed, or "the extent to which the creditors were consulted".

78 In the circumstances, due to this lack of evidence, I will not authorize the disposition of assets during the stay.

(6) Variance and Allocation

79 BMO suggests that variances of more than 5 % in the cash flow not be permitted without further court approval. As we all know, any motion to the court is expensive and time consuming. One of the main objectives of the stay is to allow the Companies respite to focus their time, money and efforts on their reorganization.

80 BMO also requests that all fees, costs and expenses, at least those related to the Administration Charge, be allocated as per the different companies or tracked separately. Having heard the parties and the Monitor on this issue, I am satisfied that the better option is to leave the Monitor deal with these two issues.

VII. Conclusions and Disposition

81 The Stay Period is extended until September 30, 2011, at 11:59 p.m. or such other date or time as this Court may order.

82 The Initial Order is hereby varied and amended as follows:

- Subparagraph 9(a) of the Initial Order is amended by the deletion of the words "and to dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate".

- Paragraphs 16, 17 and 18 of the Initial Order are deleted in their entirety and all references to the "Director's Charge", as defined in paragraph 17 of the Initial Order, are deleted throughout the Initial Order.

- Retainers are reduced from $200,000 collectively to $90,000 collectively, being $30,000 each for the Monitor, the Monitor's counsel, and the Companies' counsel. Paragraph 25 will have to be amended to reflect this and the accounts are to be paid within fifteen (15) days of receipt.

- Paragraph 27 of the Initial Order is to be amended to reduce the Administration Charge from a maximum of $500,000 to a maximum of $250,000.

- Paragraphs 28 to 32 are to be amended to reduce the DIP Lender's Charge from a maximum of $1 million to a maximum of $300,000 and BMO will be the DIP Lender.

83 The Initial Order remains unamended other than as set out herein or as may be necessary to give effect to the terms of this Order.

84 The time period of 21 days provided in subsection 14(2) of the *CCAA* is hereby extended in relation to any appeal proceedings initiated by BMO of the Initial Order, pursuant to section 13 of the *CCAA* until July 27, 2011.

85 This order takes effect immediately and replaces the Interim Order issued in this matter on July 18, 2011.

86 With more time, new money and professional guidance the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring. The stay will facilitate the ongoing operation. The extension will give the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation.

87 The Companies need to continue farming and bring their crops to harvest for the benefit of all their stakeholders. The Companies' creditors will receive greater benefit from a plan of arrangement made at the end of the extended Stay Period than at this time.

88 The evidence before me is that Hendrik Tepper is the directing mind of the Companies' farming operations and brings considerable value to the Companies' operations. Hopefully, the ongoing efforts to return Mr. Tepper home will bear fruit soon.

Motions granted.

TAB 24

See paras. 34, 36, 50 and 52.

2003 SCC 63
Supreme Court of Canada

Toronto (City) v. C.U.P.E., Local 79

2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 31 C.C.E.L. (3d) 216, 59 W.C.B. (2d) 334, 9 Admin. L.R. (4th) 161, J.E. 2003-2108, REJB 2003-49439

Canadian Union of Public Employees, Local 79, Appellant v. City of Toronto and Douglas C. Stanley, Respondents and Attorney General of Ontario, Intervener

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 13, 2003
Judgment: November 6, 2003 *
Docket: 28840

Proceedings: affirming (2001), 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40 (Ont. C.A.); affirming (2000), 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.)

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***Arbour J.* (*McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ.* concurring):**

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie*, but not conclusive, evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that Oliver had been dismissed without just cause.

III. Procedural History

A. Superior Court of Justice (Divisional Court) (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellants' argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision," applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. Court of Appeal for Ontario (2001), 55 O.R. (3d) 541

7 Doherty J.A., for the court, held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing relitigation of issues finally decided in a previous judicial proceeding," the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results and which serves to conserve the resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice:

> - Does the *res judicata* doctrine apply?
>
> - If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
>
> - If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud

at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> 22.1(1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
>
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

> 48.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. Standard of Review

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) (see also *Q.*, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. *The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard . . . .*

An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. Theses rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.), at para. 21.

16 Therefore, I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. Section 22.1 of Ontario's Evidence Act

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary," that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction - the finding of another court - admissible for the truth of its content, as an exception to the inadmissibility of hearsay (David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002), at p. 120; M.N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990), at pp. 33-94 to 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary." There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular, where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para. 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, affirmed (1984), 48 O.R. (2d) 266 (Ont. C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits." However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.), at p. 541; see also *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question, therefore, is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. The Common Law Doctrines

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle." I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision, (2) the prior judicial decision must have been final, and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.), at para. 25, *per* Binnie J.). The final requirement, known as "mutuality," has been largely abandoned in the United States and has been the subject of much academic and judicial debate there, as well as in the United Kingdom and, to some extent, in this country (See Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Prof. Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Prof. Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to

permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (U.S.S.C. 1979). He describes the offensive use of non-mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category - what would be described in U.S. law as "non-mutual offensive preclusion." Although, technically speaking, the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-633:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be

the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Commentary R. 4.01(3) of the *Rules of Professional Conduct*, Law Society of Upper Canada (Toronto: Law Society of Upper Canada, 2002), at pp. 58 and 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 (S.C.C.); *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at pp. 256-257, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621, at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation." For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction." Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a *judicial order* pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral

attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 (S.C.C.), at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined*. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-625).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-348):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *McIlkenny* [H.L.], *supra*, affirming *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (Eng. C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning M.R. endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that, in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court," but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *McIlkenny* [H.L.], *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (Eng. C.A.), at pp. 304 *et seq.* In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-518). Although safeguards must be put in place for the protection of the innocent and, more generally, to ensure the trustworthiness of court findings, continuous relitigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *McIlkenny* [H.L.], *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *McIlkenny* [H.L.], *supra*, and *Demeter*, *supra*) the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process and the importance of preserving its integrity were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the OEA, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *McIlkenny* [H.L.], *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not, in itself, an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms, such as appeals or judicial review. Indeed, reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted:

> The right to challenge a conviction is subject to an important qualification. *A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so*. Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. *The ambit of this qualification remains to be determined* . . . . [Emphasis added.]

(*Del Core*, *supra*, at p. 22, *per* Blair J.A.)

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely, *Demeter* (H.C.), *supra*, and *McIlkenny* [H.L.], *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (Ont. H.C.), *F. (K.)*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See, for example,

Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215 (Ont. H.C.) at p. 218, affirmed without reference to this point (1978), 18 O.R. (2d) 714n (Ont. H.C.); *Bomac*, *supra*, at pp. 26-27); *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (Ont. H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Ont. Gen. Div.), at p. 115; see also, Paul Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-197; and Watson, *supra*, at pp. 648-651.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see Martin Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective," in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. 1 (Toronto: Lancaster House, 2002), 279. A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *F. (K.)*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably, in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not, in my view, appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant.

There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. Application of Abuse of Process to Facts of the Appeal

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet, as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court - or the jury -, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

LeBel J. **(concurring) (*Deschamps J.* concurring):**

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision

that Oliver had been dismissed without just cause - a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard - patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in *all* administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may, in fact, obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that, in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), at para. 149; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what, in my view, is growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, David J. Mullan, "Recent Developments in Standard of Review," in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (October 20, 2000), at p. 26; Jeff G. Cowan, "The Standard of Review: The Common Sense Evolution?" (2003), paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; Frank A.V. Falzon, "Standard of Review on Judicial Review or Appeal," in *Administrative Justice Review Background Papers: Background Papers Prepared by Administrative Justice Project for the Attorney General of British Columbia* (June 2002), at pp. 32-33). Reviewing courts too have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of

counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

> - the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and
>
> - the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. The Two Standards of Review Applicable in this Case

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions - for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation - typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) ("*P.S.A.C.*"), at pp. 960-961; and *Ivanhoe inc. c. Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500*, [2001] 2 S.C.R. 565, 2001 SCC 47 (S.C.C.), at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his

decision as a whole to review on a correctness standard (see *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of *this particular legal question*: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 37; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" (at para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established," this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), and *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.). This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard," an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe*, *supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.)). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan*, *supra*, at para. 49; *MacDonell c. Québec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71 (S.C.C.), at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) The Definitions of Patent Unreasonableness

78 This Court has set out a number of definitions of "patent unreasonableness," each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*C.U.P.E.*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (at p. 237). Cory J.'s characterization in *P.S.A.C.*, *supra*, of patent unreasonableness as a "very strict test," which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-964), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam*, *supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand," drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84 at paras. 9-12,

per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

82 Similarly, in *C.U.P.E. v. Ontario*, *supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam*, *supra*, at para. 57), *and* so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan*, *supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario*, *supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) The Interplay between the Patent Unreasonableness and Correctness Standards

84 As I observed in *Chamberlain*, *supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain*, *supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Q.*, *supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *C.U.P.E.*, *supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 69; see also H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-286).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*C.U.P.E.*, *supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) ("*Nipawin*"), at p. 389, and in *C.U.P.E.*, *supra*, at p. 237:

> . . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K. H.L.). *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a *correctness* basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*," [1970] S.C.R. 425 (S.C.C.) (see Mullan, *Administrative Law*, *supra*, at pp. 69-70; see also *National Corn Growers Assn.*, *supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *C.U.P.E.*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law*, *supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *C.U.P.E.*, *supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) ("*C.A.I.M.A.W.*").

90 In *C.A.I.M.A.W.*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*C.U.P.E.*, *supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20; see also David J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-270). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see Margaret Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. concurring) took to patent unreasonableness in *C.A.I.M.A.W.*, *supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> . . . . .
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.) ("*C.U.P.E., Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*C.U.P.E., Local 301*, *supra*, at para. 59; see also *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at pp. 771 and 774-775).

94 This view was recently forcefully rearticulated in *Ryan*, *supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar nor the companion case of *O.P.S.E.U.*, should be misinterpreted as a retreat from the position that, in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were *two* standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness - whether the employees' criminal convictions could be relitigated - and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness - whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "*rationally supported*"; this standard cannot be met where, as here, what supports the adjudicator's decision - indeed, what that decision is wholly premised on - is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable - a conclusion that flows from the applicability of *two separate* standards of review - is very different from suggesting that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *C.A.I.M.A.W.*, at p. 1004 - "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" - the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, there is very little evidence of the Court according deference to the Board's interpretation of its own

> statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(Lorne Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.):

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law*.

(Ian Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65; see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) The Relationship between the Patent Unreasonableness and Reasonableness Simpliciter Standards

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness Simpliciter

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear," the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, *supra*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *C.U.P.E.*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (at para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *P.S.A.C.*, *supra*, at pp. 963-964, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational . . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly' " (see Cowan, *supra*, at pp. 27-2; see also Gabrielle Perreault, *Le contrôle judiciaire des décisions de l'administration: de l'erreur juridictionnelle à la norme de contrôle* (Montreal: Wilson & Lafleur, 2002), at p. 116; Suzanne Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (Montreal: Yvon Blais, 2003), at pp. 34-35; P. Garant, *Droit administratif*, 4e éd., vol. 2 (Montreal: Yvon Blais, 1996), at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> . . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review," *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship & Immigration)* (2000), 184 F.T.R. 246 (Fed. T.D.), at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focused on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *C.A.I.M.A.W.*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J., or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *C.A.I.M.A.W.*, *supra*, at pp. 1003-1004, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: Was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance, because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see Deborah K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser - *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), *55 Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Flazon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam*, *supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see James L.H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above - *i.e.*, attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam*, *supra*, at para. 56) is not clear enough (see David W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-487). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards" (Elliott, *supra*, at pp. 486-487).

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*, and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn," *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *C.U.P.E.*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: In what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a

patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident - *i.e.*, clear, obvious, or immediate - is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". *Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective*. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision" to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did (*Ryan*, *supra*, at para. 53).

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> . . . whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record? . . . Or can one go beyond the record to demonstrate - "identify" - why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(David Phillip Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law," paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See in this regard, the comments of Mullan in "Recent Developments in Standard of Review," *supra*, at p. 4.)

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch - *i.e.*, interpretations that fall outside the range of those that can be "reasonably," "rationally" or "tenably" supported by the statutory language - and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning," provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously, any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan*, *supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 65, *per* L'Heureux-Dubé J., citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at p. 286, and *Ryan*, *supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: *i.e.*, this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam*, *supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible." While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible - whether its illegibility is evident on a

cursory glance or only after a close examination - the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case, it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Q.*, *supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [*In Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, *supra*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Amendment to the Constitution of Canada*, [1981] 1 S.C.R. 753 (S.C.C.), at pp. 805-806). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 71:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" . . . . A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level," as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.

(See the Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174, italics in original; see also MacLauchlan, *supra* at pp. 289-291.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (*i.e.*, does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that

" 'statutory provisions often do not yield a single, uniquely correct interpretation' " and that an expert administrative adjudicator may be " 'better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language' " in a way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J.M. Evans et al., *Administrative Law*, 3rd ed. (Toronto: Emond Montgomery, 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps *more* capable) of choosing among reasonable decisions. It is *not* to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (*i.e.*, irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 367-368). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an *irrational* decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *C.U.P.E. v. New Brunswick Liquor Corp.* This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* On November 13, 2003, the Supreme Court of Canada issued a corrigendum; the changes have been incorporated herein.

TAB 25

2019 ONCA 354
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. VimpelCom Ltd.

2019 CarswellOnt 6611, 2019 ONCA 354, [2019] O.J. No. 2286,
145 O.R. (3d) 759, 306 A.C.W.S. (3d) 770, 95 B.L.R. (5th) 175

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and VimpelCom Ltd., Globalive Capital Inc., UBS Securities Canada Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., West Face Capital Inc. and Mid-Bowline Group Corp. (Defendants / Respondents)

M. Tulloch, M.L. Benotto, Grant Huscroft JJ.A.

Heard: February 19-20, 2019
Judgment: May 2, 2019
Docket: CA C65431

Proceedings: affirming *The Catalyst Capital Group Inc. v. VimpelCom Ltd.* (2018), 2018 CarswellOnt 6161, 2018 ONSC 2471, Hainey J. (Ont. S.C.J. [Commercial List])

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Geoff R. Hall, for Respondent, Novus Wireless Communications Inc.
Kent Thomson, Matthew Milne-Smith, for Respondent, West Face Capital Inc.

***M. Tulloch J.A.*:**

OVERVIEW

1 This case arises out of the failed attempt by the appellant, The Catalyst Capital Group Inc. ("Catalyst"), to purchase WIND Mobile Corp. ("Wind"). After its attempt to purchase Wind failed, Catalyst sued the respondents claiming more than $1 billion in damages. The motions judge dismissed the action on the basis of issue estoppel, cause of action estoppel, and abuse of process.

2 Catalyst appeals. For the reasons that follow, I would dismiss the appeal.

FACTS

(1) Background

3 Wind is a Canadian telecommunications provider. From 2011 to 2014, it was owned by the respondents VimpelCom Ltd. ("VimpelCom") and Globalive Capital Inc. ("Globalive"). VimpelCom held the majority of the total equity and Globalive held the majority of the voting equity.

4 In 2013, VimpelCom announced its intention to sell its interest in Wind. Catalyst began negotiating with VimpelCom to purchase that interest. The respondent UBS Securities Canada Inc. ("UBS") advised VimpelCom in these negotiations.

5 The negotiations proceeded over many months and gave rise to two agreements. On March 22, 2014, Catalyst and VimpelCom negotiated a Confidentiality Agreement providing that the existence and content of their negotiations were confidential. On July 23, 2014, Catalyst and VimpelCom signed an Exclusivity Agreement pursuant to which VimpelCom could negotiate only with Catalyst and could not solicit other bids. The exclusivity period under this agreement expired on August 18, 2014.

6 By August 11, 2014, a deal seemed imminent. However, on this date, VimpelCom advised Catalyst that it wanted a $5 million to $20 million break fee and insisted on shortening the regulatory approval period for the deal from three months to two months. Catalyst refused to agree to these demands and ceased negotiations. The negotiations between Catalyst and VimpelCom proved unsuccessful. The exclusivity period expired on August 18, 2014 without a deal.

7 After the exclusivity period expired, a group of purchasers (the "Consortium") successfully purchased VimpelCom's interest in Wind. The Consortium concluded the deal within a month of the exclusivity period's expiry. The Consortium had made an unsolicited purchase proposal to VimpelCom on August 6, 2014. VimpelCom did not respond to the proposal until the exclusivity period under its Exclusivity Agreement with Catalyst expired. The members of the Consortium included the respondents West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners LLC ("Tennenbaum"), 64NM Holdings LP ("64NM LP"), 64NM Holdings GP LLC ("64NM GP"), LG Capital Investors LLC ("LG"), Serruya Private Equity Inc., and Novus Wireless Communications Inc. Globalive was not initially part of the Consortium but joined the Consortium following the expiry of the exclusivity period on August 18, 2014.

(2) Commencement of the Moyse Action

8 Brandon Moyse ("Moyse"), a junior analyst at Catalyst, left Catalyst and began working for West Face during the course of Catalyst's negotiations with VimpelCom. He resigned from Catalyst after the signing of the Confidentiality Agreement but before the conclusion of the Exclusivity Agreement. Catalyst commenced an action against Moyse and West Face (the "Moyse Action") to enforce the non-competition clause in Moyse's employment contract with Catalyst prior to the failure of Catalyst's bid to acquire Wind.

9 Following the Consortium's purchase of VimpelCom's interest in Wind, Catalyst broadened the scope of the Moyse Action. It amended its statement of claim to allege that Moyse had communicated confidential information to West Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully acquire Wind from VimpelCom. The amendments included a claim for a constructive trust over West Face's interest in Wind.

(3) Plan of Arrangement Proceedings

10 Not long after acquiring Wind, the Consortium agreed to sell the company to Shaw Communications in December 2015. The sale proceeded by a plan of arrangement under s. 182 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, to enable Shaw to obtain clear title to Wind's shares notwithstanding Catalyst's constructive trust claim. Catalyst opposed the plan because it would release the constructive trust claim.

11 In his decision on the plan of arrangement, reported as *Mid-Bowline Group Corp., Re*, 2016 ONSC 669 (Ont. S.C.J. [Commercial List]), Newbould J. made several adverse findings against Catalyst:

1) Catalyst deliberately delayed its claim against West Face to prevent it from selling its shares (para. 33);

2) Catalyst knew the facts underlying its claim for inducing breach of contract in March 2015 but only mentioned this claim for the first time in oral argument at the plan of arrangement hearing in January 2016 (paras. 52, 56);

3) Catalyst acted in bad faith by choosing to "lie in the weeds" until the hearing of the plan of arrangement application and then springing the "new theory" of inducing breach of contract (para. 59).

12 Newbould J. did permit Catalyst to pursue a mini-trial of its constructive trust claim in the plan of arrangement proceedings. However, he declined to permit Catalyst to advance its claim for inducing breach of contract in this mini-trial. Catalyst ultimately declined to pursue a mini-trial, and Newbould J. approved the plan of arrangement on February 3, 2016.

13 In early February 2016, following the revelation of Catalyst's intention to bring a claim for inducing breach of contract, counsel for West Face explicitly invited Catalyst to amend its pleadings in the Moyse Action to include such a claim if Catalyst in fact intended to pursue it. Catalyst declined to do so. The parties to the Moyse Action proceeded to schedule trial dates for June 2016.

(4) Commencement of Current Action

14 Five days before the trial in the Moyse Action was to begin, Catalyst issued its statement of claim against West Face and the other respondents to the current action (the "Current Action") alleging breach of contract, breach of confidence, conspiracy, and inducing breach of contract. Counsel for West Face immediately wrote to Catalyst's counsel, asserting that the Current Action was litigation by installment and an abuse of process. Catalyst did not take any steps in response to this protest and instead proceeded to trial in the Moyse Action.

(5) Decisions in the Moyse Action

15 In reasons reported at [*Catalyst Capital Group Inc. v. Moyse*] 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List]) ("Moyse Trial Reasons"), Newbould J. found that Catalyst had failed to make out each of the three elements of the breach of confidence claim. First, Moyse did not communicate any confidential information about Catalyst's acquisition strategy to West Face. Second, West Face made no use of such information in acquiring Wind. Third, even if West Face made use of Catalyst's confidential information, Catalyst suffered no detriment.

16 Newbould J.'s findings on the detriment requirement of the breach of confidence cause of action are most relevant to this appeal. First, Newbould J. found that it was Catalyst's failure to agree to the break fee that VimpelCom requested that caused Catalyst to cease negotiations with VimpelCom: para. 130. Second, Newbould J. found that there was "no chance" that Catalyst could have closed the deal with VimpelCom because Catalyst insisted on making the deal conditional on receiving regulatory concessions from Industry Canada, a condition VimpelCom was unwilling to agree to: para. 131.

17 In reasons reported at 2018 ONCA 283, 130 O.R. (3d) 675 (Ont. C.A.) ("Moyse ONCA Reasons"), this court dismissed Catalyst's appeal. This court rejected Catalyst's attack on Newbould J.'s factual findings. Contrary to Catalyst's submissions, this court found that Catalyst was free to amend its pleadings in the Moyse Action to include a claim for inducing breach of contract but elected not to do so: para. 40. Similarly, this court noted that evidence pertaining to the dealings between VimpelCom, on the one side, and West Face and the Consortium on the other was relevant to Catalyst's claim and West Face's defence that it pursued its own strategies to purchase the Wind shares. The court noted that Catalyst did not object to any of this evidence at trial: paras. 41-42. The Supreme Court dismissed Catalyst's application for leave to appeal: (2019), [2018] S.C.C.A. No. 295 (S.C.C.).

(6) Decision of the Motions Judge: 2018 ONSC 2471 (Ont. S.C.J. [Commercial List])

18 The respondents in the Current Action moved to dismiss Catalyst's claims. Following this court's dismissal of Catalyst's appeal in the Moyse Action, the motions judge released comprehensive reasons dismissing Catalyst's claim ("Motions Reasons"). The motions judge dismissed the claim on the basis of issue estoppel and cause of action estoppel against VimpelCom and Globalive, as well as against Tennenbaum, 64NM LP, 64NM GP, and LG (the "US Investors"). While Globalive and the US Investors were not parties to the Moyse Action, the motions judge found that they were privies of West Face. The motions judge also dismissed Catalyst's claim against all respondents as an abuse of process. Finally, the motions judge struck Catalyst's claim of breach of contract against Globalive and UBS without leave to amend.

19 First, the motions judge applied issue estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he found that Catalyst was trying to re-litigate the issue of why Catalyst failed to acquire Wind from VimpelCom. For the motions judge, Catalyst's claim was premised on a new theory that the Consortium conspired to induce VimpelCom to insist on a break fee condition that it knew Catalyst would reject. Newbould J., however, had found that Catalyst had no chance of concluding the deal. He found that there was no evidence that the Consortium's bid played any part in VimpelCom's decision to request a break fee, and that it was VimpelCom's refusal to agree to making the purchase conditional on receiving regulatory concessions that made a deal impossible. Thus, for Catalyst to succeed in the Current Action, the court would have to make a finding inconsistent with that of Newbould J. The motions judge declined to exercise his residual discretion not to apply issue estoppel because Catalyst was not entitled to a "second bite at the cherry": para. 75.

20 Second, the motions judge applied cause of action estoppel to dismiss the claim against VimpelCom, Globalive, and the US Investors because he concluded that Catalyst's claims in the Moyse Action and the Current Action arose from the same set of facts. The motions judge identified those facts as Catalyst's failure to acquire Wind and Wind's subsequent acquisition by the Consortium. Newbould J. determined this issue against Catalyst in the Moyse Action. While Catalyst advanced a new theory of liability in the Current Action, it could have and should have advanced this theory in the Moyse Action. Newbould J.'s ruling in the plan of arrangement proceedings did not bar it from doing so.

21 Third, the motions judge dismissed Catalyst's claims against all the respondents as an abuse of process because he found that Catalyst was attempting to re-litigate why its bid failed. He stressed two factors: first, Catalyst could have advanced its claims from the Current Action in the Moyse Action; and second, for Catalyst to succeed in the Current Action, the court would have to make factual findings inconsistent with those of Newbould J.

22 Finally, the motions judge struck Catalyst's claim for breach of contract against Globalive and UBS without leave to amend. He found that Catalyst had failed to plead the required elements of a breach of contract claim because it failed to plead that Globalive and UBS were parties to the Exclusivity Agreement and the Confidentiality Agreement. He declined leave to amend because Catalyst had many opportunities to properly plead its breach of contract claim and no amendment could produce a viable cause of action.

ISSUES

23 The following issues arise on this appeal:

1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?

3) Did the motions judge err in dismissing the Current Action as an abuse of process?

4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

ANALYSIS

Standard of Review

24 This court owes deference to the motions judge's application of the tests for issue estoppel, cause of action estoppel, and abuse of process. As the Supreme Court held in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125 (S.C.C.), at para. 27, the decision to apply issue estoppel is discretionary. Accordingly, an appellate court should intervene only if the motions judge misdirected himself, came to a decision that is so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations. This same standard of review applies to the application of the tests for cause of action estoppel and abuse of process: *Law Society of Manitoba v. Mackinnon*, 2014 MBCA 28, 370 D.L.R. (4th) 385 (Man. C.A.), at para. 31; *Burcevski v. Ambrozic*, 2011 ABCA 178, 505 A.R. 359 (Alta. C.A.), at paras. 7-9, leave to appeal

refused, [2011] S.C.C.A. No. 388 (S.C.C.). I agree with the respondents that Catalyst has not pointed to an extricable error of law that would justify applying the correctness standard.

