Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
- COMMERCIAL LIST -

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

BRIEF OF AUTHORITIES

(Motion Returnable February 1, 2010)

February 1, 2010

GOODMANS LLP
Suite 3400, 333 Bay Street
Toronto, ON M5H 2S7

Fred Myers LSUC#: 26301A
Joseph Pasquariello LSUC#: 37389C

Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for The Bank of New York Mellon in its capacity as Administrative Agent for the Second Lien Lenders

INDEX

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INDEX

TAB 1

2005 CarswellOnt 6818

Stelco Inc., Re

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

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

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

Ontario Court of Appeal

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

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Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

Counsel: Paul Macdonald, Andrew Kent, Brett Harrison for Informal Independent Converts' Committee

Michael E. Barrack, Geoff R. Hall for Stelco Inc.

Robert Staley, Alan Gardner for Senior Debenture Holders

Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services

Ken Rosenberg for United Steelworkers of America

A Kauffman for Tricap Management Ltd.

Kyla Mahar for Monitor

Murray Gold for Salaried Retirees

Heath Whitley for CIBC

Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Practice and procedure

Leave to appeal order made in Companies' Creditors Arrangement Act proceeding — S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote on Plan, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders sought leave to appeal dismissal of motion — Leave to appeal granted — Leave is only sparingly granted with regard to orders made in Companies' Creditors Arrangement Act (CCAA) proceedings because of their "real time" dynamic and because of generally discretionary character underlying many of orders made by supervising judges in such proceedings — Here, leave to appeal was granted because proposed appeal raised issue of significance to practice, namely nature of common interest test to be applied by courts for purposes of classification of creditors in CCAA proceedings — Where there is urgency that leave application be expedited in public interest, court will do so in this area of law as it does in other area; however, where what is involved is essentially attempt to review discretionary order made on facts of case, in tightly supervised process with which judge is intimately familiar, collapsed process that was made available in this particular situation will not generally be afforded — Issues raised on this appeal, and timing factor involved, warranted expedited procedure that was ordered.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders appealed from dismissal of motion — Appeal dismissed — No error could be found in supervising judge's factual findings or in his exercise of discretion in determining that subordinated debenture holders should remain in same class as other creditors — There was no material distinction between legal rights of subordinated debenture holders and those of senior debt holders vis-à-vis S Inc. — Supervising judge was correct in law in applying principles dealing with commonality of interest test as summarized in recent case, which principles were cited with approval by Court of Appeal in another recent decision — Principles applied by supervising judge were not inconsistent with earlier decision of present court in other case dealing with common interest test, because differing interests in question were not different legal interest as between two creditors; they were different legal interests as between each of creditors and debtor company — Case cited by subordinated debenture holders did not deal with issue of whether creditors with divergent interests as amongst themselves, as opposed to divergent legal interests vis-à-vis debtor company, could be forced to vote as members of common class — Creditors should be classified in accordance with their contract rights, i.e., according to their respective interests in debtor company — To hold classification and voting process hostage to vagaries of potentially infinite variety of disputes, as between already disgruntled creditors who had been caught in maelstrom of Companies' Creditors Arrangement Act (CCAA) restructuring, would run risk of hobbling that process unduly and could lead to very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges have warned might well defeat purpose of CCAA.

Cases considered by *Blair J.A.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) —

referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 623, 19 C.B.R. (4th) 12 (Alta. Q.B.) — followed

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32, 1991 CarswellNS 36 (N.S. T.D.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 1988 CarswellAlta 319 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166, 1988 CarswellBC 556 (B.C. S.C.) — referred to

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 1990 CarswellNS 33 (N.S. T.D.) — referred to

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321, 1988 CarswellAlta 291 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — referred to

Sovereign Life Assurance Co. v. Dodd (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) — referred to

Wellington Building Corp., Re (1934), 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626, 1934 CarswellOnt 103 (Ont. S.C.) — referred to

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Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Joint Stock Companies Arrangements Act, 1870 (33 & 34 Vict.), c. 104

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

***Blair J.A.*:**

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").[FN1] Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

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5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, $228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt[FN2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

> a) whether the point on appeal is of significance to the practice;
>
> b) whether the point is of significance to the action;
>
> c) whether the appeal is *prima facie* meritorious or frivolous; and
>
> d) whether the appeal will unduly hinder the progress of the action.
>
> See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal*

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Products Inc.

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act[FN3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

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22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.

4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held

first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, *supra*,); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*; *Fairview Industries Ltd., Re*, *supra*; *Woodward's Ltd., Re*, *supra*. In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)*[FN4] and *Wellington Building Corp., Re*, *supra*[FN5]. Examples of the latter include *Sklar-Peppler*, *supra*[FN6] and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.)[FN7].

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re*, *supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third

party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the

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maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

***Goudge J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Application granted; appeal dismissed.

FN1 R.S.C. 1985, c. C-36, as amended.

FN2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

FN3 The *Joint Stock Companies Arrangement Act*, 1870.