(1) Did the motions judge err in dismissing the Current Action on the ground of issue estoppel?

(a) The Law

25 In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 25, the Supreme Court outlined the three requirements for issue estoppel:

> 1) The same question has been decided;
>
> 2) The judicial decision said to give rise to the estoppel is final; and
>
> 3) The parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.

Even if all three requirements are met, however, the court still has a residual discretion not to apply issue estoppel when its application would work an injustice: *Danyluk*, at paras. 62-63.

26 The second and third of these requirements were not seriously contested in this court. Catalyst's only argument on the third requirement is that parties can only be privies if the same question is involved in both proceedings. Catalyst does not argue that, should this court find that the same question is involved in both proceedings, the US Investors and Globalive were insufficiently connected to West Face to be its privies. Accordingly, the focus of these reasons is on the first requirement, that the question decided in the two proceedings be the same, as well as on the residual discretion.

27 Different causes of action may have one or more material facts in common. Issue estoppel prevents re-litigation of the material facts that the cause of action in the prior action embraces: *Danyluk*, at para. 54. However, the question out of which the estoppel arises must be "fundamental to the decision arrived at" in the prior proceedings: *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at p. 255. Accordingly, the question must be "necessarily bound up" with the determination of the issue in the prior proceeding for issue estoppel to apply: *Danyluk*, at paras. 24, 54.

28 Catalyst argues that the motions judge erred in applying issue estoppel for the following reasons:

> 1) Newbould J.'s findings in the Moyse Action were obiter and collateral to his decision;
>
> 2) Newbould J.'s findings are merely overlapping facts and are incidental to Catalyst's claims in the Current Action;
>
> 3) Catalyst may be entitled to a remedy without any inconsistent findings; and
>
> 4) The exercise of residual discretion favours not applying issue estoppel.

29 I disagree and would reject this ground of appeal.

(b) Newbould J.'s Findings Are Not Obiter

30 Catalyst submits that Newbould J.'s findings are in obiter and collateral because they were not necessary to his decision. For Catalyst, the central issue in the Moyse Action was whether Moyse passed confidential information to West Face and since Newbould J. found that Moyse had not, his other findings were collateral.

31 I would reject this submission. Catalyst's submission is premised on the assumption that the only fundamental issue in the Moyse Action was whether Moyse passed confidential information to West Face. However, to succeed in its breach of confidence claim, Catalyst was also required to prove that West Face used confidential information in its bid for Wind and that this misuse caused detriment to Catalyst: Moyse ONCA Reasons, at para. 8.

32 Canadian courts have consistently rejected the argument that a judicial finding is merely dictum or collateral because there was another sufficient basis for the judge's decision. In *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 (S.C.C.), the Supreme Court rejected the argument that a judicial finding that is "a distinct and sufficient ground for its decision [is] a mere dictum because there is another ground upon which, standing alone, the case might have been determined": p. 534, per Duff J. (Fitzpatrick C.J. concurring), pp. 539-540, per Anglin J., quoting *Commissioners of Taxation for New South Wales v. Palmer*, [1907] A.C. 179 (New South Wales P.C.), at p. 184. More recently, the Federal Court of Appeal held that a judge's finding on one necessary element of a claim gave rise to issue estoppel even though the judge had earlier in his reasons reached a conclusion on another element that was sufficient to dispose of the claim: *Abbott Laboratories v. Canada (Minister of Health)*, 2007 FCA 140, 282 D.L.R. (4th) 145 (F.C.A.), at paras. 34-35.

33 As West Face submits, accepting Catalyst's argument would lead to absurd consequences, because it would make the applicability of issue estoppel dependent on the order in which the court chooses to address issues in its reasons. Baron Bramwell's statement in *Membery v. Great Western Railway*, (1889) L.R. 14 App. Cas. 179 (U.K. H.L.), at p. 187, cited in *Stuart* by Anglin J. at p. 539, provides a complete answer to Catalyst's argument:

> Of course it is in a sense not necessary that I should express an opinion on this as the ground I have first mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff; and I decide against him on both; on one as much as on the other.

(c) Newbould J.'s Findings Are Central to the Current Action

34 Catalyst further submits that Newbould J.'s findings are merely overlapping facts such that the same question was not determined. For Catalyst, the Moyse Action was about confidential information that Moyse received and transmitted. In contrast, Catalyst submits that this action concerns the transmission of confidential information by VimpelCom and/or UBS to the Consortium in breach of the Confidentiality Agreement and the Exclusivity Agreement. As a result, it follows that Newbould J.'s finding that even if Moyse did pass on confidential information to West Face, and such confidential information did not cause detriment to Catalyst, it does not mean that confidential information that VimpelCom and/or UBS leaked to the Consortium did not cause detriment to Catalyst.

35 I do not accept this argument. It is facially appealing. However, it is premised on a misunderstanding of what the parties put at issue in the Moyse Action.

36 The Moyse Action necessarily concerned the overall conduct of West Face and the other Consortium members. As Catalyst had no direct evidence that Moyse gave West Face confidential information, it submitted that the court should infer from all the evidence that he did so: Moyse Trial Reasons, at para. 7. As Newbould J. recognized, this required the court to examine West Face's "overall course of conduct" to determine if there was a transfer of Catalyst's confidential information or if there were other explanations for West Face's conduct*:* Moyse Trial Reasons, at paras. 72-73. Therefore, whether West Face received any confidential information in breach of the Confidentiality Agreement and the Exclusivity Agreement, and whether West Face's use of confidential information caused any detriment to Catalyst, were live issues at trial.

37 Newbould J. was thus required to analyze whether the conduct of West Face and other Consortium members was consistent with the use of confidential information and whether there was any evidence that the use of confidential information caused Catalyst a detriment. He was entitled to draw inferences from the evidence as to what would likely have happened but for a misuse of confidential information: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), at para. 73. As the motions judge noted, West Face invited Newbould J. to make findings of fact that Catalyst failed to acquire Wind because it refused VimpelCom's demand for a break fee and because it would have been unable to obtain regulatory concessions. Catalyst did not object to any of these proposed findings of fact as being outside of the scope of the Moyse Action: Motions Reasons, at para. 40. In fact, Catalyst elicited considerable evidence on the dealings between VimpelCom and UBS, and the Consortium,

and urged Newbould J. to make certain findings in respect of these dealings: Moyse ONCA Reasons, at para. 42. Catalyst cannot now complain that it was improper for Newbould J. to make contrary findings or that those contrary findings were not essential to his decision.

38 I thus do not accept Catalyst's argument that Newbould J.'s findings on detriment were restricted to detriment from confidential information transmitted by Moyse. Perhaps this would have been the case had Catalyst litigated the Moyse Action differently or had it produced direct evidence of leaks of confidential information by Moyse. However, Catalyst chose to put at issue not only the Consortium's entire conduct, but also the reasons why Catalyst failed to acquire Wind and whether misuse of confidential information by the Consortium had anything to do with that failure. As this court found, Newbould J. did not overstep his bounds in finding against Catalyst on these issues: Moyse ONCA Reasons, at paras. 39-42.

(d) Newbould J.'s Findings Would Bar Catalyst from Establishing Liability

39 Catalyst submits that Newbould J.'s findings about why it failed to acquire Wind would not bar it from gaining a remedy for its claims. Catalyst argues that, even accepting Newbould J.'s findings, it is nonetheless entitled to recovery. I would reject this submission.

40 In its argument, Catalyst focuses in particular on its claims against West Face, Globalive, and the US Investors for breach of confidence and inducing breach of contract. Relying on certain statements in *Cadbury Schweppes* that establish that the court has jurisdiction to grant a remedy dictated by the facts of the case rather than strict doctrinal considerations, Catalyst submits that it may be entitled to equitable remedies such as an accounting of profits even if it suffered no financial loss.

41 However, the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence, inducing breach of contract, and conspiracy: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.), at paras. 17-19; *Persaud v. Telus Corporation*, 2017 ONCA 479 (Ont. C.A.), at para. 26; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at pp. 471-472. There is no contradiction between this requirement to prove detriment and the passages from *Cadbury Schweppes* that Catalyst points to. *Lysko* explicitly accepted that *Cadbury Schweppes* adopted a broad definition of detriment but confirmed the requirement: paras. 18-19. Accordingly, Newbould J.'s findings would bar Catalyst from establishing the liability of West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy.

42 Nor do I accept that the fact that detriment is not required to establish liability for breach of contract changes my analysis. Catalyst did not plead breach of contract against West Face or the US Investors. Admittedly, Catalyst did plead breach of contract against Globalive. However, as I will explain later in these reasons, the motions judge correctly struck Catalyst's pleading of breach of contract against Globalive as disclosing no reasonable cause of action without leave to amend. Accordingly, Catalyst was required to prove detriment for each of the causes of action it validly pled against West Face, Globalive, and the US Investors.

43 Moreover, I do not place weight on the availability of alternative remedies. Catalyst did not plead any of the alternative remedies such as an accounting for profits that it now refers to on appeal. Instead, it repeatedly pled that the breach of confidence and inducement of breach of contract caused it to fail to acquire Wind. This is a precise inconsistency with Newbould J.'s findings.

44 These inconsistencies also lead me to reject Catalyst's submission that the fact that it has pled different causes of action in the Current Action means issue estoppel cannot apply. Issue estoppel applies precisely when there are different causes of action as long as those causes of action have a material fact in common: *Danyluk*, at para. 54. For instance, in *Danyluk*, the claim to unpaid commissions was a material fact in both the administrative proceeding under the *Employment Standards Act*, R.S.O. 1990, c. E.14, and the civil claim for wrongful dismissal: para. 55. In the present case, the motions judge correctly identified that the need to prove detriment, namely that the respondents' conduct caused Catalyst to fail to acquire Wind, was a material fact common to the relevant causes of action Catalyst asserted in both actions.

45 Lastly, I do not accept that issue estoppel cannot apply even in the face of Newbould J.'s findings because those findings simply overlap with the issues in the Current Action and are not fundamental to his decision. Comparing the present case with

the Supreme Court's decision in *Angle* illustrates that Newbould J.'s findings were not merely overlapping. *Angle* was a case involving merely overlapping facts. There, Dickson J. concluded that a finding that a shareholder was not under an obligation to pay a corporation for a benefit was not legally indispensable to the judgment in the prior tax proceeding as this indebtedness was only relevant to a subsidiary issue. There was no necessary inconsistency between the shareholder being obligated to pay the corporation and the decision that the shareholder had received a taxable benefit: pp. 255-256. In contrast, here Newbould J.'s finding that there was no chance Catalyst could have successfully concluded a deal with VimpelCom made it impossible for Catalyst to succeed on its breach of confidence claim in the Moyse Action. This finding similarly makes it impossible for Catalyst to succeed on its claims in the Current Action against West Face, Globalive, and the US Investors for breach of confidence, inducing breach of contract, and conspiracy without a court having to make inconsistent findings, as proof of loss is an element of those claims.

(e) Residual Discretion

46 Catalyst argues that the motions judge erred in not exercising his residual discretion to permit Catalyst's action to proceed. Relying on *Danyluk*, Catalyst argues that the motions judge's analysis was cursory and that he erred in principle by failing to address the factors for and against the exercise of the discretion. Catalyst submits that applying issue estoppel results in an injustice to Catalyst because there has been no discovery of VimpelCom or UBS regarding the circumstances surrounding the sale of VimpelCom's shares of Wind.

47 I would not accept this argument. The court does have residual discretion, but its exercise is more limited in nature in this case because the Moyse Action was a court proceeding, not an administrative proceeding as in *Danyluk*: *Danyluk*, at para. 62. The passage in the motions judge's reasons where he explicitly referred to residual discretion was brief. However, his conclusion, at para. 75, that Catalyst failed to put its "best foot forward" and is not entitled to a "second bite at the cherry" was reasonable. It must be read in light of the motions judge's extensive reasons addressing Catalyst's failure to advance its current claims in the Moyse Action and its attempt to re-litigate Newbould J.'s findings in the Moyse Action.

48 Finally, I am not convinced that the application of issue estoppel in these circumstances would work an injustice. In *Danyluk*, the court found such an injustice because the appellant's claim to employment commissions was never properly adjudicated due to procedural unfairness in the administrative proceedings the appellant pursued before commencing a civil action: para. 80. In contrast, in this case, Catalyst received a procedurally fair trial, the result of which this court upheld on appeal. While issue estoppel bars Catalyst from eliciting evidence and advancing new theories of liability against West Face, this is not a manifest injustice since Catalyst could have elicited that evidence and advanced those theories in the Moyse Action.

(2) Did the motions judge err in dismissing the Current Action on the ground of cause of action estoppel?

(a) The Law

49 The purpose of cause of action estoppel is to prevent the re-litigation of claims that have already been decided. As expressed by Vice Chancellor Wigram in *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.), at p. 319, it requires parties to "bring forward their whole case." The court thus has the power to prevent parties from re-litigating matters by advancing a point in subsequent proceedings which "properly belonged to the subject of the [previous] litigation".

50 For cause of action estoppel to apply, the basis of the cause of action and the subsequent action either must have been argued or could have been argued in the prior action if the party in question had exercised reasonable diligence: *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.), at p. 638. That said, I accept Catalyst's submission that it is not enough that the cause of action could have been argued in the prior proceeding. It is also necessary that the cause of action properly belonged to the subject of the prior action and should have been brought forward in that action: *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321 (N.S. C.A.), at para. 37, leave to appeal refused, (1998), [1997] S.C.C.A. No. 656 (S.C.C.); *Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369 (Ont. C.A.), at para. 128, leave to appeal refused, (2018), [2017] S.C.C.A. No. 279 (S.C.C.).

51 Like issue estoppel, cause of action estoppel also requires a final judicial decision and that the parties to that decision were the same persons or the privies to the parties to the present proceeding: *Pennyfeather*, at para. 128; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 21, rev'd on other grounds, 2002 SCC 63, [2002] 3 S.C.R. 307 (S.C.C.). As these requirements were not seriously contested before us, I will not discuss them further.

(b) Catalyst Could Have Brought Forward its Claims in the Moyse Action

52 Catalyst submits that cause of action estoppel should not apply because it could not have brought forward its current claims in the Moyse Action. In particular, Catalyst argues that it was barred from advancing its claim for inducing breach of contract in the Moyse Action. Newbould J., however, found that Catalyst was aware of its claim for inducing breach of contract by March 2015 and that it chose to "lie in the weeds" rather than assert its claim: *Mid-Bowline*, at para. 59. Catalyst never took steps to amend its pleadings in the Moyse Action to add a claim for inducing breach of contract in the Moyse Action even though West Face explicitly invited it to four months prior to the trial. This case is thus analogous to *Martin v. Goldfarb*, [2006] O.T.C. 629 (Ont. S.C.J.), where Perell J. applied cause of action estoppel against corporate claims when the individual plaintiff had the opportunity to join the corporate claims to a previous individual action but failed to do so: at paras. 70, 78-79.

53 Furthermore, I would reject Catalyst's argument that the possibility that new evidence would be obtained from VimpelCom and UBS regarding the sale of Wind in the Current Action means that cause of action estoppel should not apply. New evidence is only a basis to re-open litigation if it would "entirely chang[e]" the case and the party could not have reasonably ascertained it through reasonable diligence: *Grandview*, at pp. 636-637. Even assuming that the new evidence was so important as to entirely change the case, Catalyst could have ascertained this evidence through reasonable diligence in the Moyse Action. Catalyst knew of the facts underlying its claim for inducing breach of contract by March 2015. It thus had ample time to elicit this evidence at the trial of the Moyse Action. In *Grandview*, the plaintiff learned of a new theory of liability only following the trial of the first action, and the majority of the Supreme Court still applied cause of action estoppel: pp. 632-633. Here, the case for applying cause of action estoppel is even more compelling, as Catalyst was aware of its new theory of liability more than a year prior to the trial of the Moyse Action.

(c) Catalyst Should Have Brought Forward its Claims in the Moyse Action

54 Catalyst's central argument on cause of action estoppel is that it was appropriate for Catalyst to advance its current claims in a new action rather than amending its pleadings in the Moyse Action. Catalyst submits that the focus of the Moyse Action was the leak of confidential information by Moyse. In contrast, the Current Action focuses on breaches of the Exclusivity and Confidentiality Agreements that West Face allegedly induced. The Current Action thus involves separate and distinct causes of action that flow from distinct legal relationships. Catalyst submits that the factors *Hoque* outlined to guide the court's determination of whether a party should have raised a matter in a prior proceeding show that Catalyst should not have advanced its current claims in the Moyse Action.

55 I do not agree. In *Hoque*, at para. 37, Cromwell J.A. (as he was then) outlined several factors that are relevant to whether a matter should have been raised in a prior proceeding. These include the following:

1) Whether the second proceeding is a collateral attack against the earlier judgment;

2) Whether the second proceeding relies on evidence that could have been discovered in the past proceeding with reasonable diligence; and

3) Whether the second proceeding relies on a new legal theory that could have been advanced in the past proceeding.

56 These three factors weigh against Catalyst in this case. As I have already found, the Current Action would require the court to make findings inconsistent with those of Newbould J. in order for Catalyst to establish liability for conspiracy, breach of confidence, and inducing breach of contract. It thus involves a collateral attack against Newbould J.'s trial decision. Moreover,

as I have previously stated, the new evidence that Catalyst points to could have been discovered in the Moyse Action through reasonable diligence.

57 The same is true of Catalyst's new legal theory that Globalive and UBS communicated confidential information to the Consortium and the Consortium used this information to induce VimpelCom to breach the Exclusivity and Confidentiality Agreements. I agree with Catalyst that its legal theory of causation in the Current Action is distinct from its theory of causation in the Moyse Action. However, I accept West Face's submission that this is analogous with *Grandview*, where the majority of the Supreme Court applied cause of action estoppel. In *Grandview*, the subject matter of both actions was that water flowed from the defendant's land onto the plaintiff's. Only the theory as to which way the water reached the plaintiff's land changed between the two actions. Similarly, in this case, the subject matter of both the Moyse Action and the Current Action is the flow of confidential information to West Face. While Catalyst does have a different legal theory in this action, that theory only outlines a different means by which confidential information flowed to and was used by West Face.

58 Nor am I persuaded that the different legal claims Catalyst has advanced in this action bar the operation of cause of action estoppel. I acknowledge that the existence of a "separate and distinct" cause of action is a factor that might weigh against applying cause of action estoppel: *Hoque*, at para. 37. However, as Sharpe J. (as he was then) held in *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), at p. 297, aff'd, (1997), 32 O.R. (3d) 651 (Ont. C.A.), the law does not permit the manipulation of the underlying facts to advance a new legal theory. Similarly, this court has held that cause of action estoppel bars "a subsequent lawsuit relating to the same loss being advanced on a *different cause of action*": *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641 (Ont. C.A.), at para. 47, leave to appeal refused, [2018] S.C.C.A. No. 128 (S.C.C.) (Emphasis added).

59 I find that Sharpe J.'s decision in *Las Vegas Strip* is analogous and confirms that cause of action estoppel should apply even though Catalyst has advanced distinct legal claims in the Current Action. In *Las Vegas Strip*, a strip club unsuccessfully argued that its operation was a legal non-conforming use under a municipal bylaw in a prior proceeding. The strip club then commenced a subsequent proceeding alleging that the bylaw was invalid on municipal law and *Charter* grounds. Sharpe J. acknowledged that the strip club had raised "new legal arguments" in the second proceeding: p. 298. However, he found that it was barred from doing so because the prior proceedings put squarely in issue the same matter central to the second proceeding, namely the strip club's legal right to operate. The strip club was free to raise the municipal law and *Charter* arguments in the prior proceeding but elected not to do so: pp. 295-296. This court affirmed Sharpe J.'s decision on the same basis: p. 651.

60 Similarly, in this case Catalyst was free to raise its inducing breach of contract and conspiracy claims in the Moyse Action but elected not to do so. I acknowledge, as Sharpe J. did, that Catalyst has raised new legal arguments. However, the motions judge reasonably concluded, at para. 78 of his reasons, that these new legal arguments arose from the same set of facts, namely Catalyst's failure to acquire Wind and its acquisition by the Consortium. Catalyst's current claims certainly sought to add certain facts related to VimpelCom and UBS's conduct and to subtract other facts related to Moyse's conduct. However, as Sharpe J. held in *Las Vegas Strip*, attempting to add or subtract facts does not change the reality that the underlying subject matter is the same and all of the facts were available in the earlier action: p. 297.

(3) Did the motions judge err in dismissing the Current Action as an abuse of process?

(a) The Law

61 It is well-recognized that the re-litigation of issues that have been before the courts in a previous proceeding will create an abuse of process. As stated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 52:

> [F]rom the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.

62 The abuse of process doctrine applies to prevent the attempt to impeach a judicial finding by re-litigation in a different forum: *C.U.P.E.*, at para. 46. It is a flexible doctrine unencumbered by the mutuality of parties requirement that applies to issue estoppel and cause of action estoppel: *C.U.P.E.*, at para. 37. While abuse of process does include a finality requirement, that requirement is met in this case because the Supreme Court dismissed Catalyst's application for leave to appeal from this court's decision in the Moyse Action.

63 The need to protect the integrity of the adjudicative functions of courts compels a bar against re-litigation: *C.U.P.E.*, at para. 43. If re-litigation leads to the same result, there will be a waste of judicial resources, and if it leads to a different result, the inconsistency will undermine the credibility of the judicial process: *C.U.P.E.*, at para. 51. The law thus seeks to avoid re-litigation primarily for two reasons: first, to prevent overlap and wasting judicial resources; and second, to avoid the risk of inconsistent findings: *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 24 B.C.L.R. (5th) 4 (B.C. C.A.), at para. 71; see also *C.U.P.E.*, at para. 51; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2015), pp. 217-218.

(b) The Current Action is an Abuse of Process

64 The motions judge rightly concluded that Catalyst's Current Action was an abuse of process as against all respondents because the Current Action is an attempt to re-litigate the findings in the Moyse Action.

65 Both of the concerns underlying the abuse of process doctrine are present here. Catalyst's claim is abusive both because: (a) it directly overlaps with the issues that were before the court in the Moyse Action; and (b) it can *only* be successful if the court rejects the findings made by Newbould J. For the reasons already outlined under issue estoppel and cause of action estoppel, Catalyst is trying to re-litigate Newbould J.'s factual finding that Catalyst's own actions caused its failure to acquire Wind. This is an abuse of process.

66 Moreover, Catalyst's behaviour exhibits classic signs of re-litigation. Newbould J. found that Catalyst chose to "lie in the weeds" for strategic reasons and then to spring a new theory at the last moment: *Mid-Bowline Group*, at para. 59. Catalyst filed its statement of claim in the Current Action mere days before the trial of the Moyse Action. This is analogous to *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 D.L.R. (4th) 152 (Sask. C.A.), where a law firm directed the commencement of a new class action merely a day after it exhausted its appeal processes of the dismissal of the previous class action. In that case, the Saskatchewan Court of Appeal found that there was nothing in the second class action that could not have been advanced in the first class action and that the law firm was attempting "to litigate by installment": paras. 76-78. Accordingly, the court found that the new class action was an abuse of process.

67 Catalyst's submission that abuse of process is not intended to prevent the raising of a separate cause of action in a subsequent action should be rejected. As previously discussed, Catalyst could have raised the claims it advances in the Current Action in the Moyse Action. It elected not to. As this court recently held, abuse of process applies where issues "could have been determined" but were not: *Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181 (Ont. C.A.), at para. 7. Moreover, it also applies to prevent re-litigation of previously decided facts: *Winter*, at para. 8. As previously stated, for Catalyst to succeed in the Current Action, a court would have to reach different factual findings from those of Newbould J. on the reasons why Catalyst failed to acquire Wind.

68 Moreover, none of the factors the Supreme Court outlined in *C.U.P.E.* that would permit re-litigation apply in this case. The Supreme Court stated, at para. 52, that it might be appropriate to permit re-litigation in the following circumstances:

1) When the first proceeding is tainted by fraud or dishonesty;

2) When fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

3) When fairness dictates that the original result should not be binding in the new context.

69 Catalyst does not allege that the first proceeding is tainted by fraud or dishonesty. To the extent that there is a possibility that new evidence from VimpelCom and UBS regarding the sale of Wind might impeach the original results, this evidence was not previously unavailable and could have been adduced by Catalyst at the trial of the Moyse Action. As for the fairness factor, the Supreme Court clarified that this would apply if the stakes in the original proceeding were too minor to give a party an adequate incentive to litigate: *C.U.P.E.*, at para. 53. However, the financial stakes in the Moyse Action were not minor and Catalyst robustly litigated that proceeding.

70 Catalyst's reliance on Goudge J.A.'s dissenting reasons in *Canam*, which the Supreme Court subsequently upheld, is misplaced. *Canam* is distinguishable on the facts because it concerned a claim that a party could not have raised in prior proceedings, not one which a party could have raised but chose not to. In *Canam*, a purchaser first sued the vendor in contract. The court found that there had been a misrepresentation by the vendor's realtors but dismissed the purchaser's claim because of the doctrine of merger. The purchaser then sued its lawyer in tort for professional negligence. The lawyer commenced third party proceedings against the realtors in which he sought to add them as joint tortfeasors for their misrepresentations to the purchaser. As neither the lawyer nor the realtor were parties to the purchaser's original contractual action against the vendor, Goudge J.A. found that the lawyer was not attempting to re-litigate a claim because he had not and could not have raised this issue previously: para. 58. In contrast, in this case Catalyst could have raised its claims in the Current Action but elected not to do so.

(4) Did the motions judge err in striking Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend?

71 The motions judge struck Catalyst's pleadings of breach of contract against UBS and Globalive without leave to amend. Catalyst makes two submissions. First, it argues that the motions judge erred in striking the pleadings because Catalyst did plead all elements of privity of contract against both Globalive and UBS. Second, Catalyst submits that the motions judge should have granted leave to amend because an amendment could have cured any deficiencies without incompensable prejudice to the respondents.

72 I do not agree.

73 First, the motions judge correctly concluded that the pleadings did not disclose a reasonable cause of action because they failed to plead privity of contract. A claim for breach of contract must contain sufficient particulars to identify the parties to the contract: *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (Ont. S.C.J. [Commercial List]), at para. 26. Similarly, it is trite law that, subject to certain exceptions that are not applicable here, a non-party to a contract cannot be sued for breach of contract: *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228 (S.C.C.), at pp. 236-238.

74 As the motions judge found, Catalyst failed to plead that either Globalive or UBS were parties to the Exclusivity Agreement or the Confidentiality Agreement. Catalyst's statement of claim listed the parties to each agreement without including either Globalive or UBS. While Catalyst did plead that UBS was "bound" by these agreements, the motions judge correctly concluded that as a matter of law UBS could not be bound to an agreement to which it was not a party in these circumstances. With respect to Globalive, the motions judge found that the claim must also fail. Catalyst's theory is that Globalive is vicariously liable for the actions of its principal, Anthony Lacavera ("Lacavera"), who Catalyst in turn pleads was bound not to undermine the Exclusivity Agreement. However, Catalyst pleads that Lacavera was not a party to the Exclusivity Agreement, so this claim similarly fails.

75 Second, the motions judge's decision to deny leave to amend was reasonable. The decision whether or not to grant leave to amend is a discretionary decision entitled to deference: *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONCA 817 (Ont. C.A.), at para. 14. The motions judge denied leave to amend both pleadings because Catalyst had many opportunities to properly plead its breach of contract claims and since the absence of any contract between Catalyst and Globalive or UBS meant that no amendments could make the pleading legally tenable. Both of these findings are consistent with jurisprudence establishing that a court may deny leave to amend where a party has had many opportunities to properly plead the claims and where amendments could not make the pleadings legally tenable: see *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670 (Ont. C.A.), at paras. 82-83; *RWDI* , at para. 14.

CONCLUSION

76 In all the circumstances, I would dismiss the appeal.

77 With respect to the issue of costs, the parties agreed that should the disposition of this appeal be in favour of the respondents, then they should be awarded their costs collectively fixed in the amount of $300,000. Accordingly, costs are hereby awarded to the respondents collectively, fixed in the mount of $300,000, inclusive of all taxes and disbursements.

***M.L. Benotto J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

2019 CarswellOnt 18743
Supreme Court of Canada

Catalyst Capital Group Inc. v. VimpelCom Ltd., et al.

2019 CarswellOnt 18743, 2019 CarswellOnt 18744, [2019] S.C.C.A. No. 284

Catalyst Capital Group Inc. v. VimpelCom Ltd., Globalive Capital Inc., UBS Securities Canada Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc. and West Face Capital Inc.

Per curiam

Judgment: November 14, 2019
Docket: 38746

Proceedings: Leave to appeal refused, 2019 CarswellOnt 6611, 306 A.C.W.S. (3d) 770, [2019] O.J. No. 2286, 145 O.R. (3d) 759, 2019 ONCA 354 (Ont. C.A.)Affirmed, 2018 CarswellOnt 6161, 297 A.C.W.S. (3d) 332, 2018 ONSC 2471 (Ont. S.C.J. [Commercial List])

Counsel: Counsel — not provided

Per curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C65431, 2019 ONCA 354, dated May 2, 2019, is dismissed with costs.

TAB 26

See para. 15

2016 ONSC 3106
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2016 CarswellOnt 7400, 2016 ONSC 3106, 266 A.C.W.S. (3d) 295, 36 C.B.R. (6th) 269

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of a Proposed Plan of Compromise or Arrangement With Respect to U.S. Steel Canada Inc.

H. Wilton-Siegel J.

Heard: April 29, 2016
Judgment: May 10, 2016
Docket: CV-14-10695-00CL

Counsel: Paul Steep, Stephen Fulton, for Applicant, U.S. Steel Canada Inc.
Alan Mark, Gale Rubenstein, for Province of Ontario
Lily Harmer, Kris Borg-Olivier, for USW, Local 1005 and Local 8782
Andrew Hatnay, James Sayce, Barbara Walancik, for non-unionized active employees and retirees
Michael E. Barrack, Jeff Galway, Kiran Patel, Max Shapiro, for United States Steel Corporation
Robert Staley, for Monitor, Ernst & Young Inc.
Mike Kovacevic, for City of Hamilton
Patrick Riesterer, for Brookfield Partners

***H. Wilton-Siegel J.*:**

1 The applicant, U.S. Steel Canada Inc. (the "applicant" or "USSC"), sought an extension of the stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") to July 28, 2016, as the previous stay expired on April 29, 2016. At the conclusion of the hearing, the Court advised that the extension would be granted for written reasons to follow. This Endorsement sets out the written reasons for the Court's determination.

2 Section 11.02(3) of the CCAA provides that a court shall not make an order of the nature sought unless the applicant satisfies the court that circumstances exist that make the order appropriate and that "the applicant has acted, and is acting, in good faith and with due diligence."

3 These requirements are satisfied in the present circumstances. A sales and investment process (the "SISP") is underway in Phase II, with a deadline for binding offers of May 13, 2016. There is reason to expect that one or more offers for the applicant to continue on a going-concern basis will be received. There is little doubt that the applicant is acting in good faith and with due diligence.

4 The request for an extension of the stay under the CCAA to July 28, 2016 is supported by the chief restructuring officer of the applicant, the Monitor and the principal stakeholders of the applicant, save for United States Steel Corporation ("USS") which seeks a shorter extension on conditions described below. Accordingly, there is no objection before the Court to an extension of the stay. The only issue is whether the extension should be to July 28 or May 26, as USS argues, and whether it should be on the terms sought by USS.

5 USS argues that the stay should not be extended beyond a reasonable period for evaluation of the bids received on Phase II of the SISP. In addition, USS argues that the Court should mandate disclosure of the Phase II bids to all stakeholders, including

USS, upon receipt. It also seeks an order that USSC prepare an updated liquidation analysis, based on the Phase II bids, to enable a comparison of the options available to the applicant after receipt of any offers under the SISP.

6 The applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP after the deadline. Clearly, such a plan will be necessary to reach a restructuring plan, given that the successful bidder will need to address the positions of the major stakeholders. It will also be necessary to address stakeholder concerns, including USS, regarding the impact of continuation of the SISP process on their positions. However, USSC opposes the imposition at this time of any requirement to provide USS with summaries, or copies, of any bids received on Phase II of the SISP, or of any requirement to prepare an updated liquidation analysis based on such bids.

7 The Court's determination to grant the extension of the stay requested by USSC to July 28, 2016 was based on the following considerations.

8 First, in USSC's estimation, the SISP currently underway will require a more extended period of time than is proposed by USS to complete negotiations with any successful bidder and to permit satisfaction of any conditions, including negotiations between such bidder and other affected stakeholders. This view is shared by the Union, the Province of Ontario and Representative Counsel. The applicant is proceeding under the CCAA. It is entitled to manage the restructuring process without restrictions which could jeopardize the prospects for a successful outcome.

9 Second, there can be little doubt that a longer stay extension also furthers the prospect of a successful, going-concern restructuring, insofar as it provides greater certainty to USSC's suppliers, its customers and its employees regarding the continued operations of the applicant.

10 Third, as the Monitor points out, even if a going-concern restructuring were not feasible, a longer stay would be required to implement other arrangements to satisfy the claims of the creditors of the applicant, whether under the CCAA or otherwise.

11 Fourth, USS submits that the Court should impose a shorter extension period to enable the Court to monitor the potential for value destruction to the detriment of the applicant's creditors during the extension period. In particular, USS suggests that there is a serious, ongoing material deterioration in its position both as a secured creditor as well as an unsecured creditor of USSC. I am not persuaded, however, that the evidence before the Court on this issue is sufficient to require a shorter extension period for the following three reasons.

12 First, USS places considerable emphasis on EBITDA losses of the applicant since October 1, 2015 as evidence of the deterioration of its secured position. However, the evidence before the Court — in the form of the current liquidation analysis, which has been provided to the parties on a confidential basis — evidences a fully secured position to the extent of USS' secured claim.

13 Second, USS argues that such historical EBITDA losses are suggestive of further losses that should be projected during the extension period. However, the Monitor's Twenty-Fifth Report, dated April 22, 2016, addresses the EBITDA situation in two respects which indicate a reasonable possibility that there will be no material adverse change in that position over the period of the proposed extension. In paragraph 34 of that Report, the Monitor indicates that the preliminary forecast EDITBA is estimated to be positive for Q2 2016. It also states that cumulative EBITDA at the end of Q2 2016 is estimated to be consistent with, or slightly exceed, the Independent Business Plan the applicant implemented in October 2015 and substantially better by the end of fiscal 2016.

14 Third, while USS is also a substantial unsecured creditor, it will not be the only significant unsecured creditor affected by the applicant's failure to achieve a successful restructuring if that were to occur. The other significant unsecured creditors in such event — principally, the Province of Ontario, the Union and the non-unionized employees and retirees — will have very substantial claims as well. As noted above, these creditors support the extension and oppose the additional relief sought by USS. Moreover, in the event of an unsuccessful restructuring, it is not realistic to expect that there will be an expeditious process for satisfying the claims of the applicant's creditors given the issues of quantum and priority of security that will be disputed.

15 For the foregoing reasons, I conclude that a stay to July 28, 2016 is appropriate in the circumstances. I also conclude that it is not appropriate to impose the conditions sought by USS requiring the delivery of information by USSC for the following four principal reasons.

16 First, and most important, at the present time, as mentioned, there is no clarity regarding the nature and number of bids for USSC or its assets that may be received under the SISP. That information will drive a determination not only of the manner in which USSC proceeds with respect to a restructuring plan, but also of the appropriate involvement of the other stakeholders, including USS, and the nature of disclosure that should be made to those stakeholders. It is therefore premature and unwise to mandate any particular disclosure at this time without being able to assess the consequences of such disclosure for the applicant's prospects for a successful restructuring

17 Second, as mentioned above, the applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP that is consistent with furthering the prospects for a successful restructuring. Given that intention, I think it is more appropriate to address disclosure issues after the parties have reviewed, and if possible informally negotiated, a proposed USSC plan for the involvement of stakeholders that USSC has developed based on the actual results of the SISP rather than to impose conditions based on speculation as to the likely outcome of the SISP.

18 Third, for the reasons set out above, the USS concern for the potential for value destruction during the stay extension period is not a sufficient basis for ordering the immediate preparation of a new liquidation analysis.

19 Fourth, USS is effectively seeking to amend the SISP order of the Court, dated January 12, 2016 (the "SISP Order"), to mandate disclosure of the Phase II bids that was not provided for in that Order. Instead, the SISP Order effectively left it to the applicant to fashion appropriate disclosure based on the results of the Phase II process, as the applicant's obligations are limited to consultation with the stakeholders. In particular, there is no obligation on USSC to disclose offers received under Phase II, unlike the obligation to disclose letters of interest received under Phase I of the SISP. Any motion to amend the SISP Order should be brought on a basis that is informed by changed circumstances from those contemplated at the time of the SISP Order. At a minimum, that requires completion of Phase II of the SISP.

20 Based on the foregoing, the relief sought by USS in its Notice of Objection dated April 15, 2016, in particular the relief sought in paragraph 24 thereof, is denied.

Application granted.

TAB 27

Paras. 77 and 84

2010 QCCS 764
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 1780, 2010 QCCS 764, [2010] Q.J. No. 1723, 186 A.C.W.S. (3d) 595, J.E. 2010-711, EYB 2010-170526

In the matter of the plan of arrangement and compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée, Petitioners, v. Ernst & Young Inc., Monitor, and Stadacona Limited Partnership, F.F. Soucy Limited Partnership and F.F. Soucy, Inc. & Partners, Limited Partnership, Mises en cause

Mongeon J.C.S.

Heard: 24 february 2010
Judgment: 4 march 2010
Docket: C.S. Qué. Montréal 500-11-038474-108

Counsel: *Me Jean Fontaine, Me Mathew Liben*, for Petitioners
Me Louis Gouin, for Monitor
Me Sylvain Vauclair, for GE Capital Corporation
Me Sandra Abitan, for Interim Lender (DIP)

***Mongeon J.C.S.*:**

ON PETITIONERS' MOTION FOR THE ISSUANCE OF AN INITIAL ORDER

Sections 11 and following Companies Creditors' Arrangement Act (« CCAA »)

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1 On February 24, 2010, I granted the Petitioners' Motion for the Issuance of an Initial Order pursuant to Sections 11 and following of the CCAA, with reasons to follow.

2 Here are my reasons.

I. INTRODUCTION

(A) PETITIONERS

3 Petitioner White Birch Paper Company ("*WB*") is a Nova Scotia company with holdings principally situated in the Province of Québec;

4 WB is owned by a partnership, White Birch Partners L.P., which in turn is fully owned (both directly and through further intermediaries) by Petitioner White Birch Paper Holding Company ("*WB Holding*");

5 WB is the parent company of Petitioners Stadacona General Partner Inc. ("*Stadacona GP*"), F.F. Soucy General Partner Inc. ("*FF Soucy GP*"), Black Spruce Paper Inc. ("*Black Spruce*") and 3120772 Nova Scotia Company ("*3120772*");

6 Bear Island Paper Company LLC ("*Bear Island*"), a Virginia company, is also a subsidiary of WB, but is not a Petitioner hereunder as its assets and operations are located in the United States;

7 WB is also the ultimate parent company of Petitioners Papier Masson Ltée ("*Papier Masson*") and Arrimage de Gros Cacouna Inc. ("*Arrimage*");

8 The Mises en Cause, Stadacona Limited Partnership ("*Stadacona LP*"), F.F. Soucy Limited Partnership ("*FF Soucy LP*") and F.F. Soucy, Inc. & Partners, Limited Partnership ("*FF Soucy & Partners LP*") (referred to collectively herein as the "*Partnerships*") are not petitioners in these proceedings;

9 WB and the other Petitioners seek to have the stay of proceedings sought hereunder extended to the Partnerships as they form an integral and intimately interconnected part of the business of the Petitioners. They represent that the operations of the Partnerships are so integral to and intertwined with those of the Petitioners that failure to extend the stay to them would have a negative impact on the value of the Petitioners and would make it impossible to the Petitioners to successfully restructure;

10 WB, Stadacona GP, FF Soucy GP, Black Spruce, Papier Masson, 3120772, Arrimage, Bear Island and the Partnerships will be referred to collectively herein as the "*WB Group*";

11 WB Holding is privately owned and has its executive office in Greenwich, Connecticut, U.S.A.;

12 The WB Group operates three pulp and paper mills in the province of Québec, which, together with a fourth mill situated in Virginia and operated by Bear Island, collectively have a yearly production capacity of 1.3 million metric tons of newsprint and directory paper with up to 50% recycled content;

13 Each of the Petitioners and Partnerships has its chief place of business in the Province of Québec;

(B) ORDER SOUGHT

14 The Petitioners seek, *inter alia*, the following conclusions:

a) a declaration that Petitioners are companies to which the CCAA applies;

b) a declaration that the protection of the CCAA extends to the Partnerships;

c) a declaration authorizing each of the Petitioners or the WB Group as a whole to file a plan of arrangement under the CCAA;

d) a declaration ordering that all proceedings against the Petitioners, the Partnerships and their assets be stayed and suspended;

e) a declaration authorizing the borrowers set out in the Interim Financing Credit Agreement to borrow a maximum amount of USD$140 million under an interim financing facility secured by a priming charge;

f) the appointment of Ernst & Young Inc. ("Ernst") as monitor (the "Monitor") pursuant to Section 11.7 of the CCAA;

g) such further order and/or relief as this Court may deem just.

II. OPERATIONS

(A) OVERVIEW

15 The WB Group is a major owner and operator of newsprint mills, principally in the province of Québec;

16 As of December 31, 2009, it has the second-greatest newsprint production capacity in North America, with a market share of approximately 12%;

17 It has annual net sales of approximately US$667 million as of December 31, 2009;

18 As of January 2010, the WB Group has approximately 1,278 employees;

19 The WB Group's Canadian newsprint mills are situated at Québec City (the "*Stadacona Mill*"), Rivière-du-Loup (the "*Soucy Mill*") and Masson-Angers, Québec (the "*Papier Masson Mill*"), and its United States mill is situated in Ashland, Virginia (the "*Bear Island Mill*");

20 Stadacona LP also owns and operates a sawmill, under the name of Scierie Leduc ("*Leduc Sawmill*");

(B) THE STADACONA MILL

21 The Stadacona Mill was purchased by the WB Group in 2004, and is owned and operated by Stadacona LP;

22 It features five (5) paper machines capable of producing 410,000 metric tons of newsprint per year, 95,000 tons per year of directory paper and 45,000 tons per year of paperboard;

23 The workforce at the Stadacona Mill has recently been significantly reduced, from a total of 1,014 in 2004 to a current total of 585 employees;

(C) LEDUC SAWMILL

24 The Leduc Sawmill is located in St-Émile, Québec and employs approximately 20 people;

(D) THE SOUCY MILL

25 The Soucy Mill was acquired by the WB Group in 1973, and is jointly owned and operated by FF Soucy LP and FF Soucy & Partners LP;

26 The Soucy Mill features two (2) newsprint machines, which together have an annual newsprint production capacity of 265,000 metric tons;

27 The Soucy Mill also produces uncoated ground wood specialty paper;

28 The Soucy Mill currently employs 231 people;

(E) ARRIMAGE GROS CACOUNA

29 Arrimage provides stevedoring services, specializing in paper products, at the Gros-Cacouna Seaport, near Rivière-du-Loup, Québec;

30 Its primary purpose is to load WB Group paper products on ships, for marine shipment to foreign clients;

(F) THE PAPIER MASSON MILL

31 The Papier Masson Mill was purchased by the WB Group in 2006, and is owned and operated by Papier Masson;

32 The Papier Masson Mill has one newsprint machine capable of producing 245,000 metric tons of newsprint per year;

33 Following WB Group's acquisition of the Papier Masson Mill, the workforce was significantly reduced from 287, and currently stands at 186 employees;

(G) THE BEAR ISLAND MILL

34 The Bear Island Mill was built by the WB Group in 1979;

35 It is owned by Bear Island, which is not a Petitioner in the present proceedings;

36 It operates a single newsprint paper machine, which has a capacity of 235,000 metric tons per year;

37 The Bear Island Mill currently employs 199 people;

(H) EMPLOYEES

38 As stated above, the WB Group presently employs 1,278 people.

39 With the exception of the Bear Island staff, all such employees are situated in the Province of Québec, such that the Petitioners and Partnerships employ approximately 1,100 people in Québec. These employees are, for the most part, unionized.

40 Unionized employees of the Stadacona Mill, the Soucy Mill and the Papier Masson Mill are members of the Communications, Energy and Paperworkers Union:

a) For the Stadacona Mill: Locals 137, 200, 250 and 299;

b) For the Soucy Mill: Locals 625, 627 and 905;

c) For the Papier Masson Mill: Locals 11 and 1104;

41 The unionized employees of Stadacona LP's Leduc Sawmill are members of a distinct union, the Syndicat Démocratique des Salariés de la Scierie Leduc;

42 At Arrimage, the unionized employees are members of the Syndicat des Employés d'Arrimage Gros-Cacouna;

III. FINANCIAL SITUATION

A) OVERVIEW AND CAUSES OF FINANCIAL DIFFICULTIES

43 The Petitioners and the Partnerships are currently confronted with an unprecedented combination of negative circumstances;

44 In addition to the worldwide economic downturn, the newsprint industry is experiencing a particular harsh decline in demand as electronic alternatives replace printed media;

45 Newsprint prices dropped nearly $330 per metric ton from the fourth quarter of 2008 until August 2009, a negative impact of approximately $380 million for the WB Group, on the basis of full capacity operation;

46 Moreover, the increased strength of the Canadian dollar and the weakness of the United States dollar has exacerbated the negative impact of the decline, as most of the WB Group's clients are in the United States and remit payment in United States currency, while most expenses are payable in Canadian currency;

47 In sum, the Petitioners' and Partnerships' financial and operational challenges are principally attributable to the following factors :

a) the overall decline in the world economy and its impact on demand for and price and inventories of newsprint;

b) fundamental decline in demand for newsprint as consumers move away from print media;

c) increased strength of the Canadian dollar and corresponding weakness of the American dollar;

d) significant debt service obligations;

e) the detrimental effect of low floating interest rates on the WB Group's position in certain major interest rate swap transactions;

48 These factors have led to a significant liquidity shortfall, such that the Petitioners and Partnerships are unable to respect their debt service obligations;

49 EBITDA (earnings before interest, taxes, depreciation and amortization) will not be sufficient to service the Petitioners' and Partnerships' debt and to fund required expenditures within the upcoming months;

50 This liquidity crisis demands an urgent solution, in light of the following payments that became due on September 30, 2009 and which remain unpaid:

(a) interest payment on the First Term Loan Facility: US$3,666,672.19;

(b) interest payment on the Second Term Loan Facility: US$1,380,000.00;

(c) accelerated payments under the Swap Agreements (as defined below): approximately US $58,000,000;

51 In addition, between February 24 and March 31, 2010, the Petitioners and the Partnerships would have to make a total of approximately Cdn$4,391,000 [1] in pension fund contributions;

52 Of this amount, a significant amount relates to "past service cost contributions" (also known as "special payments" or "amortization payments"), in light of the existence of solvency deficits, as set out in a report detailing such deficits prepared by Mercer (Canada) Ltd. ("*Mercer*"), and filed as *Exhibit P-2*;

53 Indeed, in 2009, a total of Cdn$1,413,110 per month is attributable to such amortization payments, as appears from an actuarial report also prepared by Mercer, and also forming part of Exhibit P-2;

54 In light of their significant liquidity shortfall, and the size of the amounts currently due as set out above (as well as all other current operational obligations, notably payroll and payment of utilities and raw materials expenses), the Petitioners and Partnerships are not in a position to make such payments;

55 In view of the above, the Petitioners and the Partnerships are now insolvent;

B) INDEBTEDNESS

56 The WB Group's principal debt obligations consist of three major credit facilities:

a) A First Lien Term Loan facility under which a total of approximately US$438 million in principal and interest are owing;

b) A Second Lien Term Loan facility under which a total of approximately US$104 million in principal and interest are owing;

c) A Revolving Asset-Based Facility under which US$50 million in principal and interest are outstanding;

57 In addition, the WB Group is party to various interest rate swaps, which are out of the money to the extent of approximately US$58 million in total as of the present date, which swaps rank *pari passu* to the lenders under the First Term Loan Facility;

C) PENSION PLANS AND RETIREMENT BENEFITS

58 The WB Group has created and contributes to various pension plans for its unionized and non-unionized employees;

59 It has also established Supplement Executive Retirement Plans ("*SERP's*") for certain management employees;

60 In addition, the Petitioners fund certain Other Post-Employment Benefits ("*OPEB's*");

61 Many of the plans are currently in a position of significant solvency deficit;

62 As stated, the Petitioners and Partnerships are in a major and urgent liquidity crisis and are therefore not in a position to make all payments due under the pension and retirement plans, in particular, those which are in respect of pre-filing obligations;

63 In view of this fact, the Petitioners and Partnerships seek an order suspending payment of amounts relating to "past service cost contributions" (i.e. amortization payments), which account for approximately Cdn$1,413,110 per month, including any amounts accrued prior to the present CCAA filing [2] ;

64 The Petitioners submit that such an order is justified during the stay period, as all available liquidity must be utilized to sustain the operations of the Petitioners and Partnerships, and to meet their ongoing post-filing obligations;

65 Consequently, the Petitioners In view of this fact, the Petitioners and Partnerships seek an order and Partnerships propose to continue making all current contributions to pension plans, SERP's and OPEB's;

D) UTILITIES AND TRADE CREDITORS

66 The Petitioners and Partnerships, in addition to employee expenses and debt-service obligations, have monthly expenses of approximately Cdn$40 million, including approximately Cdn$10.5 million in utilities expenses (principally electricity, natural gas and steam);

V) INTERIM FINANCING (« DIP »)

67 In order to continue to operate, the WB Group, therefore, needs significant additional liquidity. To this end, the WB Group retained the services of Lazard Frères & Co LLC as financial advisors, who were able to convince a group of First Term Loan lenders to advance and cover said liquidity requirements in the form of a « DIP »

loan secured by a priming charge. A copy of the Interim Financing Credit Agreement was filed as Exhibit P-3 (the « DIP Loan »).

68 Essentially, the DIP Loan is for an aggregate amount of US$140 million, from which an amount of approximately US$50 million will be deducted and applied to the full payment and discharge of the Asset Based Revolving Credit Facility.

69 After earmarking a further amount of approximately US$16 million [3] to cover the Administrative and D&O priming charge (as explained below), the DIP Loan will provide some US$74 million in additional liquidity which, according to the Monitor, should permit a orderly and appropriate restructuring. The DIP Loan will bear interest at the rate of approximately 17.5% to 19% per annum and is entirely supported by the Monitor (see Monitor's Initial Report Exhibit P-4).