FN4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

FN5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

FN6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".

FN7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

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TAB 2

2000 CarswellOnt 2812

Lederer v. 372116 Ontario Ltd.

Sonya Lederer and Maxine Cooper, Applicants and 372116 Ontario Ltd., c.o.b. Hemispheres International Manufacturing Company, Respondent

Ontario Superior Court of Justice [Commercial List]

Nordheimer J.

Heard: July 26, 2000
Judgment: August 8, 2000
Docket: 00-CL-3777

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Counsel: *Gordon D. Capern* and *Megan E. Shortreed*, for Applicants.

P. David McCutcheon, for Respondent, Hemispheres International Manufacturing Company.

Donald H. Jack and *Mark Adilman*, for proposed Respondent, Allan Fenwick.

Joseph M. Steiner and *Lindsay P. Hill*, for proposed Respondents, Keith Ray, KPMG, LLP & Wm. Eisenberg & Co.

Ronald Slaght, Q.C. and *Risa Kirshblum*, for proposed Respondent, Susan Fenwick.

Subject: Corporate and Commercial; Civil Practice and Procedure

Corporations --- Shareholders — Shareholders' remedies — Derivative actions — Under statute — Miscellaneous issues

Plaintiffs were sisters of AF, who was sole officer and director of HI Co. — Plaintiffs each owned 30 per cent of HI Co. and AF owned remaining 40 per cent — Plaintiffs brought application for leave under s. 246 of Ontario Business Corporations Act to commence derivative action against AF and various defendants — Proposed defendants brought motion to be added as intervening respondents in application — Issue was whether proposed intervenors were already adequately represented by presence of HI Co. and AF — Motion dismissed — No reason in principle why proposed intervenors should become involved in issues between plaintiffs and AF — Only issue to be determined on application was whether derivative action should be allowed to advance — Dismissing motion would not preclude any of proposed intervenors from exercising their rights to bring later motions to strike out statement of claim as against them — Business Corporations Act, R.S.O. 1990, c. B.16, s. 246.

Practice --- Pre-trial procedures — Miscellaneous procedures

Plaintiffs were sisters of AF, who was sole officer and director of HI Co. — Plaintiffs each owned 30 per cent of HI Co. and AF owned remaining 40 per cent — Plaintiffs brought application for leave under s. 246 of Ontario Business Corporations Act to commence derivative action against AF and various defendants — AF brought motion to seal all or part of court file — AF's argument that information was confidential and potentially harmful was rejected — Motion dismissed — No societal value found in shielding financial information from public view — No societal value found in shielding information to avoid potential exposure of HI Co. to ongoing litigation in U.S. — Business Corporations Act, R.S.O. 1990, c. B.16, s. 246.

Cases considered by *Nordheimer J.*:

Ethyl Canada Inc. v. Canada (Attorney General) (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Haal Securities Ltd. v. Goldhar (1985), 6 C.P.C. (2d) 225 (Ont. Master) — distinguished

Intercontinental Precious Metals Inc. v. Cooke (1993), 10 B.L.R. (2d) 203, 88 B.C.L.R. (2d) 101, [1994] 4 W.W.R. 66 (B.C. S.C.) — distinguished

M. v. H. (1994), 20 O.R. (3d) 70, 9 R.F.L. (4th) 94, 33 C.P.C. (3d) 337 (Ont. Gen. Div.) — applied

MacIntyre v. Nova Scotia (Attorney General), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre*) 65 C.C.C. (2d) 129 (S.C.C.) — referred to

Marc-Jay Investments Inc. v. Levy (1974), 5 O.R. (2d) 235, 50 D.L.R. (3d) 45 (Ont. H.C.) — applied

Publow v. Wilson (**1994)**, 9http://ecarswell.westlaw.com/Find/Default.wl?rs=WLCA1.0&vr=2.0&DB=6407&FindType=Y&SerialNum=1994409063**C.C.E.L.** (**2d)** **22**, 36http://ecarswell.westlaw.com/Find/Default.wl?rs=WLCA1.0&vr=2.0&DB=6407&FindType=Y&SerialNum=1994409063**C.P.C.** (**3d)** **33**, 59http://ecarswell.westlaw.com/Find/Default.wl?rs=WLCA1.0&vr=2.0&DB=6407&FindType=Y&SerialNum=1994409063**C.P.R. (3d) 294** (Ont. Gen. Div.) — applied

Redipac Recycling Corp., Re (1998), 9 C.B.R. (4th) 291 (Ont. Bktcy.) — considered

Richardson Greenshields of Canada Ltd. v. Kalmacoff (1995), 22 O.R. (3d) 577, 80 O.A.C. 98, 123 D.L.R. (4th) 628, 18 B.L.R. (2d) 197 (Ont. C.A.) — distinguished

Starr v. Puslinch (Township) (1976), 12 O.R. (2d) 40 (Ont. Dist. Ct.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 246 — referred to

s. 246(1) — referred to

s. 246(2) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 13.01 — considered

R. 13.01(1) — referred to

R. 13.01(1)(b) — considered

R. 13.01(2) — referred to

R. 30.1 — referred to

MOTION for intervenor status in application for leave to bring derivative action; MOTION to seal all or part of court file in proposed action.