70 After reviewing the allegations of paragraphs 128 to 159 of the Petition as well as the evidence of the representative of the Petitioners and the Monitor, the undersigned is satisfied that:

> d) the priming charge will not secure any obligations that were owing prior to the filing;
>
> e) the interim financing proposed is intended to permit the WB Group to restructure over a period of approximately nine to twelve months;
>
> f) the interim financing is crucial to the survival of the Petitioners and Partnerships over the said restructuring period;
>
> g) the sizing of the interim financing, cost of borrowing and fees are reasonable and have been minimized in order to reduce the impact on all other secured creditors;
>
> h) the interim financing will enhance the prospects of a viable restructuring;

71 Furthermore, I am advised that management has the confidence of its major creditors and shall remain in place over the restructuring period;

72 As a result, I am prepared to approve same.

VI) DIRECTORS' INDEMNIFICATION AND CHARGE

73 A successful restructuring of the Petitioners and Partnerships will only be possible with the continued participation of the Petitioners' directors and officers. These executives are essential to the ongoing viability of the Petitioners' and Partnerships' businesses, and the successful restructuring thereof;

74 Even though the Petitioners intend to comply with all applicable laws and regulations, the Petitioners' directors and officers may nevertheless be concerned about the potential for their personal liability in the context of the present restructuring;

75 Given the allegations of paragraphs 162 to 167 of the Petition, I am also satisfied that the D&O Charge sought is reasonable and in the best interests of the Petitioners. Accordingly, I am prepared to approve same.

VII) QUESTIONS OF PARTICULAR INTEREST

76 Three questions raised by the present proceedings require more particular comment.

A) Confidentiality of certain documents

77 The first issue has to do with the WB Group's request to put all sensitive financial information filed in support of its Petition to be put under seal. More particularly, the WB Group seeks the protection of its financial statements and cash flow statements from general access by the public in general and by the Group's competitors in particular.

78 Paragraphs 170 to 175 of the Petition outline the factual basis for such order.

79 I note two specific allegations which are pertinent:

a) the fact that the WB Group is privately owned and that it does not wish to share this information with its competitors;

b) the fact that the public disclosure of such sensitive information would be very prejudicial to the Group because of its potential use by its competitors in a manner which may jeopardize the restructuring.

80 These allegations are not supported with additional detailed facts. Consequently, I raised the question of sufficiency of these arguments to grant the requested confidentiality order.

81 I quote from the *2010 Annotated Bankruptcy and Insolvency Act* of Houlden, Morawetz and Sarra at pages 1125 and 1126:

. . . "There had been some issue over what information should or should not be sealed during a CCAA proceeding.

The Supreme Court of Canada [4] considered the confidentiality of commercial information in context of judicial proceedings, finding that a confidentiality order should only be granted when 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 . . . The Court held that 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. In order to qualify as an « important commercial interest », the interest in question cannot merely be specific to the party requesting the order . . . « 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.

In another judgment [5], the Supreme Court of Canada held that the « administration of justice thrives on exposure to light, and withers under a cloud of secrecy » . . .

(underlining added)

82 The burden of establishing that the order is necessary bears upon the applicant.

83 However, section 10(3) CCAA now reads as follows (in force since September 18, 2009):

3) Publication ban - The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

(underlining added)

84 In the present instance, I was not convinced that the allegations of the Petition were elaborate and complete enough to meet the tests enunciated in « Sierra Club » and « Toronto Star Newspapers ». It seems that a Petitioner seeking such order would have to explain in more detail the necessity of derogating from the general rule imposing publicity and public access to all evidentiary material in CCAA proceedings. In short, the exception of confidentiality (now codified in section 10(3) CCAA) will always have to be restrictively interpreted and applied only when the underlying facts are strong enough to warrant such an order.

85 But for the comments stated below, and if I were to base by decision only upon the contents of the Petition, I would have denied this request on the basis of incomplete and insufficient evidence to support it.

86 However, the Petitioners have suggested in paragraph 175 of the Petition, that the said financial information could be made available to « certain creditors upon signature of a confidentiality agreement ».

87 At my suggestion, the WB Group agreed to furnish unfettered access to the said documentation to *all creditors* without further distinction or limitation, upon signing of a confidentiality agreement.

88 Such a position is in line with the wording and intent of section 10(3) CCAA. Consequently, I was prepared to grant the WB Group's request and keep confidential and under seal the financial data filed by the Petitioners except for those creditors (regardless of their importance) who would be agreable to signing a confidentiality agreement in exchange for the said information. Such a « *modus operandi* » ensures that the confidentiality order and will not « unduly prejudice the company's creditors ».

B) Past service pension contributions

89 The second issue has to do with the Group's obligation to effect certain pension contributions.

90 The WB Group takes the position that « past service pension contributions » are the result of a pre-filing obligation and requests a confirmation of this position.

91 This issue is specifically covered in sections 103 to 110 of the Petition, which I have summarized in paragraphs 58 to 65 of the present Reasons. In addition, I have heard the testimony of Mr. Jay Epstein, Vice-President finance, of the WB Group.

92 Mr. Epstein's testimony has clearly identified the nature and specificity of the payments which cannot be met at the present time and in respect of which the Group requests a stay of its obligations.

93 The Group's monthly payments to the various pension funds and plans are approximately US$2.2 million per month. They consist mainly of « past service pension contributions » of approximately US$1.4 million per month and « current service pension contributions » of approximately US$800 000,00 per month.

94 Past service contributions are due by the Group as a result of its obligation to make up for the actuarial deficit of the funds and/or plans. They are not the result of the Group's failure or negligence to pay its current service contributions or past service contributions, the said contributions having been paid by the Group up to December 31st, 2009. Past service contributions are calculated every year-end by Mercer, the Group's Advisor and Pension Plan Manager and Exhibit P-2 (A) and (B) establishes with greater accuracy the exact nature and amounts currently due.

95 On the whole of the evidence presented before me, I am satisfied that the relief sought by the WB Group falls squarely within the definition of « past service contributions » or « cotisations d'équilibre », as those words were defined by my colleagues Madam Justice Danièle Mayrand in Re: *AbitibiBowater Inc.*[6] and Justice Paul Chaput in Re: *Papiers Gaspésia*[7]. Madame Justice Mayrand wrote:

[37] **Aux termes de l'article 11(3) de la LACC, l'ordonnance initiale ne peut suspendre les droits ou créances qui résultent d'obligations relatives à la fourniture de services ou de biens <u>après</u> l'ordonnance initiale.**

[38] **Les syndicats prétendent que les cotisations d'équilibre visent à combler des obligations qui découlent de services rendus par les employés après le dépôt de la demande initiale.**

[39] **Avec respect, cet argument n'est pas fondé.**

[40] **Les syndicats prennent appui sur un commentaire du juge Farley de la Cour supérieure de l'Ontario qui, dans la cause de *Ivaco*[8] en première instance, dit ce qui suit :**

Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a « fresh obligation ».

[41] **Avec égards, cette assertion n'est pas déterminante et a d'ailleurs été écartée par le juge Spence dans la cause de *Collins*[9], alors qu'il s'exprime ainsi :**

The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.

[42] **Plus loin, il ajoute :**

It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience.

Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.

[43] **Dans le présent dossier, les évaluations actuarielles, qui ont déterminé les montants des cotisations d'équilibre et dont on demande la suspension, sont toutes antérieures au dépôt de la demande initiale. D'ailleurs, l'évaluation actuarielle du « Régime de retraite applicable aux employés syndiqués de la compagnie *Abitibi-Consolidated du Canada* », de loin le plus important, date du 2 décembre 2006.**

[44] **Tout comme dans les dossiers de *Papiers Gaspésia* et *Mine Jeffrey*, les cotisations d'équilibre suspendues ont été identifiées avant le dépôt de la demande initiale et ne sont pas dues pour des services rendus après le dépôt de celle-ci.**

96 See also Houlden Morawetz and Sarra. The *2010 Annotated BIA*, paragraph N§54, pages 1121 and 1122 on the same issue.

97 The mere fact that those past service contributions are considered to be pre-filing obligations is, however, not the only issue to consider. I must also analyse if, in the absence of a consent of all affected stakeholders, I should authorize the suspension of past service contributions. In AbitibiBowater, the situation was relatively simple and clear: the past service contributions due, as at the date of the Initial Order, was close to $1.4 billion and monthly contributions to correct the situation were estimated at approximately $13 million per month. The Monitor was therefore able to convince the Court that it would be illusory to expect that AbitibiBowater would be able to complete a successful restructuring if it would remain obligated to continue to fund past service contributions

during the period of restructuration. Accordingly, Madam Justice Mayrand exercised her discretion in favor of the suspension.

98 In the present instance, there has been no debate before me on this specific question. Unlike *AbitibiBowater*, we are not talking about $13 million per month but approximately $1.4 million, or approximately $16.8 million per year. The total actuarial deficit is not nearly as high as $1.4 billion but closer to US$129 000 000,00.

99 No evidence challenging the Group's position (that it would be unable to complete a successful restructuring and continue to pay past service contributions during the restructuring period) was submitted, despite the fact that the Petition was duly served upon all the Unions representing the unionized employees in Quebec [10]. Furthermore, I insisted that Petitioners' counsel attempt, during the lunch break of the hearing on February 24, 2010, to communicate with the said Unions and/or Union Representatives, to inquire as to their position. At the resumption of the hearing, no one appeared or manifested oneself [11].

100 Faced with only a one-sided argument, albeit convincing and well supported by the jurisprudence (to which the decision of madam Justice Peppall of the Ontario Superior Court of Justice in Re: *Fraser Papers Inc. et al* (Court file CT-09-8241-OOCL dated 2009-06-30) must be added), I also chose to exercise my discretion in favor of the Petitioners' and Partnerships' requests. I also wish to point out that we are now more than a full week later and the stakeholders affected by this issue, namely the employees, have not indicated any willingness of intention to challenge the same.

C) Extension of the initial order and protection of the CCAA to the partnerships

101 One last point: I am asked to extend the Initial Order not only to the Petitioner companies but also to the Partnerships. Although the CCAA does not deal with this issue specifically, I am prepared to exercise my discretion and to rely on the Court's inherent jurisdiction to grant a stay of proceedings against the partnerships, given that the structure of the WB Group is such that it would be impossible to proceed otherwise.

102 See Re: *Calpine Canada Energy Ltd* (2006), [2006] Carswell-Alta 446; 19 C.B.R. (5th) 187. See also *Houlden Morawetz and Sarra, op.cit.* paragraph N§ 63, page 1135.

102 *CONCLUSION*

103 As for the rest of the conclusions sought, there seemed to be no major difficulties needing particular comment. In any event, any dissatisfied stakeholder may at any time avail itself of the « come back » clause if need be. The Order was therefore granted accordingly, without costs.

Footnotes

1 Representing payments for January 2010, due at the end of February and for February 2010, due at the end of March

2 I am informed that all pension contributions, for either past service or current service have been made up to December 31st, 2009

3 The D&O charge is for an amount of US$10 million and a further amount of US$3 million may have to be reserved to cover the liability of employers pursuant to sections 81.3 and 136(1)(d) BIA. Finally, a US$3 million Administrative Charge is also required.

4 *Sierra Club of Canada v. Canada (Minister of Finance)* [2002], 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522. See also *Marcotte c. Banque de Montréal* (2008), 2008 CarswellQue 8627 (C.S. Que.).

5 *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, [2005] 2 S.C.R. 188 (S.C.C.).

6 [2009] QCCS, 2028 (CanLii)

7 [2004] CanLii 40296 (QCCS)

8 Re*: Ivaco Inc.* [2005] 47 C.C.B.P. 62 Canada Inc. (ON. S.C.); [2006] 275 D.L.R. (4th) 132 (ON. C.A.)

9 Re: *Collins & Aikman Automotive Canada Inc*. [2007] CanLii 45908 (ON. S.C.)

10 Syndicat canadien des communications, de l'énergie et du papier, Locals 200, 250, 137, 625, 905, 627, 1104 and 11; Fraternité nationale des forestiers et travailleurs d'usine, Local 299; Syndicat des employés d'Arrimage de Gros Cacouna Inc., Syndicat démocratique des salariés de la scierie Leduc.

11 These Reasons are delivered more than one week after the hearing. To this date, no one has asked to be heard on this point.

TAB 28

HMANALY N§59
Houlden & Morawetz Analysis N§59

Bankruptcy and Insolvency Law of Canada, 4th Edition

COMPANIES' CREDITORS ARRANGEMENT ACT

Section 9
L.W. Houlden and Geoffrey B. Morawetz

N§59 — Jurisdiction of Courts

N§59 — Jurisdiction of Courts

See s. 9.(1)

See Madam Justice Georgina Jackson and Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in *Annual Review of Insolvency Law, 2007* (Toronto: Carswell, 2008).

Below are cases that deal with specific aspects of the jurisdiction of the court in *CCAA* proceedings.

Section 9(1) is similar to the definition of "locality of a debtor" in s. 2(1) of the *Bankruptcy and Insolvency Act,* see *ante.* Section 9(1) gives three bases of jurisdiction: (1) the province where the head office of the company is located in Canada; (2) the province where the chief place of business is located in Canada; and (3) if the company has no place of business in Canada, the province where any assets of the company are situated.

Where the head office of a company was located in Manitoba and most of its assets were also located in that province, it was held that an application under the *CCAA* should have been brought in Manitoba and that the courts of Saskatchewan had no jurisdiction to receive it: *Re Oblats de Marie Immaculee du Manitoba* (2002), 34 C.B.R. (4th) 76, 2002 CarswellSask 287, 2002 SKQB 161 (Sask. Q.B.).

The Ontario Court of Appeal held that the lower court erred in removing two directors from the board of a debtor corporation under *CCAA* proceedings when it concluded that there was reasonable apprehension that the newly appointed directors might favour certain shareholders and not have the best interests of the corporation at heart. The Court of Appeal held that the court's discretion under s. 11 of the *CCAA* does not give authority to remove the directors and that any such authority could only be exercised under corporations law where the court finds oppression:

the law firm's relationship with it is sufficiently connected to their present retainer. In the result, Fitzpatrick J. held that the law firm was disqualified from acting any further in this proceeding: *Barrows Capital Inc. v. Storm Mountain Development Corporation*, 2020 CarswellBC 432, 2020 BCSC 255 (B.C. S.C.).

The Ontario Superior Court of Justice sanctioned a *CCAA* plan of arrangement. The secured lenders made up the only class eligible to vote on the plan and receive a distribution. The plan also provided for third-party releases: *Re Lydian International Limited*, 2020 CarswellOnt 9768, 2020 ONSC 4006 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see N§45 "Sanctioning of the Plan".

(1) — *Sealing Orders*

There had been some issue over what information should or should not be sealed during a *CCAA* proceeding. The Supreme Court of Canada considered the confidentiality of commercial information in context of judicial proceedings, finding that a confidentiality order should only be granted when 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 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. The Court held that 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. 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 that can be expressed in terms of public interest in confidentiality. "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: *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522. See also *Réal Marcotte et Bernard LaParé c. Banque de Montréal et al,* Clément Gascon, J.C.S., (C.s. Q.), (20 Juin 2008), dossier no. 500-06-000197-034.

In another judgment, the Supreme Court of Canada held that "In any constitutional climate, the administration of justice thrives on exposure to light—and withers under a cloud of secrecy. That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians". Court proceedings are presumptively "open" in Canada. Public access will be barred only when the court, in the exercise of its discretion, concludes

that disclosure would subvert the ends of justice or unduly impair its proper administration: *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, [2005] 2 S.C.R. 188.

Hence, the applicant bears the burden of establishing that the order is necessary to prevent a serious risk to the proper administration of justice or to the public interest in the confidentiality of an important commercial interest, because reasonable alternative measures will not prevent the risk. The applicant bears the burden of establishing that the salutary effects of a sealing order outweigh its deleterious effects on the rights and interests of the parties and the public, including the public interest in open and accessible court proceedings. Transcripts from examination and records filed in court are not generally to be sealed.

However, under s. 10(3) effective September 18, 2009, the court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors. The court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate. The provision is aimed at balancing the need for an open court process and protecting sensitive cash flow information that is necessary for creditor to assess the viability of a proposed plan.

Where asked to reconcile the Canadian legal framework with an international sealing regime, the Québec Court of Appeal held that external law must give way to fundamental principles, including the open-court principle, concepts and traditions prevalent in Canada, particularly where the applicant failed to demonstrate any legitimate interest in giving preference to the other law: *Globe-X Management Ltd.* (2006), 2006 CarswellQue 1800 (Que. C.A.).

The debtor corporation under protection of the *CCAA* brought a motion for a permanent sealing order regarding confidential information, and the order was granted, subject to any interested party asking for review, on notice to the debtor. The Ontario Superior Court of Justice held that there had been minimal redaction of the financial material; that there was minimal negative effect to the concept of an open court; that reasonable alternative measures would not have prevented the risk to the debtor corporation; and that the salutary effects of a confidentiality order as to the elements redacted outweighed any deleterious effects: *Re Stelco Inc. [Sealing Order for Confidential Information]* (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]).

In another request for a sealing order in the same case, the court dismissed a motion for a sealing order on the affidavit of a financial analyst sworn on behalf of certain equity holders. The court held that sealing orders cannot be granted merely because parties involved agree between themselves to have the material sealed or withdrawn, and that the applicant had presented no evidence that

having the blacked-out material available to public would cause any harm to it or to anyone privy to it. While the court would consider exclusion where the material is truly irrelevant, in making such a determination, the court should take an expansive view of relevance in order to safeguard the principle of ensuring that the interests of justice and public awareness and scrutiny be maintained by having an open court system: *Re Stelco Inc. [Sealing Order - re Talyor affidavit]* (2006), 2006 CarswellOnt 407, 17 C.B.R. (5th) 95 (Ont. S.C.J. [Commercial List]).

The courts must be vigilant in maintaining the principle of ensuring that the interests of justice and public awareness and scrutiny be maintained in the open court system.

In a cross-border *CCAA* and Chapter 15 U.S. *Bankruptcy Code* proceeding, the Ontario Superior Court of Justice held that the sealing of a debtor company's sensitive financial information in the context of its *CCAA* proceedings may be appropriate in certain circumstances, including to prevent a real and substantial risk to a commercial interest of the debtor in the context of litigation and where the salutary effects of the sealing order outweigh its deleterious effect: *Re MuscleTech Research & Development Inc.* (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

The permanent sealing of information may be appropriate where the information is sensitive, the redacted material is kept to a minimum, there are no reasonable alternatives that would safeguard such information and protect the debtor, the benefits of non-disclosure outweigh any deleterious effects, and there is minimal negative impact on the openness of the courts; and (c) information may be sealed to the extent it is irrelevant to the proceedings and ought not to have been filed in the first place, however, where materials were germane to the issue in consideration, they will not be sealed merely because they were not used: *Re Stelco Inc.* (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]) and *Re Stelco Inc.* (2006), 2006 CarswellOnt 407, 17 C.B.R. (5th) 95 (Ont. S.C.J. [Commercial List]).

Where applicants sought a sealing order with respect to the confidentiality of certain documents, Mongeon J. of the Québec Superior Court referenced the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 2002 CarswellNat 822, 2002 CarswellNat 823, 287 N.R. 203, [2002] 2 S.C.R. 522 (S.C.C.), which held that a confidentiality order for commercial information should only be granted when 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. Mongeon J. was not convinced that the test had been met, and held that an applicant seeking such an order would have to explain in more detail the necessity of derogating from the general rule permitting public access to all evidentiary material in *CCAA* proceedings. The exception of confidentiality now codified in s. 10(3) of the *CCAA* should be restrictively interpreted and applied only when the underlying facts are strong enough to warrant such an order. The applicants suggested that the financial information could be made available to certain creditors on execution of a confidentiality agreement. Mongeon J.

adopted this suggestion, provided that the documentation would be made available to all creditors on the signing of a confidentiality agreement: *Re White Birch Paper Holding Co.* (2010), 2010 CarswellQue 1780 (Que. S.C.J.).

Adopting the tests set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522 (S.C.C.), the court held that protecting the disclosure of sensitive personal and compensation information was an important commercial interest that should be protected. The aggregate amount of the management incentive plan charge had been disclosed and individual information, in the court's view, would add nothing. It held that the salutary effects of sealing the information outweighed the deleterious effects: *Re Canwest Publishing Inc. / Publications Canwest Inc.* (2010), 2010 CarswellOnt 212, 63 C.B.R. (5th) 115, 2010 ONSC 222, [2010] O.J. No. 188 (Ont. S.C.J. [Commercial List]).

The Ontario Court of Appeal upheld a decision granting a sealing order redacting certain portions of a settlement agreement. The debtor companies were granted *CCAA* protection and an order appointed a litigation trustee to deal with the assets available to creditors, which consisted almost entirely of claims against former officers, directors and advisors. The sealing order provided for the immediate full disclosure of all terms of the settlement, other than the amounts and details of payment and provided that any non-settling party may have access to the redacted information on signing a confidentiality agreement only to use the redacted information in the settlement approval proceedings. The sealing order would terminate on final approval of the settlements. The motion judge found that the litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), [2002] 2 S.C.R. 522 had been met. The sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions regarding approval of the settlement. The Court of Appeal observed that the motion judge applied the correct legal test, laid down by the Supreme Court of Canada in *Sierra Club* that a confidentiality order should only be granted when 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 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. The Court of Appeal observed that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where there is a litigious dispute; the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed"; and the purpose of the communication is to attempt to effect a settlement. Those conditions were met. It was open to the motion judge to conclude that the salutary effects of the sealing order outweighed its deleterious

effects on the important right to free expression and the public interest in open and accessible court proceedings. The Court of Appeal held that the sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The "comeback" clause allowed any party to return to court for a reassessment should the circumstances change: *Re Hollinger Inc.* (2011), 2011 CarswellOnt 9272, 107 O.R. (3d) 1, 84 C.B.R. (5th) 79 (Ont. C.A.).

The Alberta Court of Queen's Bench reviewed the requirements for a sealing order with respect to a receiver's report. The receiver's report provided details with respect to the ongoing sale process, including realtors' marketing reports and an appraisal. The receiver took the position that the protection of the commercial interest formed a proper basis for the issuance of a sealing order as there was an ongoing sales process. In the absence of the sealing order, it was submitted that there was a serious risk that the integrity of the sales process would be adversely affected and that all parties involved would suffer financially. In considering requests for a sealing order, the court will consider: (a) whether 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 (b) whether the salutary effect of the confidentiality order, including the effect on the right of civil litigants to a fair trial, outweighs 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. Here, the sealing order was granted; however, the court ordered that the documents had to be released, on a confidential basis, to legal counsel for the objecting parties: *Romspen Investment Corp. v. Hargate Properties Inc.*, 2012 CarswellAlta 1101, 99 C.B.R. (5th) 319, 2012 ABQB 412 (Alta. Q.B.).

The Ontario Superior Court of Justice determined that an adjudication as to the reasonableness of the fees of the secured creditor's counsel should be made by the presiding judge in *CCAA* proceedings. The applicant, who took the position that the fees were excessive, had requested that the fees be assessed by an assessment officer. Justice Mesbur noted that on an assessment, the solicitor bears the onus of showing that the fees are fair and reasonable; and that while assessment officers may apply a series of well-established factors with which they have familiarity and experience, judges of the Ontario Superior Court Commercial List are not devoid of that experience. They scrutinize and approve fees of all kinds of professionals on a daily basis, and they have a particular understanding of and expertise in the issues underlying *CCAA* proceedings, and particularly the rights and obligations of debtors and their secured lenders. Mesbur J. concluded that these special rights and obligations must inform the reasonableness of the fees charged, in the overall context of the *CCAA* proceedings themselves. On the issue of costs of an assessment itself, a judge of the Commercial List has the broad authority under s. 131 of the *Courts of Justice Act* to make any appropriate costs order, including broad discretion to make whatever costs order is just when the issue is a costs adjudication: *Re Farley Windoor Ltd.*, 2013 CarswellOnt 11111, 3 C.B.R. (6th) 313, 2013 ONSC 5150 (Ont. S.C.J. [Commercial List]).

The Court of Appeal for Ontario refused leave to appeal from a judgment setting aside a *CCAA* initial order. Justice Sharpe was of the view that the moving parties had failed to make out a case for granting leave to appeal. The test for leave to appeal in insolvency proceedings is stringent where it involves the exercise of discretion as to the assessment of competing interests and the availability of the special protection afforded by the *CCAA*. Justice Sharpe was of the view that this case fell squarely within the category in which deference is owed to the *CCAA* judge and where leave to appeal will be refused. The Court concluded that there was ample evidence to support the findings of the application judge. The appellate judge was not persuaded that there was any error in principle or misapprehension of the evidence: *Re CanaSea PetroGas Group Holdings Ltd.*, 2014 CarswellOnt 17259, 2014 ONCA 824 (Ont. C.A.).

Two contract counterparty companies (collectively "Cliffs") objected to the jurisdiction of the court to hear a motion brought by the debtors for relief in connection with a supply contract under which Cliffs supplied the debtor for a number of years until Cliffs purported to terminate the contract shortly before *CCAA* proceedings commenced. Justice Newbould of the Ontario Superior Court concluded that the court had jurisdiction over the claim of the debtor against Cliffs and that Cliffs had not established that Ontario is not the convenient forum for the dispute. The current *CCAA* proceeding commenced in November 2015, and shortly after the debtor commenced ancillary insolvency proceedings under Chapter 15 of the U.S. *Bankruptcy Code* in Delaware, the U.S. court recognizing the *CCAA* proceeding as a foreign main proceeding. What was at issue in this motion was the rights of the debtor under the Cliffs contract to the end of 2024. Newbould J. held that the Court has both statutory authority granted under the *CCAA* and an inherent and equitable jurisdiction when supervising a reorganization. The *CCAA* provides that a court has jurisdiction to make any order "that it considers appropriate in the circumstances", including procedural orders. The Court held that the "single control" model favours a *CCAA* court to deal with the issues in this case, including a public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Newbould J. held that the issues were completely interwoven and it would make no sense to require the debtor to litigate its claim against Cliffs in the U.S. when Cliffs' claim against the debtor must be dealt with in the Ontario Court. For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Here, Cliffs had raised significant damage claims against the debtor and its purported termination of the contract was an important factor that led to the *CCAA* proceedings. Newbould J. held that to establish jurisdiction simpliciter, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction if established, the Court observing that the real and substantial connection test

does not oust the traditional private international law bases for court jurisdiction. In this case, the genesis of the contract was a 2001 *CCAA* proceeding, the contract was part of the court-approved restructuring. The traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance applied in this case. Newbould J. held that based on the traditional rules governing where a contract is made, the debtor had made an arguable case that the contract and its amendments generally were contracts made in Ontario. Moreover, the fact that the original contract became effective only when approved in Ontario by the *CCAA* judge is a strong indicator that there is a strong and substantial connection to Ontario. The presumption had been met and Cliffs did not meet the burden of rebuttal. Newbould J. further held that a party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate, fairer and more efficient. The non-exhaustive factors to be considered include: the cost of transferring the case or of declining the stay; the impact of a transfer on the conduct of the litigation or on related parallel proceedings; the possibility of conflicting judgments; location of evidence; applicable law; recognition and enforcement of an Ontario judgment. Newbould J. held that the evidence did not establish *forum non conveniens* in this case. Cliffs has not met its burden of showing that the alternative forum in the U.S. was clearly more appropriate: *Re Essar Steel Algoma Inc.*, 2016 CarswellOnt 1040, 2016 ONSC 595 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted a sealing order with respect to an amended settlement agreement and portions of the monitor's report. Justice Hainey approved the applicant's request for sealing, having found that the applicant had satisfied the burden for sealing the materials under the test set forth in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42 (S.C.C.). Hainey J. also approved the amended settlement agreement on the basis that the provisions were proper, fair, and reasonable and in the best interests of the applicant and its stakeholders. The trustee for the holders of senior notes, as well as an *ad hoc* committee of shareholders, requested an adjournment of the motion to permit it to obtain and consider further information concerning the amended settlement agreement. In particular, counsel for the noteholder committee and trustee requested an order for disclosure of the unredacted monitor's report, arguing that the confidentiality provision in the amended settlement agreement permitted disclosure as ordered by the court. Justice Hainey declined to grant the relief requested in view of the terms of the amended settlement agreement, the urgency of the motion, and the approval required. He noted that counsel to the noteholder committee and the trustee, as well as counsel to the shareholder committee, had each signed a confidentiality agreement and had reviewed all of the unredacted materials pertaining to the motion. Hainey J. was of the view that it was reasonable that if the stakeholders were not prepared to sign a confidentiality agreement, they cannot receive confidential information about the amended settlement agreement: *Re Crystallex International Corp.*, 2019 CarswellOnt 679, 2019 ONSC 408 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed a motion brought by the *CCAA* debtor for a sealing order of certain material in the monitor's report. Justice Hainey noted that the debtor's *CCAA*

proceedings have been ongoing for more than eight years, during which time the sole business activity has been pursuing, and now enforcing, its claim against Venezuela for having unilaterally rescinded its gold mining operation contract. The arbitration award and related judgment enforcing the arbitration award are now final. Justice Hainey added that it was significant that the monitor did not fully support the debtor's request for a sealing order. Section 10(3) of the *CCAA* governs the issue of whether there should be a sealing order, and the tests in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822, 2002 SCC 41, [2002] S.C.J. No. 42, 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* [2002] 2 S.C.R. 522 (S.C.C.), specify that in order to grant a sealing order, the court must be satisfied that a) the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest, well-grounded in the evidence; b) there must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as much as reasonably possible; and c) the salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle. The onus is on the debtor to satisfy the court that the criteria are met. The Court was unable to conclude that disclosure of the information would be harmful to the debtor's commercial interests: *Re Crystallex International Corporation*, 2020 CarswellOnt 9120, 2020 ONSC 3434 (Ont. S.C.J. [Commercial List]).

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HMANALY N§62
Houlden & Morawetz Analysis N§62

Bankruptcy and Insolvency Law of Canada, 4th Edition

COMPANIES' CREDITORS ARRANGEMENT ACT

Section 10
L.W. Houlden and Geoffrey B. Morawetz

N§62 — Court Order Prohibiting Release of Information where Prejudice to Debtor Company

N§62 — Court Order Prohibiting Release of Information where Prejudice to Debtor Company

See s. 10

Section 10(3) authorizes the court to make an order restricting the disclosure of the cash-flow statement or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors. However, the court may direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate. For businesses undergoing a restructuring, protecting the detailed information in a cash-flow statement may be vital to prevent it from providing an unfair advantage to competitors or from violating securities laws if the debtor company is publicly traded.

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TAB 29

2011 ANNREVINSOLV 17

Annual Review of Insolvency Law
Editor: Janis P. Sarra

17 — The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Québec Perspective

The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Québec Perspective

Denis Ferland [*]

I. — Introduction

In recent years, the variety of roles undertaken by court-appointed monitors has expanded. From an appointment in virtue of the inherent jurisdiction of the court under the *Companies' Creditors Arrangement Act* (*CCAA*), the appointment of a monitor is now a statutory requirement, [2] which includes an active participation on the monitor's part in the restructuring process. One could say that the recent modifications to the *CCAA* have further expanded the powers and the duties of monitors, although it seems to be a codification of the existing practice. However, it appears that the courts expanded and tailored the monitor's role, including its powers and obligations. New issues have been raised as a result of the increasingly active role of monitors. This commentary addresses the treatment of confidential information by the monitor and discusses the issue of their cross-examination.

A. — The Treatment of Confidential Information

Section 11.7(1) *CCAA* states that the court must appoint a trustee to monitor the business and the financial affairs of the debtor company when issuing an initial order. The main function of the monitor is to report to the court on the debtor company's ongoing financial situation and on its efforts to develop a plan of arrangement. This traditional role has evolved, it has been broadened and tailored by the initial, and subsequent, orders to meet the specific needs of the situation of the debtor company.

In order to adequately assess the business and financial affairs of the debtor company, the monitor is given wide access to the debtor company's property, including the premises, books, records, data as well as other financial documents of the debtor company. [3] The monitor can also investigate the state of the company's business and financial affairs as well as the cause of its financial

difficulties.[4] It is the monitor's duty to make such an investigation for the benefit of the court and the creditors. The debtor company must assist the monitor by providing it with the requested information.[5] The process of gathering information related to the financial situation of the debtor company can present some challenges for the monitor. The information can be, amongst other, unreported or disorganized. Key employees may even have left the debtor company.

With respect to the monitor's obligation to report to the court, the *CCAA* specifies that the monitor must "file a report ... on the state of the company's business and financial affairs".[6] Such a report must be filed by the monitor shortly after its appointment, within 45 days of the end of the company's financial quarter, before a meeting of the creditors and as directed by the court.[7] A similar report must be filed with the court after any assertion by the monitor of an adverse material change in the debtor company's projected cash-flow or financial circumstances.[8] The *CCAA* does not exhaustively define the information that must be disclosed in any monitor's report. The monitor retains a certain discretion regarding the level of details or information it must provide in the report knowing that, as an officer of the court, the monitor must give a complete picture of the financial situation and affairs of the debtor company, to the court and the creditors including the efforts and likelihood of the filing of a plan of arrangement. Ultimately, the monitor must present a final report that reflects a selection and an interpretation of the information made available to it or discovered by it.

Information contained in a monitor's report, including exhibits and cash-flow statements, become, in principle, public once the report is filed into the court records.[9] Furthermore, the monitor's status as officer of the court requires that it make sure that all relevant information has been impartially disclosed to the court and the creditors. The debtor company may thus be reluctant to disclose some sensitive information such as financial information (revenues, costs, sale price, and profitability) or even commercial agreements, especially for private companies. While it is the monitor's responsibility to ensure that all relevant information is made available to all stakeholders, it must also respect the confidentiality or sensitive nature of such information if its disclosure in a public forum can cause prejudice to the debtor company's financial affairs.

Both the *CCAA* and the Standard Initial Order developed by the Barreau de Montréal, enclosed as Schedule "A", provide for some protection of confidential information. Pursuant to such Standard Initial Order, if the monitor has been advised by the corporation of the confidential, proprietary or competitive nature of the information then the monitor must avoid disclosing such information.[10] The confidentiality orders provided for under section 10(3) *CCAA* only apply to cash-flow statements if the court is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors. For other types of information, the debtor company or any party to the *CCAA* proceedings may obtain, when justified, a sealing order.

Courts have authorized sealing orders over confidential documents or portions of monitors' reports that are commercially sensitive. Sealing orders shield documents or the monitors' reports from the public and even potentially from other parties to a *CCAA* proceeding. By way of example, this type of order has been granted over an appendix of the monitor's report that contained a sale agreement,[11] as well as over a tax settlement agreement reached between parties to a *CCAA* proceeding.[12] However, courts are careful to limit the sealing order to what is strictly required to ensure the protection of sensitive information given the general principle that court records are public.

The test for sealing orders, developed by the Supreme Court of Canada,[13] has been applied in an insolvency context.[14] A confidentiality order can be granted when:

- such an order is necessary to prevent a serious risk to an important commercial interest because reasonably alternative measures will not prevent the risk; and
- the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.

The first part of the test requires the consideration of three elements:

- the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question;
- 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; and
- the judge is required to consider not only whether reasonable alternatives are available to such an order but he or she must also strive to restrict the order as much as is reasonably possible while preserving the commercial interest in question.[15]

Sealing orders must be limited to what is required to protect the interest of the debtor company without causing undue prejudice to creditors. In *White Birch Paper Holding Company*,[16] in order to eliminate the potential deleterious effects on creditors to issuing a sealing order in a *CCAA* proceeding, the Québec Superior Court issued, at the debtor company's request, a sealing order that may be suspended for creditors that agree to sign a confidentiality agreement.

> In the present instance, I was not convinced that the allegations of the Petition were elaborate and complete enough to meet the tests enunciated in "Sierra Club" and "Toronto Star Newspapers". *It seems that a Petitioner seeking such order would have*

> *to explain in more detail the necessity of derogating from the general rule imposing publicity and public access to all evidentiary material in CCAA proceedings. In short, the exception of confidentiality (now codified in section 10(3) CCAA) will always have to be restrictively interpreted and applied only when the underlying facts are strong enough to warrant such an order*.
>
> But for the comments stated below, and if I were to base [m]y decision only upon the contents of the Petition, I would have denied this request on the basis of incomplete and insufficient evidence to support it.
>
> However, the Petitioners have suggested in paragraph 175 of the Petition, that the said financial information could be made available to "certain creditors upon signature of a confidentiality agreement".
>
> *At my suggestion, the WB Group agreed to furnish unfettered access to the said documentation to all creditors without further distinction or limitation, upon signing of a confidentiality agreement*.
>
> *Such a position is in line with the wording and intent of section 10(3) CCAA. Consequently, I was prepared to grant the WB Group's request and keep confidential and under seal the financial data filed by the Petitioners except for those creditors (regardless of their importance) who would be agreeable to signing a confidentiality agreement in exchange for the said information. Such a "modus operandi" ensures that the confidentiality order and will not "unduly prejudice the company's creditors"*. [17]

The *White Birch Paper Holding Company* case illustrates the tension between protecting the debtor company's sensitive information and the general principle of publicity of *CCAA* proceedings. It also shows the conflicting duties of the monitor who must protect the creditors and other stakeholders, but also assist the debtor company in reorganizing and developing a plan of arrangement. Therefore, the utmost integrity of the monitor is expected and required, otherwise the structure of the *CCAA* would need to be changed. The courts must insure that these very high standards are met in each instance. This issue illustrates with particular clarity the need for an independent monitor in the restructuring.

B. — The Cross-examination of Monitors

Court-appointed monitors play a very significant and important role in *CCAA* proceedings. The recent modifications to the *CCAA* and the use of the inherent jurisdiction of the court allow for the granting of initial orders that include wider duties to the monitor than those suggested by section 11.7(1) *CCAA*. [18] For instance, courts will consider the opinion of the monitor in the following situations:

(a) Establishment of a super-priority for interim financing [19]

(b) assignment of contracts [20]

(c) Resiliation of contracts [21]

(d) disposition of the totality or parts of the company's assets outside the ordinary course of business [22]

The monitor is also responsible for analyzing potential preferences or undervalued transactions that have occurred during the suspect period. [23] As well, the monitor must inform the court when it is of the opinion that it would be more beneficial to the debtor company's creditors if proceedings were continued under the *BIA*. [24]

In Québec, under the Standard Initial Order developed by the Barreau de Montréal, [25] the monitor's powers include the following:

(a) Monitoring the company's receipts and disbursements;

(b) Assisting the company in dealing with its creditors during the stay period;

(c) Assisting the company with the preparation of its cash-flow projections and the development, negotiation and implementation of the plan;

(d) Advising and assisting the company to review its business and assessing opportunities for cost reduction, revenue enhancement and operating efficiencies;

(e) Assisting the company with restructuring and in its negotiations with its creditors and with the holding and administering of any meetings held to consider the plan;

(f) Reporting to the court on the state of the business and financial affairs of the company or developments in the proceedings;

(g) Reporting to the court and interested parties, including but not limited to creditors affected by the plan, with respect to the monitor's assessment and recommendations with respect to the plan;

(h) Retaining advisers and legal counsel as reasonably necessary for the purpose of carrying out the terms of the initial order;

(i) Acting as a "foreign representative" of the company in any insolvency, bankruptcy or reorganization proceedings outside of Canada;

(j) Giving any consent or approval as may be contemplated by the Order or the *CCAA*.

As evidenced by the foregoing, the powers of the monitor extend beyond the mere examination of the company's financial affairs and its monitoring. In taking on the larger role of overseeing the restructuring process, monitors become advisors to the debtor company, but are also protectors of the creditors and other stakeholders, and finally, must be the "eyes and ears" of the court, all at once. The courts have repeatedly stated that the monitor is an officer of the court. [26] As such, the monitor acts as an auxiliary of the court and a guide in the restructuring process at the same time. The monitor has the obligation to act independently and to consider the interests of all stakeholders involved in the restructuring process. This obligation of integrity and good faith, combined with the multiplicity of interests at stake, is one of the inherent challenge monitors face throughout *CCAA* proceedings.

Tension can arise as a result of the monitor's view on a particular issue and as a consequence of its occasional competing roles within the restructuring process. Accordingly, creditors or stakeholders may seek to examine the monitor in addition to the debtor company's representatives so as to obtain information that extends further than the contents of the monitor's report. The monitor's status as officer of the court resulted in courts, especially outside of the province of Québec, being reluctant to permit monitors to be cross-examined on the content of their reports. [27] Courts have usually held that the monitor cannot be compelled by parties to the restructuring. Such reluctance seems to be attributable to the desire to keep the monitor outside of adversarial *CCAA* proceedings so as to protect its impartiality. [28] Courts however have recognized that the monitor can and should collaborate with the creditors and make itself available to answer questions on his report. [29]

In Ontario, it has been established that the monitor can be subjected to cross-examination on the basis of its report, but only in unusual or exceptional circumstances. [30] These circumstances include the monitor's refusal to answer questions on a report as may be reasonably requested by the creditors [31] or partiality manifested by the monitor towards a party to the *CCAA* proceedings. [32] Even in these circumstances, the courts have favored informal and non-confrontational approaches such as the submission of written questions to the monitor or an out of court interview. [33]

In certain circumstances, the deference given to the monitor by the courts can be questioned. Although the monitor is an officer of the court, different views have to be brought to the attention of the court. One could wonder whether a professional, paid by the debtor company, working closely with the debtor company, can be totally neutral. It is obvious that an officer of the court has to be protected, but on the other hand, the monitor should be available to explain its reports to the court

and be cross-examined, although it should be offered the deference and the protection of a court officer. This practice is the norm in the province of Québec.

In Québec, section 35 of the Standard Initial Order developed by the Barreau de Montréal provides that:

> 35. DECLARES *that the Monitor may provide creditors and other relevant stakeholders of the Petitioner with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioner's counsel*. In the case of information that the Monitor has been advised by the Petitioner is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioner unless otherwise directed by this Court. [34]

This provision allows the parties to the restructuring to question the monitor, it encompasses the dual objectives of obtaining additional information from the monitor and protecting the monitor from close involvement in the adversarial process of the *CCAA*.

II. — Conclusion

This brief analysis of the treatment of confidential information by monitors and the question of subjecting them to cross-examination illustrates the tension between the different duties of monitors. As officers of the court, monitors must act impartially for the benefit of all stakeholders in the restructuring. Monitors must ensure that the relevant information is made available to creditors and other stakeholders but without undue prejudice to the debtor company.

In dealing with the monitor's multiple mandates, conflicts can arise if stakeholders start to question the balance between the multiple interests at stake. The monitor must act independently and assist in the restructuring. The monitor must consider the interests of the debtor company, the creditors and of the other stakeholders. The practice of permitting cross-examination can help all the parties to the restructuring so that they have all the information they need to make a decision with respect to the plan of arrangement, and help the court in making its determination and in the rendering of orders. Furthermore, some safeguard measures can be put in place to prevent monitors from being too involved in the adversarial process of the *CCAA* proceedings.

Schedule A

CANADA	
—	
	SUPERIOR COURT
—	
PROVINCE OF QUEBEC	*Commercial division*
—	
DISTRICT OF MONTRÉAL	.....
—	
File: No: 500-11-•	*Montreal, •, 200•*

—	*Present: The Honourable •, J.S.C..* *IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED*:
—	•
—	Petitioner
—	And
—	•
—	Monitor

Initial Order

ON READING •'s petition for an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36 (as amended the "*CCAA*") and the exhibits, the affidavit of • filed in support thereof (the "*Petition*"), the consent of • to act as monitor (the "*Monitor*"), relying upon the submissions of counsel and being advised that the interested parties, including secured creditors who are likely to be affected by the charges created herein were given prior notice of the presentation of the Petition;

GIVEN the provisions of the CCAA;

WHEREFORE, THE COURT:

1. GRANTS the Petition.

2. ISSUES an order pursuant to the CCAA (the "*Order*"), divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Stay of Proceedings against the Petitioner and the Property
- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations
- No Exercise of Rights or Remedies;

- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Interim Financing (DIP)
- Directors' and Officers' Indemnification and Charge
- Restructuring
- Powers of the Monitor
- Priorities and General Provisions Relating to CCAA Charges
- General

Service

3. DECLARES that sufficient prior notice of the presentation of this Petition has been given by the Petitioner to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

Application of the CCAA

4. DECLARES that the Petitioner is a debtor company to which the CCAA applies.

Effective time

5. DECLARES 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 (the "*Effective Time*").

Plan of Arrangement

6. DECLARES that the Petitioner shall have the authority to file with this Court and to submit to its creditors one or more plans of compromise or arrangement (collectively, the "*Plan*") in accordance with the CCAA.

Stay of Proceedings against the Petitioner and the Property

7. ORDERS that, until and including • [DATE — MAX. 30 DAYS], or such later date as the Court may order (the "*Stay Period*"), no proceeding or enforcement process in any court or tribunal (each, a "*Proceeding*") shall be commenced or continued against or in respect of the Petitioner,

or affecting the Petitioner's business operations and activities (the "*Business*") or the Property (as defined herein below), including as provided in paragraph 10 hereinbelow except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Petitioner or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

Stay of Proceedings against the Directors and Officers

8. ORDERS that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Petitioner nor against any person deemed to be a director or an officer of the Petitioner under subsection 11.03(3) CCAA (each, a "*Director*", and collectively the "*Directors*") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Petitioner where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

9. ORDERS that the Petitioner shall remain in possession and control of its present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (collectively the "*Property*"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraph 28 hereof.

No Exercise of Rights or Remedies

10. ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "*Persons*" and each being a "*Person*") against or in respect of the Petitioner, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

11. DECLARES that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the Petitioner or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioner becomes bankrupt or a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "*BIA*") is appointed in respect of the Petitioner, the period between the date of the Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioner in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

12. ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Petitioner, except with the written consent of the Petitioner and the Monitor, or with leave of this Court.

Continuation of Services

13. ORDERS that during the Stay Period and subject to paragraph 15 hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the Petitioner or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Petitioner, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Petitioner, and that the Petitioner shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of the Order are paid by the Petitioner, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Petitioner or such other practices as may be agreed upon by the supplier or service provider and the Petitioner, with the consent of the Monitor, or as may be ordered by this Court.

14. ORDERS that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Petitioner on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order to make further advance of money or otherwise extend any credit to the Petitioner.

15. ORDERS that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by the Petitioner with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of the Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by Petitioner and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into the Petitioner's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

Non-Derogation of Rights

16. ORDERS that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "*Issuing Party*") at the request of the Petitioner shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of the Order, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Interim Financing (DIP)

17. ORDERS that Petitioner be and is hereby authorized to borrow, repay and reborrow from • (the "*Interim Lender*") such amounts from time to time as Petitioner may consider necessary or desirable, up to a maximum principal amount of $• outstanding at any time, on the terms and conditions as set forth in the Interim Financing Term Sheet attached hereto as Schedule • (the "*Interim Financing Term Sheet*") and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of Petitioner and to pay such other amounts as are permitted by the terms of the Order and the Interim Financing Documents (as defined hereinafter) (the "*Interim Facility*");

18. ORDERS that Petitioner is hereby authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the "*Interim Financing Documents*") as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Term Sheet, and Petitioner is hereby authorized to perform all of its obligations under the Interim Financing Documents;

19. ORDERS that Petitioner shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the "*Interim Lender Expenses*")) under the Interim Financing Documents and shall perform all of its other obligations to the Interim Lender pursuant to the Interim Financing Term Sheet, the Interim Financing Documents and the Order;

20. DECLARES that all of the Property of Petitioner [or such Property as determined by the Court] is hereby subject to a charge and security for an aggregate amount of $• (such charge and security is referred to herein as the "*Interim Lender Charge*") in favour of the Interim Lender as security for all obligations of Petitioner to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Term Sheet and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs 40 and 41 of this Order;

21. ORDERS that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan;

22. ORDERS that the Interim Lender may:

(a) notwithstanding any other provision of the Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to Petitioner if the Petitioner fails to meet the provisions of the Interim Financing Term Sheet and the Interim Financing Documents;

23. ORDERS that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the "*Notice Period*") of a default thereunder to the Petitioner, the Monitor and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA;

24. ORDERS that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 17 to 23 hereof unless either (a) notice of a motion for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with the Order or (b) the Interim Lender applies for or consents to such order;

Directors' and Officers' Indemnification and Charge

25. ORDERS that the Petitioner shall indemnify its Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Petitioner after the Effective Time, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

26. ORDERS that the Directors of the Petitioner shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $• (the "*Directors' Charge*"), as security for the indemnity provided in paragraph 25 of this Order as it

relates to obligations and liabilities that the Directors may incur in such capacity after the Effective Time. The Directors' Charge shall have the priority set out in paragraphs 40 and 41 of this Order.

27. ORDERS that, 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 Directors 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 for which the Directors are entitled to be indemnified in accordance with paragraph 25 of this Order.

Restructuring

28. DECLARES that, to facilitate the orderly restructuring of its business and financial affairs (the "*Restructuring*") but subject to such requirements as are imposed by the CCAA, the Petitioner shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of its operations or locations as it deems appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other maner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $• or $• in the aggregate;

(d) terminate the employment of such of its employees or temporarily or permanently lay off such of its employees as it deems appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Petitioner and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Petitioner may determine;

(e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of its agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Petitioner and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(f) subject to section 11.3 CCAA, assign any rights and obligations of Petitioner.

29. DECLARES that, if a notice of disclaimer or resiliation is given to a landlord of the Petitioner pursuant to section 32 of the CCAA and subsection 28(e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving the Petitioner and the Monitor 24 hours prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioner, provided nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

30. ORDERS that the Petitioner shall provide to any relevant landlord notice of the Petitioner's intention to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If the Petitioner has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between the Petitioner and the landlord.

31. DECLARES that, in order to facilitate the Restructuring, the Petitioner may, subject to the approval of the Monitor, or further order of the Court, settle claims of customers and suppliers that are in dispute.

32. DECLARES that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Petitioner is permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in its possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to its advisers (individually, a "*Third Party*"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioner binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioner or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioner.

Powers of the Monitor

33. ORDERS that • is hereby appointed to monitor the business and financial affairs of the Petitioner as an officer of this Court (the "*Monitor*") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, without delay, (i) publish once a week for two (2) consecutive weeks [or as otherwise directed by the Court], in [newspapers specified by the Court] and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "*Website*") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Petitioner of more than $1,000, advising them that the Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective 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;

(b) shall monitor the Petitioner's receipts and disbursements;

(c) shall assist the Petitioner, to the extent required by the Petitioner, in dealing with its creditors and other interested Persons during the Stay Period;

(d) shall assist the Petitioner, to the extent required by the Petitioner, with the preparation of its cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(e) shall advise and assist the Petitioner, to the extent required by the Petitioner, to review the Petitioner's business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(f) hall assist the Petitioner, to the extent required by the Petitioner, with the Restructuring and in its negotiations with its creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(g) shall report to the Court on the state of the business and financial affairs of the Petitioner or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;

(h) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of the Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under the Order or under the CCAA;

(k) may act as a "foreign representative" of the Petitioner or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

(l) may give any consent or approval as may be contemplated by the Order or the CCAA; and

(m) may perform such other duties as are required by the Order or the CCAA or by this Court from time to time.

Unless expressly authorized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioner, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioner.

34. ORDERS that the Petitioner and its Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of the Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioner in connection with the Monitor's duties and responsibilities hereunder.

35. DECLARES that the Monitor may provide creditors and other relevant stakeholders of the Petitioner with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioner's counsel. In the case of information that the Monitor has been advised by the Petitioner is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioner unless otherwise directed by this Court.

36. DECLARES that if the Monitor, in its capacity as Monitor, carries on the business of the Petitioner or continues the employment of the Petitioner's employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

37. DECLARES that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order

of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph 34(i) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

38. ORDERS that Petitioner shall pay the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioner's legal counsel and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after the Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

39. DECLARES that the Monitor, the Monitor's legal counsel, if any, the Petitioner's legal counsel and the Monitor and the Petitioner's respective advisers, as security for the professional fees and disbursements incurred both before and after the making of the Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of $• (the "*Administration Charge*"), having the priority established by paragraphs 40 and 41 hereof.

Priorities and General Provisions Relating to CCAA Charges

40. DECLARES that the priorities of the Administration Charge, the Interim Lender Charge and Directors' Charge (collectively, the "*CCAA Charges*"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge;

(b) second, the Directors' Charge;

(c) third, the Interim Lender Charge; and

(d) fourth, •.

41. DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "*Encumbrances*") affecting the Property charged by such Encumbrances.

42. ORDERS that, except as otherwise expressly provided for herein, the Petitioner shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioner obtains the prior written consent of the Monitor and the prior approval of the Court.

43. DECLARES that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Petitioner, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

44. DECLARES that the CCAA Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioner (a "*Third Party Agreement*"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

(b) any of the beneficiaries of the CCAA Charges shall not have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

45. DECLARES that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioner pursuant to the Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

46. DECLARES that the CCAA Charges shall be valid and enforceable as against all Property of the Petitioner and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes.

General

47. ORDERS that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisers of the Petitioner or of the Monitor in relation to the Business or Property of the Petitioner, without first obtaining leave of

this Court, upon five (5) days written notice to the Petitioner's counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

48. DECLARES that the Order and any proceeding or affidavit leading to the Order, shall not, in and of themselves, constitute a default or failure to comply by the Petitioner under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

49. DECLARES that, except as otherwise specified herein, the Petitioner and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioner and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

50. DECLARES that the Petitioner and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioner shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

51. DECLARES that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioner and the Monitor and has filed such notice with this Court, or appears on the service list prepared by the monitor or its attorneys, save and except when an order is sought against a Person not previously involved in these proceedings;

52. DECLARES that the Petitioner or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice only to each other.

53. DECLARES that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon five (5) days notice to the Petitioner, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, such application or motion shall be filed during the Stay Period ordered by this Order, unless otherwise ordered by this Court;

54. DECLARES that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

55. DECLARES that the Monitor, with the prior consent of the Petitioner, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and any subsequent orders of this Court and, without limitation to the foregoing, an order under Chapter 15 of the *U.S. Bankruptcy Code*, for which the Monitor shall be the foreign representative of the Petitioner. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

56. REQUESTS the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order.

57. ORDERS the provisional execution of the Order notwithstanding any appeal.

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Honourable .....

Footnotes

* Denis Ferland is a partner at Davies Ward Phillips & Vineberg, S.E.N.C.R.L., s.r.l. in Montreal. The author would like to convey his sincere thanks to his colleague Me Olivier Coche, without whom this paper would not have been possible.

2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.7(1) [*CCAA*].

3 *Ibid*, s 24.

4 *Ibid*, s 23(1)(c).

5 *Ibid*, s 35. In addition, the company must comply with the duties set out in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 158 [*BIA*].

6 *CCAA*, *supra* note 1, ss 23(1)(b), (d).

7 *Ibid.*

8 *CCAA*, *supra* note 1, s 23(1)(d)(i).

9 *CCAA*, *supra* note 1, s 23(1)(j); *Companies' Creditors Arrangement Regulations*, SOR/2009-219, s 10.

10 *CCAA*, *supra* note 1, s 10(3); Barreau de Montréal, *Standard Initial Order*, Superior Court: Commercial Division, s 35, online: <http://www.barreaudemontreal.qc.ca/Ang/EFM104b_1.html>.

11 *Re Nortel Networks Corp*, [2009] OJ No 3169.

12 *Re Nortel Networks Corp*, [2010] OJ No 761.

13 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras 36-90 [*Sierra Club*]; see also Houlden, Morawetz & Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2010) at 1125-1126.

14 *Re Stelco Inc*, [2006] OJ No 275.

15 *Sierra Club*, *supra* note 12 at paras 53-57.

16 *Arrangement relatif à White Birch Paper Holding Company*, 2010 QCCS 764.

17 *Ibid* at paras 84-88 [emphasis added].

18 For a review of the developments in the role of monitors, see Douglas I Knowles, "To liquidate or Restructure Under the *CCAA*? The Monitor's Conflicting Duties" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2006* (Toronto: Thomson Carswell, 2007) at 95.

19 *CCCA*, *supra* note 1, s 11.2(4)(g).

20 *Ibid*, s 11.3(3)(a).

21 *Ibid*, s 32(4)(a).

22 *Ibid*, ss 36(3)(b), (c)

23 *Ibid*, s 36.1.

24 *Ibid*, s 23(1)(h).

25 Barreau de Montréal, *supra* note 9.

26 *Re Ivaco Inc* (2006), 83 OR (3d) 108, ¶55.

27 *Bank of Nova Scotia v Atcon Group Inc*, 2011 NBQB 100; *Re Pine Valley Mining Corporation*, 2008 BCSC 446 at para 15 [*Pine Valley*]; see also Janis P Sarra, *Rescue! Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 269-271.

28 *Pine Valley*, *supra* note 26 at paras 9-18; *Re Bell Canada International Inc*, [2003] OJ No 4738, ¶8 [*Bell Canada*].

29 *Mortgage Insurance Co v Innisfil Landfill Corp*, 1995 CanLII 7366, ¶5.

30 *Re Bakemates International Inc*, [2002] OJ No 3569, ¶31-32; *Bell Canada*, *supra* note 27.

31 *Ibid* at para 8.

32 *Re SemCanada Crude Co*, 2010 ABQB 531, ¶100.

33 For example see *Re Bakemates International*, [2001] OJ No 2024 (overturned on appeal for other reasons).

34 Barreau de Montréal, *supra* note 9 [emphasis added].

End of Document

TAB 30

ESSENTIALS OF
CANADIAN LAW

STATUTORY INTERPRETATION

THIRD EDITION

RUTH SULLIVAN

IRWIN LAW

C. IMPORTANT CONCEPTS

1) Legislative Intent

The expression "legislative intention" or "legislative intent" is used by most interpreters to refer to the meaning or purpose that is taken to have been present in the "mind of the legislature" at the time a provision was enacted. It is the meaning the legislature wished to embody in the legislative text or the purpose it sought to accomplish by enacting the legislation.

The anthropomorphism of this usage is obviously troubling. A legislature does not have a mind, nor is it capable of formulating wishes or seeking goals. As a legal institution, a legislature may think and act through human agents. But which human agents represent the legislature for this purpose? All members of the legislature? All those who voted on the bill? Only those who voted in its favour? Only those who participated in its creation and formulation? What about the non-elected policy makers and drafters who actually formed intentions about the meaning and purpose of particular provisions? Should their intentions be considered? To avoid these difficult questions, legislative intention is sometimes attributed to the text itself, as in the expression "intent of the text."

Other aspects of the concept of legislative intent are also troubling. Those who invoke it appear to assume that, first, at the time of enactment the legislature had views about the question now facing the court and that, second, these views are discoverable by judges and other interpreters. While the first assumption is true in some cases, it is not true in all. Many issues come to court precisely because the legislature has failed to anticipate and provide for them. The second assumption seems dubious in light of modern theories of meaning that emphasize the role of the listener or reader in constructing the meaning of a communication. How can a court be sure that its understanding of a provision corresponds to what the proponents had in mind?

Despite these problems, references to legislative intent are ubiquitous in statutory interpretation and not likely to disappear, however weighty the theoretical objections. This is because statutes are obviously enacted for a reason, and the language in which they are drafted reflects deliberate and careful choices by the legislature. Given the sovereign authority of the legislature under constitutional law (subject only to the Constitution of Canada), these choices cannot be ignored. Courts and other interpreters must at least try to understand the intentions that initially motivated the legislation. Such understanding is possible insofar as those intentions are constructed out of linguistic structures and conventions,

3) Encyclopedic Knowledge

Another aspect of its competence as a drafter is the legislature's presumed knowledge of whatever information or data is relevant to the law it enacts. This includes knowledge of the law existing at the time of enactment—common law, international law, federal and provincial legislation, the legislation of foreign jurisdictions, and the caselaw interpreting legislation.[22] It also includes knowledge of the world. In dealing with any subject, the legislature is presumed to have acquired the information and understanding needed to devise appropriate rules or an appropriate regulatory scheme.[23] This knowledge may be highly technical and dependent on specialized expertise. However, the legislature is also credited with the sort of general knowledge referred to as "legislative facts."[24] This consists of data and studies concerning economic and social conditions, an understanding of history and culture, and an appreciation of the human condition. This is the sort of knowledge one receives from the social sciences and the liberal arts.

4) Straightforward Expression

The legislature is presumed to prefer a clear, simple, and straightforward manner of expression. Drafters avoid metaphor and language that is allusive, convoluted, or indirect.[25] The goal is to make the legislative directive as clear and as concise as possible. When highly technical matters are dealt with, it is often impossible to draft legislation that is easy for non-technical audiences to read. Nonetheless, if there is a simple combination of words that can be used to make a point, but the legislature has not used that combination of words, then chances are that is not the point the legislature was trying to make.

5) Orderly Arrangement

The provisions included in legislation are presumed to be ordered in a coherent and systematic way.[26] By convention, each subsection of a statute contains a single complete idea. Related ideas are grouped together

22 See, for example, *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 45.

23 See, for example, *R v Ahmad*, 2011 SCC 6 at para 31; *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at paras 82–83; *Canada 3000 Inc, Re*, 2006 SCC 24 at para 37; *R v Clarke*, 2013 ONCA 7 at para 20, aff'd 2014 SCC 28.

24 For discussion of legislative facts, see Chapter 12.

25 See *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at para 74.

26 See *R* v *Carvery*, 2012 NSCA 107 at para 54ff, aff'd 2014 SCC 27.

within the same section or series of sections. Parallel structures are used to express functionally equivalent or analogous meanings. The nature of the connection among provisions is also suggested by headings, marginal notes, and other components. As much as possible, the sequence of provisions is methodical and follows a conventional order or reflects an intelligible plan.

6) Coherence

It is presumed that legislation is internally consistent and coherent. The legislature does not contradict itself or enact inconsistent provisions.[27] Its policies, and the procedures and rules for implementing those policies, are meant to work together harmoniously so that the entire body of legislation forms a single coherent and consistent system. This body of legislation must be made consistent with entrenched constitutional law, just as the common law must be made consistent with it.

7) No Tautology (Every Word Must Be Given Meaning)

It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice. This is what is meant when it is said that the legislature "does not speak in vain."[28]

8) Consistent Expression

It is presumed that the legislature uses words and patterns of expression in a consistent way. Once the legislature has adopted a particular way of expressing a meaning, it avoids stylistic variation and prefers to express the same meaning in the same way, and parallel meanings in parallel ways, throughout the legislative text.[29]

The presumption of consistent expression applies not only to words and phrases but to any structure or feature of expression. Having done a thing once, the legislature is inclined to use the same or a comparable method when it sets out to do the same or a similar thing again. As this

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27 See *R v LTH*, 2008 SCC 49 at para 47. The techniques for dealing with conflicts among legislative provisions are discussed in Chapter 19.

28 See *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 87.

29 See *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at para 42; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 123–24.

method is repeatedly used for a particular purpose, a convention is established. The more distinctive the convention, the more frequent the repetition, the more justified the conclusion that this convention is always used to accomplish this purpose and that any departure from it signals a different intent.

These assumptions about the way legislation is drafted underlie many of the rules and techniques relied on by courts in analyzing legislative texts. Insofar as they are shared by both drafter and audience, they facilitate clear and accurate communication.

F. DRIEDGER'S MODERN PRINCIPLE

The leading modern case on statutory interpretation is *Re Rizzo & Rizzo Shoes Ltd*,[30] in which the so-called modern principle of interpretation formulated by Elmer Driedger in *The Construction of Statutes*[31] was adopted by the Supreme Court of Canada as its preferred approach. In the *Rizzo* case, the Ontario Court of Appeal held that an employer petitioned into bankruptcy in Ontario was not obliged to pay employee benefits under sections 40 and 40a of the province's *Employment Standards Act*:

> 40 — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives [notice in writing].
>
> . . .
>
> (7) Where the employment of an employee is terminated contrary to this section,
>
> (a) the employer shall pay termination pay . . . .
>
> 40*a* . . .
>
> (1a) Where,
>
> (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment;
>
> . . .
>
> the employer shall pay severance pay . . . .

30 [1998] 1 SCR 27 [*Rizzo*]. See also *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 [*Bell ExpressVu*].

31 (Toronto: Butterworths, 1974) at 67.

In the Supreme Court of Canada, Iacobucci J, speaking for the court, wrote:

> The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer . . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer."
>
> The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer," but rather by operation of law . . . .
>
> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
>
> Although much has been written about the interpretation of legislation . . . , Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> . . .
>
> I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.[32]

In considering the entire context of sections 40 and 40a, Iacobucci J looked to the purpose of the provisions, the purpose of the Act, the scheme of the Act, and its legislative history. He also noted that the plain meaning–based interpretation of the Court of Appeal would result in the "arbitrary and inequitable" treatment of employees terminated because of bankruptcy.[33]

Since the *Rizzo* case, Driedger's modern principle has become the mantra of statutory interpretation in Canada. The key point of the principle is the point Iacobucci J makes in introducing it—that statutory interpretation cannot be founded on the wording of the legislation alone. The words of the text must be read and analyzed in light of a purposive analysis, a scheme analysis, the larger context in which the legislation was written and operates, and the intention of the legislature, which includes implied intention and the presumptions of legislative intent.[34] In the course of resolving an interpretation problem, an interpreter must also consider the relevance of a wide range of rules, principles, and maxims.[35]

Since the *Rizzo* case, there has also been some backing away from the modern principle as it is explained above. The leading case establishing a somewhat different version is *Bell ExpressVu Limited Partnership v Rex*.[36] It concerned the interpretation of paragraph 9(c) of the *Radio-*

32 *Rizzo*, above note 30 at paras 18–23. For similar accounts of the proper approach to interpretation, see *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 48. See also *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 43; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 9ff; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 34.

33 *Rizzo*, above note 30 at para 41.

34 See Elmer Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 106. For a pragmatic version of the modern principles, see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, ON: Butterworths, 2002) at 3.

35 See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at paras 2.9 and 2.19–2.22. For a complete and critical examination of the principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006) 40 *Revue juridique Thémis* 131.

36 Above note 30.

communications Act, which prohibited the decoding of an encrypted subscription programming signal or network feed "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed." The issue was whether this prohibition applied to encrypted signals originating in the United States or was limited to signals emanating from licensed Canadian operations. Speaking once again for the court, Iacobucci J began by acknowledging that the lower courts were divided in their response to this issue. He then cited the modern principle and offered the following commentary:

> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings . . . .
>
> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (CanLII), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". . . .
>
> Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision . . . .
>
> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" . . . . The words of the provision must be "reasonably capable of more than one meaning" . . . . By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

> For this reason, ambiguity cannot reside in the mere fact that several courts—or, for that matter, several doctrinal writers—have come to differing conclusions on the interpretation of a given provision . . . .[37]

After reading the words of paragraph 9(c) in their proper context, Iacobucci J found no ambiguity and therefore "no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation."[38]

These passages from the *Bell ExpressVu* case are frequently cited by courts to justify the exclusion of the aids to interpretation that do not support the court's preferred outcome.[39]

37 *Ibid* at paras 26–30.
38 *Ibid* at para 55.
39 For additional comment on this case, see Chapter 18.

TAB 31

Sullivan on the Construction of Statutes

SIXTH EDITION

Ruth Sullivan

LexisNexis

The Presumption Against Tautology

Sullivan on the Construction of Statutes, 6th Ed.

Ruth Sullivan

CHAPTER 8 - TEXTUAL ANALYSIS

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

The Presumption Against Tautology

Governing principle

§8.23 ***Governing principle.*** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.[1] Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. In *Hill v. William Hill (Park Lane) Ltd.*, Viscount Simons wrote:

> [A]lthough a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out.[2]

In *R. v. Proulx*, Lamer C.J. wrote:

> It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.[3]

As these passages indicate, every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.[4]

§8.24 The presumption against tautology is invoked by the courts frequently and for a variety of purposes: to reveal ambiguity[5] or resolve it,[6] to infer the purpose of provisions,[7] to determine the scope of general terms, powers or conditions,[8] and to clarify the relation between the provisions of one or more Acts.[9] It applies both to individual words and phrases and to larger units of legislation such as paragraphs and sections and to parts of

the legislative scheme.[10] It applies to the Charter and other constitutional instruments as well as to ordinary legislation.[11]

§8.25 In *R. v. Kelly*,[12] the Supreme Court of Canada relied on the presumption against tautology to help determine the elements of the offence created by s. 426(1) of the *Criminal Code*. That subsection provided that a person is guilty of an offence if, while acting as an agent, he or she "corruptly … agrees to accept … any reward, advantage or benefit" as consideration for an act or omission that affects the principal's affairs. The Court was asked whether an agent, to be guilty of the offence, must do something more than accept a benefit in return for an act or omission that affects the principal. The majority of the Court said yes, on the ground that some meaning must be given to the word "corruptly". Cory J. wrote:

> The interpretation of the word "corruptly" must take place within the context of s. 426 itself. It is a trite rule of statutory interpretation that every word in the statute must be given a meaning. It would be superfluous to include "corruptly" in the section if the offence were complete upon the taking of the benefit in the circumstances described by the section. The word must add something to the offence.[13]

The Court concluded that the word "corruptly" as used in the section was intended to make secrecy an essential element of the offence.

§8.26 In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*,[14] the Supreme Court of Canada relied on the presumption against tautology to help rebut the presumption against changing the common law. The issue in the case was whether s. 8 of the *Competition Tribunal Act* gave the Tribunal jurisdiction to enforce its orders through punishment for contempt *ex facie curiae*. At common law this jurisdiction is reserved to superior courts. Under s. 8(1) of the Act, the Tribunal had "jurisdiction to hear and determine all applications made under Part VII of the *Competition Act* and any matters related thereto". Under s. 8(2) it had the powers, rights and privileges of a superior court in relation to all matters necessary or proper for the due exercise of its jurisdiction.

§8.27 The majority of the Court concluded that although s. 8 did not confer jurisdiction to punish for contempt *ex facie curiae* in so many words, it did so by necessary implication. Its reasoning was based in part on the need to give meaning to the expression "any matters relating thereto" in s. 8(1). Gonthier J. explained:

> The respondent claimed that the phrase "any matters related thereto" essentially added to the Tribunal's jurisdiction various ancillary matters that may arise in the course of the hearing of an application. Such an interpretation would, in my opinion, fail to give its full meaning to s. 8(1) *CTA*. It is an established principle of common law, codified to a certain extent in s. 31 of the *Interpretation Act*, R.S.C., 1985, c. I-21, that "[t]he powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured" … Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto". Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising *outside* of the hearing and determination of these applications. These matters may include for instance the

> enforcement of the orders made under Part VIII.[15]

The *Chrysler* case illustrates the frequent interaction of the presumption of knowledge with the presumption against tautology. The Court here presumes first that the legislature is aware of the law governing powers conferred on tribunals (presumption of knowledge) and second that it would not waste words by conferring a power on a tribunal that it already enjoys (presumption against tautology).[16]

Rebuttal

§8.28 ***Rebuttal.*** Although the presumption against tautology is frequently invoked, it is also easily rebutted. This is done by identifying a meaning or function for the words in question, to show that they are not in fact meaningless or superfluous. In *R. v. Biniaris*,[17] for example, counsel argued that in order to avoid tautology the appeal against an unreasonable verdict referred to in s. 686(1) of the *Criminal Code* must be an appeal on a question of fact. The section referred to the following grounds for appeal:

> (i) the verdict should be set aside on the ground that it is unreasonable … ,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law …

Counsel argued that since para. (ii) effectively covered questions of law, para. (i) must refer to something else. This argument did not succeed in the Supreme Court of Canada. Arbour J. wrote:

> The reasoning is that if [the appeal from an unreasonable verdict] were a question of law, there would be no need for both s. 686(1)(a)(i) and s. 686(1)(a)(ii) … This inference from the wording of the two subsections is far from inescapable … [18]

Arbour J. pointed out several reasons why it would make sense to include para. (i) even if unreasonable verdicts were treated as raising a question of law. For example, para. (ii) arguably refers to decisions of the trial judge on specific questions of substantive law, procedure and evidence arising during the course of trial whereas para. (i) refers to conclusion of the judge or jury on the ultimate issue of guilt or innocence.[19]

§8.29 The presumption can also be rebutted by suggesting reasons why in the circumstances the legislature may have wished to be redundant or to include superfluous words. Drafters sometimes anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, resort to repetition or the inclusion of unnecessary provisions. In the *Chrysler* case, for example, in a dissenting judgment, McLachlin J. conceded that the phrase "and any matters related thereto" appearing in the *Competition Tribunal Act* would be unnecessary if its only

function were to confer ancillary powers on the Tribunal. However, in her view,

> one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. *Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers* … Given the relatively common use of phrases like 'and all [or any] matters related thereto' in legislative drafting, I do not find [Mr. Justice Gonthier's] argument persuasive.[20]
>
> [Author's emphasis]

§8.30 A similar point was made by the Manitoba Court of Appeal in *Tuteckyj v. Winnipeg (City)*.[21] In that case the Court was required to interpret the following standard, breach of which would result in "unsightly premises" for the purposes of the regulation. This standard contained considerable overlap and redundancy.

> 5(1) Premises must be kept free and clean from:
>
> (a) rubbish, garbage, junk and other debris;
>
> (b) wrecked, dismantled, partially dismantled, inoperative, discarded, abandoned or unused vehicles, trailers and other machinery or any parts thereof;
>
> (c) excessive growth of weeds or grass; and
>
> (d) objects and conditions, including holes and excavations, that are health, fire or accident hazards.

In considering whether these paragraphs had to be treated as mutually exclusive in order to avoid tautology, Beard J.A. concluded that the overlap and redundancy were deliberate:

> All of these provisions … form the definition of 'unsightly' in the By-law. It is clear that the legislation was not drafted with the intention that the words and provisions would be separate and exclusive. The only possible explanation for the use of these words and provisions is that the drafters intended to use repetition and superfluous words to ensure the clearest and widest possible meaning to the word 'unsightly.' This is not surprising, given that what is considered to be 'unsightly' is very subjective and even elusive. It would be impossible to list all of the myriad of ways in which a property could be considered to be unsightly. The use of overlapping and repetitive words and provisions is that the drafters intended to avoid loopholes and to provide clarity in the legislation. [22]

Because the redundancy served a function, the presumption against tautology was rebutted.

§8.31 Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti cautela*, out of an abundance

of caution, and the presumption against tautology is rebutted.[23]

Footnote(s)

1 *Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 838 (S.C.C.).

2 [1949] A.C. 530, at 546 (H.L.).

3 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, at para. 28 (S.C.C.).

4 See *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 48 (S.C.C.): "The appellant's position would render [certain] words superfluous. This cannot have been the intention of the legislature … *Rizzo Shoes* … makes it clear that all words in a statute must be given meaning." *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493, at 504 (S.C.C.): "Some meaning must be attributed to the word … as otherwise it is mere surplusage, and courts in the application of the principles of statutory construction endeavour, where possible, to attribute meaning to each word employed by the Legislature in the statute." *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89, [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, at 209 (S.C.C.): "It is a principle of statutory interpretation that every word of a statute must be given meaning". See also *Canadian Artists' Representation v. National Gallery of Canada*, [2014] S.C.J. No. 101, 2014 SCC 42, at para. 17 (S.C.C.); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, at para. 38 (S.C.C.); *R. v. Katigbak*, [2011] S.C.J. No. 48, 2011 SCC 48, at paras. 56-58 (S.C.C.); *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] S.C.J. No. 20, [2006] 1 S.C.R. 715, at paras. 45-46 (S.C.C.); *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, 74 C.R. (3d) 1, at 19 (S.C.C.); *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 431 (T.D.); *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] S.C.J. No. 37, [1985] 1 S.C.R. 831, at 838 (S.C.C.); *Goulbourn (Township) v. Ottawa-Carleton (Regional Municipality)*, [1979] S.C.J. No. 118, 101 D.L.R. (3d) 1, at 7, 13 (S.C.C.).

5 See, for example, *R. v. B. (G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 27-28 (S.C.C.).

6 See, for example, *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45, [2008] 2 S.C.R. 604, at para. 20 (S.C.C.); *R. v. Clark*, [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6, at para. 51 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at paras. 31, 39 (S.C.C.); *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 62 (S.C.C.); *Re Therrien*, [2001] S.C.J. No. 36, [2001] 2 S.C.R. 3, at para. 120 (S.C.C.); *R. v. Z. (D.A.)* , [1992] S.C.J. No. 80, [1992] 2 S.C.R. 1025, at 1044-48 (S.C.C.); *Davidson v. Canada (Board of Referees, Unemployment Insurance)*, [1987] F.C.J. No. 536, 80 N.R. 268, at 269 (F.C.A.); *Extendicare Health Services Inc. v. Canada (Minister of National Health & Welfare)*, [1987] F.C.J. No. 819, 15 F.T.R. 187, at 190-91 (T.D.), revd [1989] F.C.J. No. 538, [1989] 3 F.C. 593 (F.C.A.); *Swan v. Canada (Minister of Transport)*, [1990] F.C.J. No. 114, [1990] 2 F.C. 409, at 431 (T.D.).

7 See, for example, *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 20 (S.C.C.); *Reference re Criminal Code (Canada), Sections 193 & 195(1)(c)*, [1990] S.C.J. No. 52, [1990] 4 W.W.R. 481, at 553 (S.C.C.).

8 See, for example, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, at para. 38 (S.C.C.); *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846, at paras. 36, 57, 81 (S.C.C.); *Winters v. Legal Services Society*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 160, at para. 61 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 42 (S.C.C.); *Grini v. Grini*, [1969] M.J. No. 53, 5 D.L.R. (3d) 640, at 644-45 (Man. Q.B.); *R. v. Green*, [1992] S.C.J. No. 18, [1992] 1 S.C.R. 614, at 615 (S.C.C.).

9 See, for example, *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at para. 52 (S.C.C.); *R. v. Proulx*, [2000] S.C.J. No. 6, 2000 SCC 5 (S.C.C.); *Morguard Properties Ltd. v. City of Winnipeg*, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493, at 504-505 (S.C.C.); *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 76 (S.C.C.); *Menzies v. Manitoba Public Insurance Corp.*, [2005] M.J. No. 313 (Man. C.A.), at paras. 45, 48-49 (Man. C.A.).

10 See *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] S.C.J. No. 127, [1989] 2 S.C.R. 1297, at 489 (S.C.C.).

11 See, for example, *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, 46 C.R.R. 193, at 215 (S.C.C.).

12 [1992] S.C.J. No. 53, [1992] 2 S.C.R. 170 (S.C.C.).

13 *Ibid.*, at 188. See also *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, at para. 24 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para. 45 (S.C.C.); *Wormell v. Insurance Corp. of British Columbia*, [2011] B.C.J. No. 621, 2011 BCCA 166, at paras. 22-27 (B.C.C.A.).

14 [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394 (S.C.C.).

15 *Ibid.*, at 410-11.

16 For similar reasoning, see *Trick v. Trick*, [2006] O.J. No. 2737, 81 O.R. (3d) 241, at para. 45 (Ont. C.A.); *Temelini v. Ontario Provincial Police (Commissioner)*, [1999] O.J. No. 1876, 44 O.R. (3d) 609, at 618 (Ont. C.A.); *Davidson v. Canada (Board of Referees, Unemployment Insurance)*, [1987] F.C.J. No. 536, 80 N.R. 268, at 269 (F.C.A.) and *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89, [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, at paras. 23-24 (S.C.C.).

17 [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381 (S.C.C.).

18 *Ibid.*, at para. 29.

19 *Ibid.*; see also *Zaidan Group Ltd. v. London (City)*, [1990] O.J. No. 33, 64 D.L.R. (4th) 514 (Ont. C.A.), affd [1991] S.C.J. No. 92, [1991] 3 S.C.R. 593 (S.C.C.); *Clarke v. Clarke*, [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1, at 16 (S.C.C.); *Musqueam First Nation v. British Columbia (Assessor of Area #09)*, [2012] B.C.J. No. 837, 2012 BCCA 178, at para. 64 (B.C.C.A.); *Firestone Canada Inc. v. Ontario (Pension Commission)*, [1990] O.J. No. 1377, 74 O.R. (2d) 325, at 339 (Ont. H.C.J.), revd [1990] O.J. No. 2316, 1 O.R. (3d) 122 (Ont. C.A.).

20 *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394, at 435 (S.C.C.). See also *R. v. Hinchey*, [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128, at para. 55 (S.C.C.): " … the additional words are not intended to add to the meaning of benefit, but to prevent the meaning … from being restricted."

21 [2012] M.J. No. 370, 2012 MBCA 100 (Man. C.A.).

22 *Ibid.*, at para. 74.

23 *Québec (Procureur général) c. Syndicat de la fonction publique du Québec*, [2008] J.Q. no 4945, 2008 QCCA 1054, at para. 65 (Que. C.A.), revd [2010] S.C.J. No. 28 (S.C.C.); *Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2007] N.S.J. No. 502, 2007 NSCA 115, at para. 41 (N.S.C.A.).

End of Document

Introduction

Sullivan on the Construction of Statutes, 6th Ed.

Ruth Sullivan

CHAPTER 9 - PURPOSIVE ANALYSIS

Introduction

§9.1 The modern principle emphasizes the importance of purposive analysis in statutory interpretation. This chapter describes what is entailed in this form of analysis, surveys the ways it is used, and draws attention to certain of its complexities and difficulties.

§9.2 The chapter begins with a brief look at the history of purposive analysis followed by consideration of why an emphasis on purpose is particularly favoured by modern courts. Important factors here are the rise of the modern administrative state, the emergence of new types of legislation and the influence of Charter interpretation. The chapter then looks at what is meant by purpose and the different ways of establishing it. The legal techniques for discovering purpose are examined and the role of cultural norms in this process is considered. Also, the sources and implications of indeterminacy in this area are discussed.

Propositions underlying purposive analysis

§9.3 ***Propositions underlying purposive analysis.*** A purposive analysis of legislative texts is based on the following propositions:

(1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.

(3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

This approach to statutory interpretation does not necessarily make purpose the most important consideration in interpreting legislation.[1] It merely ensures that the legislature's

purposes — including both the purpose of the Act as a whole and the purpose of the particular provision to be interpreted — are identified and taken into account in every case.

Footnote(s)

1 See the comparison of purposive analysis to the purposive approach, below at §9.7-9.9.

End of Document

Provisions that codify the common law

§17.17 ***Provisions that codify the common law.*** Canadian courts outside Quebec generally use the terms "codify" and "codification" to refer to legislative provisions that reproduce the common law without changing it. When a common law rule or principle is "codified" in this sense, it is stated in a fixed statutory form while its substance remains the same. In interpreting a codified rule or principle, the courts look to the common law for clarification. They therefore look to pre-enactment cases in the enacting jurisdiction and to cases in other common law jurisdictions as well. [10] In *Waldick v. Malcolm*,[11] for example, the Supreme Court of Canada had to interpret Ontario's *Occupier's Liability Act*. Section 3(1) of the Act provided that an occupier owes a duty of care to persons entering the premises. Section 4(1) provided that the duty "does not apply in respect of risks willingly assumed" by persons entering the premises. One of the issues in the case was the relation of the defence created by s. 4(1) to the common law defence of *volenti non fit injuria*. The Court concluded that the legislation codified rather than modified the common law doctrine. Iacobucci J. wrote:

> I have no doubt that s. 4(1) of the Act was intended to embody and preserve the *volenti* doctrine. This can be seen by looking at the statutory scheme that is imposed by the Act as a whole. It is clear the intention of the Act was to replace, refine and harmonize the common law duty of care owed by occupiers of premises to visitors on those premises. That much seems evident from the wording of s. 2 of the Act:
>
> > 2. … the provisions of this Act apply in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show … to persons entering on the premises …
>
> I am of the view that the Act was not intended to effect a wholesale displacement of the common law defences to liability, and it is significant that no mention is made of common law defences in s. 2. Reinforcement of this view is found when one asks why this area of law should entail a defence other than *volenti* which is applicable to negligence actions generally. … [12]

The Court here relied on an implied exclusion argument as well as the norm of uniformity to conclude that s. 4(1) was properly understood to be a codification. Having reached that conclusion, the Court then turned to common law cases, both Canadian and British, to establish the content of the doctrine.

Provisions that modify the common law

§17.18 ***Provisions that modify the common law.*** When legislation is enacted to change the common law, courts are careful not to undermine the legislature's purpose by re-introducing common law rules or principles through interpretation. This point is made in the *Woelk* case. As explained above, *Woelk* dealt with the action for loss of *consortium* created by s. 35(1) of Alberta's *Domestic Relations Act*.[13] At common law this

action could be brought only by husbands and was regarded by the courts as ill-conceived and anomalous. In responding to the new legislation, McIntyre J. emphasized the Court's obligation to give full effect to the legislature's policy of change:

> … the enactment of s. 35 has extended the right of action for a loss of *consortium* to wives and, by its statutory pronouncement, has created a new cause of action which must be approached, freed from the limitations imposed by the earlier decisions in the common law. In my opinion, it is not open to the Court to treat the new cause of action as trivial and deserving of only token awards. It is not open to the Courts to consider that the Legislature of Alberta, in passing s. 35, intended to preserve the old jurisprudence … It is my view that, the Legislature having created the right of the wife to damages and having omitted any restriction on damage awards, the Courts must endeavour to assess the damages realistically, according to the evidence in each case.[14]

As the *Woelk* and *Waldick* cases emphasize, when legislation is enacted to reform the common law, it is important to carefully analyze the purpose and scope of the intended reform. Because the legislation is meant to operate within an existing framework of established concepts and principles, it must be interpreted with those concepts and principles in mind. But in so far as the legislation is designed to effect specific changes, the weight of past understandings must not be allowed to defeat that purpose.[15]

§17.19 This last point is emphasized by the Supreme Court of Canada in *Re Giffen*,[16] where the issue was the effect of s. 20(a) of British Columbia's *Personal Property Security Act* (the PPSA). It provided that a security interest in property is not effective against a trustee in bankruptcy unless the security interest was perfected at the date of the bankruptcy. In this case, title to a car leased by the bankrupt with an option to purchase had remained in the lessor creating a security interest within the meaning of the *PPSA*. However, the lessor had never perfected its interest. The car was sold and both the lessor and the trustee in bankruptcy claimed the proceeds. Relying on common law principle, the Court of Appeal held that the trustee in bankruptcy could acquire no better title to the car than the lessee herself enjoyed. On this analysis, the lessor was entitled to the proceeds. The Supreme Court of Canada disagreed. As Iacobucci J. wrote:

> Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of its legislation. This was done in the provincial PPSAs, which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of "security interest". The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the Act itself.[17]

Interpreting an "exhaustive code"

§17.20 ***Interpreting an "exhaustive code".*** Canadian courts outside Quebec use the terms "code", "exhaustive code", "complete code" and sometimes "codification" to refer

to legislation that purports to set out a complete and comprehensive statement of the law governing a matter.[18] The key feature of a code is that it is meant to offer an exhaustive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution. Once a code is in place, subsequent elaboration of the law dealt with in the code is carried out within its framework and is governed by its principles and policies.[19]

§17.21 When a code is enacted in an area where there is an existing body of judge-made law, the courts face a delicate task. Obviously the common law cases are an important source of law and should be looked to for clarification. But a code is not necessarily a codification of existing law. The courts must be sensitive to the ways in which a code may be meant to modify existing law. This concern is expressed by the British Columbia Court of Appeal in *Foley v. Imperial Oil Limited*,[20] interpreting s. 3(1) of British Columbia's *Occupiers Liability Act*. It provided that "an occupier of premises owes a duty to take care that in all the circumstances of the case is reasonable to see that [persons and property on the premises] will be reasonably safe … ". Speaking for the Court, Smith J.A. wrote:

> The *Act* provides a complete code regarding the duty of an occupier of land. Reference to earlier common law cases is no longer required and may, in fact, result in legal error if the wrong standard of care (one based on the common law categories) is applied, rather than the statutory standard of care.[21]

§17.22 In *Bank of England v. Vagliano Brothers*, Lord Hershell wrote:

> … the proper way to deal with such a statute as the *Bills of Exchange Act*, which was intended to be a code of the law relating to negotiable instruments … is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> … I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate … What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.[22]

In interpreting a code, concern for the internal coherence of the statute takes precedence over the presumption against changing the common law. The courts are alive to the possibility that the meaning or impact of existing rules or concepts may be affected by their integration into a coherent, self-contained scheme or by their interaction with new rules. As much as possible, the policies and values relied on in interpretation are derived from the code itself rather than the common law.[23] However, in so far as the code incorporates common law terms and concepts, courts may rely on the common law to interpret them.

Footnote(s)

1 [1988] S.C.J. No. 39, [1988] 1 S.C.R. 914 (S.C.C.).

2 *Ibid.*, at para. 25. See also *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, [2007] S.C.J. No. 42, 2007 SCC 42, [2007] 3 S.C.R. 217, at paras. 24*ff*. (S.C.C.); *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39, [2006] 2 S.C.R. 319, at paras. 4, 69 (S.C.C.); *Amos v. Insurance Corp. of British Columbia*, [1995] S.C.J. No. 74, [1995] 3 S.C.R. 405, at para. 15 (S.C.C.); *Canada v. Berg*, [2014] F.C.J. No. 109, 2014 FCA 25, at para. 23 (F.C.A.); *Manitoba Public Insurance Corp. v. University of Waterloo et al.*, [2007] M.J. No. 321, 2007 MBCA 107, 285 D.L.R. (4th) 122, at paras. 34-35 (Man. C.A.); *Payne v. Alb*, [1999] O.J. No. 1954, 44 O.R. (3d) 598, at 604-605 (Ont. C.A.); *Streeting v. Canada (Minister of Employment & Immigration)*, [1988] F.C.J. No. 127, 49 D.L.R. (4th) 145, at 151-52 (F.C.T.D.).

3 [1980] S.C.J. No. 82, [1980] 2 S.C.R. 430 (S.C.C.).

4 *Ibid.*, at 437.

5 [2005] S.C.J. No. 10, [2005] 1 S.C.R. 649 (S.C.C.).

6 *Ibid.*, at paras. 24-25.

7 [2011] S.C.J. No. 52, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.).

8 *Ibid.*, at para. 25 (S.C.C.).

9 *Ibid.*, at para. 36.

10 See *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2013] S.C.J. No. 42, 2013 SCC 42, at para. 36 (S.C.C.). See also *Cliffs Over Maple Bay (Re)*, [2011] B.C.J. No. 1550, 2011 BCCA 346, at paras. 22-26 (B.C.C.A.); *Point on the Bow Developments Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*, [2007] A.J. No. 655, 2007 ABCA 204, at paras. 20-22 (Alta. C.A.).

11 [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456 (S.C.C.).

12 *Ibid.*, at paras. 40-41. Emphasis in original. See also *Wolfe Island (Township) v. Ontario (Ministry of the Environment)*, [1995] O.J. No. 1537, 23 O.R. (3d) 737 (Ont. C.A.).

13 See *Woelk v. Halvorson*, [1980] S.C.J. No. 82, [1980] 2 S.C.R. 430 at 434 (S.C.C.).

14 See *Woelk v. Halvorson*, *ibid.*, at para. 12.

15 For an illustration of the sort of analysis that is required, see *Cuthbertson v. Rasouli*, [2013] S.C.J. No. 53, 2013 SCC 53, [2013] 3 S.C.R. 341, at paras. 29*ff*. (S.C.C.); *McKeen v. The Mortgage Makers Inc. and Libby*, [2009] N.B.J. No. 306, 2009 NBCA 61, at paras. 17*ff*. (N.B.C.A.).

16 [1998] S.C.J. No. 11, [1998] 1 S.C.R. 91 (S.C.C.).

17 *Ibid.*, at para. 26. See also *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] S.C.J. No. 37, [2000] 1 S.C.R. 842, at para. 38 (S.C.C.); *Garland v. Consumer's Gas Co.*, [1998] S.C.J. No. 76, [1998] 3 S.C.R. 112, at paras. 29, 51 (S.C.C.); *Director of Child and Family Services v. A.C.*, [2007] M.J. No. 26, 2007 MBCA 9, at paras. 57, 61 (Man. C.A.), confirmed in concurring judgment of McLachlin C.J. In *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30, [2009] 2 S.C.R. 181 (S.C.C.), the majority interpreted the legislation at issue in a manner that was consistent with the common law.

18 For discussion of the distinctive character of civil law codes, see P.-A. Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at pp. 28*ff*.

19 However, if legislation that was intended to provide an exhaustive code becomes inadequate to achieve its goals, the courts may re-assess whether it should be regarded as exclusive of the common law. This possibility is discussed below at §17.44-17.45.

20 [2011] B.C.J. No. 1034, 2011 BCCA 262 (B.C.C.A.).

21 *Ibid.*, at para. 29 (B.C.C.A.).

22 [1891] A.C. 107, at 144-45 (H.L.). See also *KBA Canada, Inc. v. Supreme Graphics Limited*, [2014] B.C.J. No. 544, 2014 BCCA 117, at paras. 20-32 (B.C.C.A.); *MacLeod Savings & Credit Union Ltd. v. Perrett*, [1981] S.C.J. No. 10, [1981] 1 S.C.R. 78, at 197 (S.C.C.).

23 See *Jackson v Canadian National Railway*, [2013] A.J. No. 1397, 2013 ABCA 440, at para. 41 (Alta. C.A.), leave to appeal refused [2014] S.C.C.A. No. 57 (S.C.C.).

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Common law thwarts legislative purpose

§17.30 ***Common law thwarts legislative purpose.*** Resort to the common law is impermissible if it would interfere with the policies embodied in legislation or defeat its purpose. This was an important consideration in *Zaidan Group Ltd. v. London (City)*,[6] a case concerned with the right of a municipal ratepayer to claim interest on an overpayment of its taxes. This overpayment had been refunded by the City of London without interest, as allowed under Ontario's *Assessment Act*. Although another provincial enactment conferred power on municipalities to pass by-laws authorizing the payment of interest on overpaid taxes, no by-law on the subject had been passed by the City of London. In these circumstances the ratepayer sought to rely on the common law doctrine of unjust enrichment. It argued that the municipality's use of money to which it was not entitled represented an enrichment for which there was no legal justification. This strategy did not succeed. As Carthy J.A. explained:

> … There is no question of a gap being left in the legislation for the common law to fill. The taxes are a statutory creation and the conditions surrounding their payment and repayment must be in the statutes associated with their creation. The common law cannot characterize competent legislation as unjust, and it would be doing so if it imposed an additional duty to pay interest on a statutory duty to levy and to refund a specific amount of money.[7]

Giving each municipality discretion to decide whether interest should be paid in these circumstances was a definitive solution, expressing a policy adopted by the legislature. To permit recourse to the common law to force the recovery of interest would undermine this policy; it would effectively take back the discretion which the legislature had chosen to confer on the municipality. Given the paramountcy of legislation, this could not be allowed.

Avoiding tautology

§17.31 ***Avoiding tautology.*** The presumption that the legislature does not legislate in vain is sometimes relied on in concluding that the legislature intended to preclude further recourse to the common law. In *Jackson v. Canadian National Railway*,[8] for example, the Alberta Court of Appeal concluded that the appellant could not rely on the common law duty to charge reasonable transportation rates given that the *Canada Transportation Act* established maximum rates and maximum revenue entitlements. The Court wrote:

> The chambers judge … found that the legislation underlying the maximum rate scales, the maximum revenue 'entitlements,' as well as the legislation allowing a one-time adjustment to the VRCPI [volume-related composite price index], would largely be rendered 'meaningless' (para 123) if the construction put forward by the appellant were adopted.
>
> We agree. In our view, there would be no reason to set maximum rate scales, and later maximum revenue entitlements, if the railway companies were not entitled to charge the maximum rates, or recover the maximum revenue entitlement, as

> calculated and administered by the Agency in accordance with the provisions of the *CTA*. … [9]

§17.32 When a statute codifies a common law rule, the courts generally conclude that the legislature intended reliance to be placed on the statute rather than the common law rule; otherwise, there would be no point in codifying the rule. In *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*,[10] for example, the Court ruled that an employee could not sue his union for breach of the common law duty of fair representation because that duty had been incorporated into the *Canada Labour Code*. L'Heureux-Dubé J. wrote:

> The common law duty adds nothing to the effectiveness of the Canada Labour Code and serves no purpose in situations where, as here, the Code applies.
>
> …
>
> … the common law duty of fair representation is neither 'necessary or appropriate' in circumstances where the statutory duty applies. Parliament has codified the common law duty and provided a new and superior method of remedying a breach. It is therefore reasonable to conclude that while the legislation does not *expressly* oust the common law duty of fair representation, it does however effect this end by necessary implication … [11]

Similarly, when a specific legislative provision applies to the same facts as a general common law rule or remedy and application of the specific provision would be pointless if the common law continued to apply, resort to the common law is likely to be excluded. This reasoning is illustrated in *Reference re Bill C-62, an Act to Amend the Excise Tax Act (Canada)*.[12] In that case the Government of Alberta argued that vendors of supplies who incurred expenses in collecting and remitting tax under the *Excise Tax Act* should be able to rely on the general law of restitution to recover those expenses from the federal Crown. In rejecting this argument, Lamer C.J. wrote:

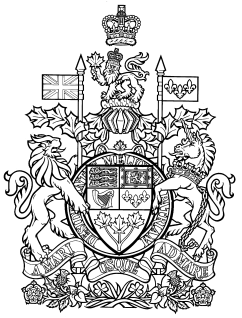
> … the GST Act is not entirely silent on the issue of compensation for costs of compliance. Section 346 of the statute provides a one-time transitional credit for small businesses to assist them in offsetting their initial compliance costs. In my opinion, this is a strong indication that Parliament did direct its attention to the question of compensation for compliance costs by enacting a provision providing partial compensation in certain cases. Even if the Attorney General for Alberta were correct to suggest that a more generous right to compensation exists at common law, in my view Parliament decided to substitute for that right its own view of the socially appropriate level of compensation for compliance costs.[13]

By enacting a specific provision addressing cost recovery, the legislature indicated that it had considered the matter but was not satisfied to leave it to the common law. The specific provision would be superfluous if the general law applied.

Implied exclusion

§17.33 ***Implied exclusion***. When the legislature codifies only part of the law relating to a matter, a court may rely on implied exclusion reasoning to conclude that the part of the law not codified was meant to be excluded. In *McClurg v. R.*,[14] for example, one of the

TAB 32



CANADA

Debates of the Senate

1st SESSION • 38th PARLIAMENT • VOLUME 142 • NUMBER 100

OFFICIAL REPORT
(HANSARD)

Friday, November 25, 2005

THE HONOURABLE SHIRLEY MAHEU
SPEAKER *PRO TEMPORE*

Senators from both sides have also been very generous in providing explanations. I have often bothered Senator Prud'homme with questions of procedure, because I was not familiar with them.

If I have upset anyone over the past few days, it is because I felt that, with a snap election on the way, using the procedure to try to pressure the other side into paying more attention to the substance of the bill was the only means at my disposal.

I have learned a lot from these procedures. The battle over this bill is not over. It may continue in another arena, but I would like us to carry it on, with all the friendships that I have developed in the Senate, during the next Parliament.

[*English*]

The Hon. the Speaker *pro tempore*: Honourable senators, pursuant to an Order of the Senate adopted earlier this day, the Senate will now suspend to the call of the chair. Is it agreed, honourable senators?

Hon. Senators: Agreed.

The Hon. the Speaker *pro tempore*: I do now leave the chair. I invite all honourable senators to the Speaker's quarters for a reception.

The Senate adjourned during pleasure.

• (1720)

[*Translation*]

The sitting was resumed.

ROYAL ASSENT

The Hon. the Speaker informed the Senate that the following communication had been received:

RIDEAU HALL

November 25, 2005

Mr. Speaker:

I have the honour to inform you that the Honourable Michel Bastarache, Puisne Judge of the Supreme Court of Canada, in his capacity as Deputy of the Governor General, signified royal assent by written declaration to the bills listed in the Schedule to this letter on the 25th day of November, 2005, at 4:57 p.m.

Yours sincerely,

Barbara Uteck
Secretary to the Governor General

The Honourable
The Speaker of the Senate
Ottawa

Bills Assented to Friday, November 25, 2005:

An Act to amend the Criminal Code (trafficking in persons) (*Bill C-49, Chapter 43, 2005*)

An Act to amend the Criminal Code (proceeds of crime) and the Controlled Drugs and Substances Act and to make consequential amendments to another Act (*Bill C-53, Chapter 44, 2005*)

An Act governing the operation of remote sensing space systems (*Bill C-25, Chapter 45, 2005*)

An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings (*Bill C-11, Chapter 46, 2005*)

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts (*Bill C-55, Chapter 47, 2005*)

An Act to provide first nations with the option of managing and regulating oil and gas exploration and exploitation and of receiving moneys otherwise held for them by Canada (*Bill C-54, Chapter 48, 2005*)

An Act to authorize payments to provide assistance in relation to energy costs, housing energy consumption and public transit infrastructure, and to make consequential amendments to certain Acts (*Bill C-66, Chapter 49, 2005*)

An Act to amend the Telecommunications Act (*Bill C-37, Chapter 50, 2005*)

An Act to amend the Export and Import of Rough Diamonds Act (*Bill S-36, Chapter 51, 2005*)

An Act to acknowledge that persons of Ukrainian origin were interned in Canada during the First World War and to provide for recognition of this event (*Bill C-331, Chapter 52, 2005*)

An Act respecting the regulation of commercial and industrial undertakings on reserve lands (*Bill C-71, Chapter 53, 2005*)

An Act to amend certain Acts in relation to financial institutions (*Bill C-57, Chapter 54, 2005*)

An Act to amend the Excise Tax Act (elimination of excise tax on jewellery) (*Bill C-259, Chapter 55, 2005*)

• (1730)

[*English*]

ADJOURNMENT

Leave having been given to revert to Government Notices of Motions:

Hon. Bill Rompkey (Deputy Leader of the Government): Honourable senators, with leave of the Senate, I move:

> That notwithstanding the orders of the Senate of November 23 and 25, 2005, when the Senate adjourns today, it do stand adjourned until Tuesday, November 29, 2005, at 2 p.m.

The Hon. the Speaker *pro tempore***:** Is leave granted, honourable senators?

Hon. Senators: Agreed.

Motion agreed to.

The Senate adjourned until Tuesday, November 29, 2005, at 2 p.m.

Appendix

(*see page 2211*)

Minister of Industry Ministre de l'Industrie

David L. Emerson
Ottawa, Canada K1A 0H5

NOV. 24 2005

The Honourable Jerahmiel S. Grafstein
Senator and Chair of the Standing Senate Committee
on Banking, Trade and Commerce
Room 217, East Block
The Senate of Canada
Ottawa, Ontario K1A OA4

Dear Senator Grafstein:

I am writing in response to observations made during your Committee's meeting of November 23, 2005, with respect to Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*. As the Committee noted, this bill is a very important piece of legislation that will have a significant impact on the economy, the protection of workers, and the life of many Canadians who face a situation of financial distress.

Bill C-55 contains a comprehensive and balanced reform of Canada's insolvency system. There is very strong and broad support for the policy objectives of the bill, which underscores the importance of securing its adoption by Parliament in a timely manner. However, given exceptional circumstances, the scrutiny of the detailed provisions of the bill has raised a number of implementation issues that deserve further consideration. In this regard, the government commits not to proceed with the coming into force of Bill C-55 before June 30, 2006. As soon as possible in 2006, the government, through the Leader of the Government in the Senate, will refer the matter to the Committee for further study.

I would like to thank the Committee for its diligence and cooperation.

Sincerely,

David L. Emerson

c.c. Mr. Gérald Lafrenière, Committee Clerk

Canada

The Thirty-eighth Parliament was dissolved by Proclamation of Her Excellency the Governor General on Tuesday, November 29, 2005

THE SENATE OF CANADA

PROGRESS OF LEGISLATION

(*indicates the status of a bill by showing the date on which each stage has been* ***completed***)

(1st Session, 38th Parliament)

Friday, November 25, 2005

(**Where royal assent is signified by written declaration, the Act is deemed to be assented to on the day on which the two Houses of Parliament have been notified of the declaration.*)

GOVERNMENT BILLS
(SENATE)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-10	A second Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law	04/10/19	04/10/26	Legal and Constitutional Affairs	04/11/25	0 observations	04/12/02	04/12/15	25/04
S-17	An Act to implement an agreement, conventions and protocols concluded between Canada and Gabon, Ireland, Armenia, Oman and Azerbaijan for the avoidance of double taxation and the prevention of fiscal evasion	04/10/28	04/11/17	Banking, Trade and Commerce	04/11/25	0	04/12/08	05/03/23*	8/05
S-18	An Act to amend the Statistics Act	04/11/02	05/02/02	Social Affairs, Science and Technology	05/03/07	0	05/04/20	05/06/29*	31/05
S-31	An Act to authorize the construction and maintenance of a bridge over the St. Lawrence River and a bridge over the Beauharnois Canal for the purpose of completing Highway 30	05/05/12	05/06/07	Transport and Communications	05/06/16	0	05/06/21	05/11/03	37/05
S-33	An Act to amend the Aeronautics Act and to make consequential amendments to other Acts	05/05/16	Bill withdrawn pursuant to Speaker's Ruling 05/06/14						
S-36	An Act to amend the Export and Import of Rough Diamonds Act	05/05/19	05/06/09	Energy, the Environment and Natural Resources	05/06/16	0	05/06/20	05/11/25*	51/05
S-37	An Act to amend the Criminal Code and the Cultural Property Export and Import Act	05/05/19	05/06/15	Foreign Affairs	05/06/29	0	05/07/18	05/11/25*	40/05
S-38	An Act respecting the implementation of international trade commitments by Canada regarding spirit drinks of foreign countries	05/05/31	05/06/15	Agriculture and Forestry	05/06/23	3	05/07/18	05/11/03	39/05
S-39	An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act	05/06/07	05/06/15	Legal and Constitutional Affairs					
S-40	An Act to amend the Hazardous Materials Information Review Act	05/06/09	05/06/30	Social Affairs, Science and Technology	05/09/29	0	05/10/20		

GOVERNMENT BILLS
(HOUSE OF COMMONS)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-2	An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act	05/06/14	05/06/20	Legal and Constitutional Affairs	05/07/18	0 observations	05/07/19	05/07/20*	32/05
C-3	An Act to amend the Canada Shipping Act, the Canada Shipping Act, 2001, the Canada National Marine Conservation Areas Act and the Oceans Act	05/03/21	05/04/14	Transport and Communications	05/06/09	0 observations	05/06/22	05/06/23*	29/05
C-4	An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment	04/11/16	04/12/09	Transport and Communications	05/02/15	0	05/02/22	05/02/24*	3/05
C-5	An Act to provide financial assistance for post-secondary education savings	04/12/07	04/12/08	Banking, Trade and Commerce	04/12/09	0 observations	04/12/13	04/12/15	26/04
C-6	An Act to establish the Department of Public Safety and Emergency Preparedness and to amend or repeal certain Acts	04/11/18	04/12/07	National Security and Defence	05/02/22	0	05/03/21	05/03/23*	10/05
C-7	An Act to amend the Department of Canadian Heritage Act and the Parks Canada Agency Act and to make related amendments to other Acts	04/11/30	04/12/09	Energy, the Environment and Natural Resources	05/02/10	0	05/02/16	05/02/24*	2/05
C-8	An Act to amend the Financial Administration Act, the Canada School of Public Service Act and the Official Languages Act	05/03/07	05/03/21	National Finance	05/04/14	0	05/04/19	05/04/21*	15/05
C-9	An Act to establish the Economic Development Agency of Canada for the Regions of Quebec	05/06/02	05/06/08	National Finance	05/06/16	0	05/06/21	05/06/23*	26/05
C-10	An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts	05/02/08	05/02/22	Legal and Constitutional Affairs	05/05/12	0 observations	05/05/16	05/05/19*	22/05
C-11	An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings	05/10/18	05/10/27	National Finance	05/11/24	0	05/11/25	05/11/25*	46/05
C-12	An Act to prevent the introduction and spread of communicable diseases	05/02/10	05/03/09	Social Affairs, Science and Technology	05/04/12	2	05/04/14	05/05/13*	20/05
C-13	An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act	05/05/12	05/05/16	Legal and Constitutional Affairs	05/05/18	0	05/05/19	05/05/19*	25/05

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-14	An Act to give effect to a land claims and self-government agreement among the Tlicho, the Government of the Northwest Territories and the Government of Canada, to make related amendments to the Mackenzie Valley Resource Management Act and to make consequential amendments to other Acts	04/12/07	04/12/13	Aboriginal Peoples	05/02/10	0	05/02/10	05/02/15*	1/05
C-15	An Act to amend the Migratory Birds Convention Act, 1994 and the Canadian Environmental Protection Act, 1999	04/12/14	05/02/02	Energy, the Environment and Natural Resources	05/05/17	0 observations	05/05/18	05/05/19*	23/05
C-18	An Act to amend the Telefilm Canada Act and another Act	04/12/13	05/02/23	Transport and Communications	05/03/22	0 observations	05/03/23	05/03/23*	14/05
C-20	An Act to provide for real property taxation powers of first nations, to create a First Nations Tax Commission, First Nations Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute and to make consequential amendments to other Acts	04/12/13	05/02/16	Aboriginal Peoples	05/03/10	0	05/03/21	05/03/23*	9/05
C-22	An Act to establish the Department of Social Development and to amend and repeal certain related Acts	05/06/09	05/06/21	Social Affairs, Science and Technology	05/07/18	0	05/07/20	05/07/20*	35/05
C-23	An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts	05/06/02	05/06/14	Social Affairs, Science and Technology	05/07/18	0	05/07/20	05/07/20*	34/05
C-24	An Act to amend the Federal-Provincial Fiscal Arrangements Act and to make consequential amendments to other Acts (fiscal equalization payments to the provinces and funding to the territories)	05/02/16	05/02/22	National Finance	05/03/08	0	05/03/09	05/03/10*	7/05
C-25	An Act governing the operation of remote sensing space systems	05/10/18	05/11/01	Foreign Affairs	05/11/24	0 observations	05/11/25	05/11/25*	45/05
C-26	An Act to establish the Canada Border Services Agency	05/06/14	05/06/29	National Security and Defence	05/11/01	0 observations	05/11/02	05/11/03	38/05
C-28	An Act to amend the Food and Drugs Act	05/10/19	05/11/01	Social Affairs, Science and Technology	05/11/22	0	05/11/23	05/11/25*	42/05
C-29	An Act to amend the Patent Act	05/02/15	05/03/07	Banking, Trade and Commerce	05/04/12	2	05/04/14	05/05/05*	18/05
C-30	An Act to amend the Parliament of Canada Act and the Salaries Act and to make consequential amendments to other Acts	05/04/13	05/04/14	National Finance	05/04/21	0	05/04/21	05/04/21*	16/05
C-33	A second Act to implement certain provisions of the budget tabled in Parliament on March 23, 2004	05/03/07	05/04/20	National Finance	05/05/03	0	05/05/10	05/05/13*	19/05

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-34	An Act for granting to Her Majesty certain sums of money for the public service of Canada for the financial year ending March 31, 2005 *(Appropriation Act No. 2, 2004-2005)*	04/12/13	04/12/14	—	—	—	04/12/15	04/12/15	27/04
C-35	An Act for granting to Her Majesty certain sums of money for the public service of Canada for the financial year ending March 31, 2005 *(Appropriation Act No. 3, 2004-2005)*	04/12/13	04/12/14	—	—	—	04/12/15	04/12/15	28/04
C-36	An Act to change the boundaries of the Acadie—Bathurst and Miramichi electoral districts	04/12/13	05/02/01	Legal and Constitutional Affairs	05/02/22	0 observations	05/02/23	05/02/24*	6/05
C-37	An Act to amend the Telecommunications Act	05/10/25	05/11/02	Transport and Communications	05/11/22	2 observations	05/11/24	05/11/25*	50/05
C-38	An Act respecting certain aspects of legal capacity for marriage for civil purposes	05/06/29	05/07/06	Legal and Constitutional Affairs	05/07/18	0	05/07/19	05/07/20*	33/05
C-39	An Act to amend the Federal-Provincial Fiscal Arrangements Act and to enact An Act respecting the provision of funding for diagnostic and medical equipment	05/02/22	05/03/08	Social Affairs, Science and Technology	05/03/10	0	05/03/22	05/03/23*	11/05
C-40	An Act to amend the Canada Grain Act and the Canada Transportation Act	05/05/12	05/05/16	Agriculture and Forestry	05/05/18	0	05/05/19	05/05/19*	24/05
C-41	An Act for granting to Her Majesty certain sums of money for the public service of Canada for the financial year ending March 31, 2005 *(Appropriation Act No. 4, 2004-2005)*	05/03/22	05/03/23	—	—	—	05/03/23	05/03/23*	12/05
C-42	An Act for granting to Her Majesty certain sums of money for the public service of Canada for the financial year ending March 31, 2006 *(Appropriation Act No. 1, 2005-2006)*	05/03/22	05/03/23	—	—	—	05/03/23	05/03/23*	13/05
C-43	An Act to implement certain provisions of the budget tabled in Parliament on February 23, 2005	05/06/16	05/06/21	National Finance	05/06/28	0	05/06/28	05/06/29*	30/05
C-45	An Act to provide services, assistance and compensation to or in respect of Canadian Forces members and veterans and to make amendments to certain Acts	05/05/10	05/05/10	National Finance	05/05/12	0	05/05/12	05/05/13*	21/05
C-48	An Act to authorize the Minister of Finance to make certain payments	05/06/28	05/07/06	National Finance	05/07/18	0 observations	05/07/20	05/07/20*	36/05
C-49	An Act to amend the Criminal Code (trafficking in persons)	05/10/18	05/11/01	Legal and Constitutional Affairs	05/11/24	0	05/11/25	05/11/25*	43/05
C-53	An Act to amend the Criminal Code (proceeds of crime) and the Controlled Drugs and Substances Act and to make consequential amendments to another Act	05/11/22	05/11/22	Legal and Constitutional Affairs	05/11/24	0	05/11/25	05/11/25*	44/05

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-54	An Act to provide first nations with the option of managing and regulating oil and gas exploration and exploitation and of receiving moneys otherwise held for them by Canada.	05/11/22	05/11/22	Aboriginal Peoples	05/11/24	0 observations	05/11/25	05/11/25*	48/05
C-55	An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts	05/11/22	05/11/23	Banking, Trade and Commerce	05/11/24	0 observations	05/11/25	05/11/25*	47/05
C-56	An Act to give effect to the Labrador Inuit Land Claims Agreement and the Labrador Inuit Tax Treatment Agreement	05/06/16	05/06/20	Aboriginal Peoples	05/06/21	0	05/06/22	05/06/23*	27/05
C-57	An Act to amend certain Acts in relation to financial institutions	05/11/23	05/11/25	—	—	—	05/11/25	05/11/25*	54/05
C-58	An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2006 (*Appropriation Act No. 2, 2005-2006*)	05/06/15	05/06/21	—	—	—	05/06/22	05/06/23*	28/05
C-66	An Act to authorize payments to provide assistance in relation to energy costs, housing energy consumption and public transit infrastructure, and to make consequential amendments to certain Acts	05/11/22	05/11/22	Energy, the Environment and Natural Resources	05/11/24	0	05/11/25	05/11/25*	49/05
C-71	An Act respecting the regulation of commercial and industrial undertakings on reserve lands	05/11/23	05/11/25	—	—	—	05/11/25	05/11/25*	53/05

COMMONS PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-259	An Act to amend the Excise Tax Act (elimination of excise tax on jewellery)	05/06/16	05/11/23	Banking, Trade and Commerce	05/11/25	0	05/11/25	05/11/25*	55/05
C-302	An Act to change the name of the electoral district of Kitchener—Wilmot—Wellesley—Woolwich	04/12/02	04/12/07	Legal and Constitutional Affairs	05/02/17	0 observations	05/02/22	05/02/24*	4/05
C-304	An Act to change the name of the electoral district of Battle River	04/12/02	04/12/07	Legal and Constitutional Affairs	05/02/17	0 observations	05/02/22	05/02/24*	5/05
C-331	An Act to acknowledge that persons of Ukrainian origin were interned in Canada during the First World War and to provide for recognition of this event	05/11/23	05/11/25	—	—	—	05/11/25	05/11/25*	52/05

SENATE PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-2	An Act to amend the Citizenship Act (Sen. Kinsella)	04/10/06	04/10/20	Social Affairs, Science and Technology	04/10/28	0	04/11/02	05/05/05*	17/05

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-3	An Act to amend the Official Languages Act (promotion of English and French) (Sen. Gauthier)	04/10/06	04/10/07	Official Languages	04/10/21	0	04/10/26 Senate agreed to Commons amendments 05/11/22	05/11/25*	41/05
S-4	An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act in order to affirm the meaning of marriage (Sen. Cools)	04/10/06	Dropped from Order Paper pursuant to Rule 27(3) 05/02/22						
S-5	An Act to repeal legislation that has not come into force within ten years of receiving royal assent (Sen. Banks)	04/10/07	04/10/26	Transport and Communications (withdrawn) 04/10/28 Legal and Constitutional Affairs					
S-6	An Act to amend the Canada Transportation Act (running rights for carriage of grain) (Sen. Banks)	04/10/07							
S-7	An Act to amend the Supreme Court Act (references by Governor in Council) (Sen. Cools)	04/10/07	Dropped from Order Paper pursuant to Rule 27(3) 05/02/22						
S-8	An Act to amend the Judges Act (Sen. Cools)	04/10/07	Dropped from Order Paper pursuant to Rule 27(3) 05/06/16						
S-9	An Act to amend the Copyright Act (Sen. Day)	04/10/07	04/10/20	Social Affairs, Science and Technology					
S-11	An Act to amend the Criminal Code (lottery schemes) (Sen. Lapointe)	04/10/19	04/10/26	Legal and Constitutional Affairs	05/04/12	2 observations	05/05/17		
S-12	An Act concerning personal watercraft in navigable waters (Sen. Spivak)	04/10/19	05/06/01	Energy, the Environment and Natural Resources	05/06/29	0	05/11/23		
S-13	An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate) (Sen. Oliver)	04/10/19	04/11/17	Legal and Constitutional Affairs					
S-14	An Act to protect heritage lighthouses (Sen. Forrestall)	04/10/20	04/11/02	Social Affairs, Science and Technology	05/03/21	0	05/03/23		
S-15	An Act to prevent unsolicited messages on the Internet (Sen. Oliver)	04/10/20		Subject matter 05/02/10 Transport and Communications					

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-16	An Act providing for the Crown's recognition of self-governing First Nations of Canada (Sen. St. Germain, P.C.)	04/10/27		Subject matter 05/02/22 Aboriginal Peoples					
S-19	An Act to amend the Criminal Code (criminal interest rate) (Sen. Plamondon)	04/11/04	04/12/07	Banking, Trade and Commerce	05/06/23	1	05/06/28		
S-20	An Act to provide for increased transparency and objectivity in the selection of suitable individuals to be named to certain high public positions (Sen. Stratton)	04/11/30		Subject matter 05/02/02 Legal and Constitutional Affairs					
S-21	An Act to amend the criminal Code (protection of children) (Sen. Hervieux-Payette, P.C.)	04/12/02	05/03/10	Legal and Constitutional Affairs					
S-22	An Act to amend the Canada Elections Act (mandatory voting) (Sen. Harb)	04/12/09	Dropped from Order Paper pursuant to Rule 27(3) 05/10/18						
S-23	An Act to amend the Royal Canadian Mounted Police Act (modernization of employment and labour relations) (Sen. Nolin)	05/02/01	Dropped from Order Paper pursuant to Rule 27(3) 05/11/25	Subject matter 05/07/18 Legal and Constitutional Affairs					
S-24	An Act to amend the Criminal Code (cruelty to animals) (Sen. Bryden)	05/02/03	05/03/10	Legal and Constitutional Affairs					
S-26	An Act to provide for a national cancer strategy (Sen. Forrestall)	05/02/16	05/06/01	Social Affairs, Science and Technology					
S-28	An Act to amend the Bankruptcy and Insolvency Act (student loan) (Sen. Moore)	05/03/23	05/06/01	Banking, Trade and Commerce					
S-29	An Act respecting a National Blood Donor Week (Sen. Mercer)	05/05/05	05/06/01	Social Affairs, Science and Technology					
S-30	An Act to amend the Bankruptcy and Insolvency Act (RRSP and RESP) (Sen. Biron)	05/05/10							
S-32	An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act in order to affirm the meaning of marriage (Sen. Cools)	05/05/12	Dropped from Order Paper pursuant to Rule 27(3) 05/11/03						
S-34	An Act to amend the Department of Justice Act and the Supreme Court Act to remove certain doubts with respect to the constitutional role of the Attorney General of Canada and to clarify the constitutional relationship between the Attorney General of Canada and Parliament (Sen. Cools)	05/05/16							

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-35	An Act to amend the State Immunity Act and the Criminal Code (terrorist activity) (Sen. Tkachuk)	05/05/18	Dropped from Order Paper pursuant to Rule 27(3) 05/11/25						
S-41	An Act to amend the Department of Foreign Affairs and International Trade Act (human rights reports) (Sen. Kinsella)	05/06/21	05/11/22	Human Rights					
S-42	An Act to amend the Food and Drugs Act (clean drinking water) (Sen. Grafstein)	05/07/20							
S-43	An Act to amend the Criminal Code (suicide bombings) (Sen. Grafstein)	05/09/28							
S-44	An Act to amend the Public Service Employment Act (Sen. Ringuette)	05/09/28							
S-45	An Act to amend the Canadian Human Rights Act (Sen. Kinsella)	05/10/25		Subject matter 05/11/24 Human Rights					
S-46	An Act respecting a National Philanthropy Day (Sen. Grafstein)	05/11/03							
S-47	An Act to amend the Criminal Code (impaired driving) and other Acts (Sen. LeBreton)	05/11/22							

PRIVATE BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-25	An Act to amend the Act of incorporation of The General Synod of the Anglican Church of Canada (Sen. Rompkey, P.C.)	05/02/10	05/03/23	Banking, Trade and Commerce	05/05/05	0 observations	05/05/10	05/05/19*	56/05
S-27	An Act respecting Scouts Canada (Sen. Di Nino)	05/02/17	05/04/19	Legal and Constitutional Affairs					

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Friday, November 25, 2005

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TAB 33

Registration
SI/2009-68 August 19, 2009

WAGE EARNER PROTECTION PROGRAM ACT

AN ACT TO AMEND THE BANKRUPTCY AND INSOLVENCY ACT, THE COMPANIES' CREDITORS ARRANGEMENT ACT, THE WAGE EARNER PROTECTION PROGRAM ACT AND CHAPTER 47 OF THE STATUTES OF CANADA, 2005

Order Fixing September 18, 2009 as the Date of the Coming into Force of Certain Sections of the Acts

P.C. 2009-1207 July 30, 2009

Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry,

(*a*) pursuant to section 141[a] of *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, chapter 47 of the Statutes of Canada, 2005, hereby fixes September 18, 2009 as the day on which sections 2 to 42, 44 to 54, 56, 58, 59, 63 to 66, 68 to 87, 89 to 105, 108 to 131 and 136 to 139 of that Act come into force; and

(*b*) pursuant to section 113 of *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, chapter 36 of the Statutes of Canada, 2007, hereby fixes September 18, 2009 as the day on which subsection 1(1), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 34, 35, 37, 42, 44, 46 to 48 and 50, subsection 51(1), sections 55 to 57, subsection 58(2) and section 67 of that Act come into force.

EXPLANATORY NOTE

(*This note is not part of the Order*.)

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts received royal assent on November 25, 2005. That Act establishes the Wage Earner Protection Program, introduces comprehensive reform to Canadian insolvency legislation and makes consequential amendments to other Acts.

The Order brings sections 2 to 42, 44 to 54, 56, 58, 59, 63 to 66, 68 to 87, 89 to 105, 108 to 131 and 136 to 139 of that Act into force on September 18, 2009.

An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005 makes technical amendments to those Acts and received royal assent on December 14, 2007.

[a] S.C. 2007, c. 36, s. 109

Enregistrement
TR/2009-68 Le 19 août 2009

LOI SUR LE PROGRAMME DE PROTECTION DES SALARIÉS
LOI MODIFIANT LA LOI SUR LA FAILLITE ET L'INSOLVABILITÉ, LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, LA LOI SUR LE PROGRAMME DE PROTECTION DES SALARIÉS ET LE CHAPITRE 47 DES LOIS DU CANADA (2005)

Décret fixant au 18 septembre 2009 la date d'entrée en vigueur de certains articles des Lois

C.P. 2009-1207 Le 30 juillet 2009

Sur recommandation du ministre de l'Industrie, Son Excellence la Gouverneure générale en conseil :

a) en vertu de l'article 141[a] de la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, chapitre 47 des Lois du Canada (2005), fixe au 18 septembre 2009 la date d'entrée en vigueur des articles 2 à 42, 44 à 54, 56, 58, 59, 63 à 66, 68 à 87, 89 à 105, 108 à 131 et 136 à 139 de cette loi;

b) en vertu de l'article 113 de la *Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, chapitre 36 des Lois du Canada (2007), fixe au 18 septembre 2009 la date d'entrée en vigueur du paragraphe 1(1), des articles 3 et 6, du paragraphe 9(3), des articles 12 et 13, des paragraphes 14(2) et (3), 15(2) et (3), 16(2) et (3) et 17(2), des articles 19 à 22, 34, 35, 37, 42, 44, 46 à 48 et 50, du paragraphe 51(1), des articles 55 à 57, du paragraphe 58(2) et de l'article 67 de cette loi.

NOTE EXPLICATIVE

(*La présente note ne fait pas partie du décret*.)

La *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence* a reçu la sanction royale le 25 novembre 2005. Elle établit le Programme de protection des salariés et apporte une réforme en profondeur des lois canadiennes sur l'insolvabilité ainsi que des modifications à d'autres lois en conséquence.

Le décret fixe au 18 septembre 2009 la date d'entrée en vigueur des articles 2 à 42, 44 à 54, 56, 58, 59, 63 à 66, 68 à 87, 89 à 105, 108 à 131 et 136 à 139 de cette loi.

La *Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)* apporte des modifications d'ordre technique à ces lois et a reçu la sanction royale le 14 décembre 2007.

[a] L.C. 2007, ch. 36, art. 109

The Order brings subsection 1(1), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 34, 35, 37, 42, 44, 46 to 48 and 50, subsection 51(1), sections 55 to 57, subsection 58(2) and section 67 of that Act into force on September 18, 2009.

Le décret fixe au 18 septembre 2009 la date d'entrée en vigueur du paragraphe 1(1), des articles 3 et 6, du paragraphe 9(3), des articles 12 et 13, des paragraphes 14(2) et (3), 15(2) et (3), 16(2) et (3) et 17(2), des articles 19 à 22, 34, 35, 37, 42, 44, 46 à 48 et 50, du paragraphe 51(1), des articles 55 à 57, du paragraphe 58(2) et de l'article 67 de cette loi.

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 CRYSTALLEX INTERNATIONAL CORPORATION
Applicant

Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE APPLICANT CRYSTALLEX INTERNATIONAL CORPORATION RE: STAY EXTENSION AND SEALING OF INFORMATION

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