***Nordheimer J.*:**

1 There are two sets of motions before me regarding this application. There are motions by Allan Fenwick, by Keith Ray, KPMG, LLP and Wm. Eisenberg & Co. and by Susan Fenwick, in which all of those parties seek to be added as intervening respondents to the application. There are also motions by Allan Fenwick and by the respondent, Hemispheres, to seal all or a portion of the court record.

2 The main application involves a request by Ms. Lederer and Ms. Cooper, both of whom are shareholders in Hemispheres, for leave pursuant to section 246 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, to commence a derivative action in the name of Hemispheres against Allan Fenwick, various companies which it is alleged that Allan Fenwick controls, Susan Fenwick, certain Fenwick Family Trusts and Keith Ray, KPMG, LLP and Wm. Eisenberg & Co.

3 I was advised at the outset of these motions that the applicants had consented to the addition of Allan Fenwick as a respondent to the main application. The applicants, however, oppose the addition of the other proposed intervenors. The applicants also oppose the relief sought regarding the sealing of all or a portion of the court record.

4 It is unnecessary for the purpose of these motions to delve very deeply into the underlying allegations in the proposed derivative action. Put shortly, the applicants and Allan Fenwick are sisters and brother. The applicants each own 30% of Hemispheres and Allan Fenwick owns the remaining 40%. Allan Fenwick is the sole officer and director of Hemispheres. Hemispheres is the creation of the father of these parties and represents his effort to pass on to them the business he had created with the understanding that his son would run the business but his daughters would have an entitlement to share in its profits and value. In essence the applicants contend that Allan Fenwick has used his position as the controlling mind of Hemispheres to divert assets, opportunities, income and other assets of Hemispheres to his own benefit or to the benefit of entities which he controls. The applicants contend that Susan Fenwick, the spouse of Allan Fenwick, participated, and aided Allan Fenwick, in this diversion of Hemispheres assets. They applicants also contend that Keith Ray and his employers, Wm. Eisenberg & Co. and KPMG, LLP similarly participated, and aided Allan Fenwick, in this diversion of Hemispheres assets through their role as Hemispheres' accountants.

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The motions to intervene

5 These two motions raise the issue of who is entitled to notice of, or to participate in, an application for leave to commence a derivative action. Each of the proposed intervenors who seek to be added as respondents to the application assert that they should be entitled to participate in the application because they may be adversely affected by its outcome in the sense that, if leave is granted, they will all become defendants to a complex and costly piece of litigation. The applicants, on the other hand, assert that the issue of whether leave should be granted to commence a derivative action is an issue solely between the applicants on the one hand and the company, in whose name they wish to have leave to commence the intended proceeding, on the other.

6 The right to commence a derivative action is contained in section 246 of the *Ontario Business Corporations Act* which states, in part:

(1) Derivative actions — Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(2) Idem — No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) and the court is satisfied that,

(a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

7 The proposed intervenors point out that there is nothing in section 246 which stipulates who must be parties to an application under that section. The proposed intervenors say therefore that one must turn to the *Rules of Civil Procedure* for guidance. Rule 13.01 governs motions for leave to intervene in a proceeding as an added party. It states:

(1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

8 The proposed intervenors assert that they will be affected by the judgment in the application and therefore that they qualify under rule 13.01(1)(b) to seek to intervene in the application. The applicants answer that the proposed inter-

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venors will not be adversely affected by the decision regarding the derivative action since, regardless of the outcome of that application, the proposed action is going to proceed in one form or another due to the fact that the applicants have personal claims to advance against the proposed defendants. Therefore, the applicants say that the proposed intervenors will be facing all of the costs and burdens of the proceeding in any event.

9 I am prepared to accept that the proposed intervenors are correct in their submissions that they may be adversely affected by the results of the application. It does seem to me that the prospect of being drawn into a complex piece of litigation with all its attendant costs and inconvenience is sufficient to constitute an adverse result for the proposed intervenors even if they may face those consequences in any event. If the derivative action is allowed to proceed, it will clearly increase the scope of the proceeding and therefore the impact on the proposed intervenors. Consequently, it is still an adverse result for the proposed intervenors to have to face the derivative claims.

10 However, that is not the end of the inquiry. It is clear that the decision to add a person as a party to a proceeding under rule 13.01 is a discretionary one. It is not sufficient merely to fit oneself within the provisions of the rule. The proposed intervenors must still satisfy the court that the court should exercise its discretion to add them as parties to the application. As the Divisional Court said in *Starr v. Puslinch (Township)* (1976), 12 O.R. (2d) 40 (Ont. Dist. Ct.) by Grange J. at p. 46:

> I also believe that it is clear from the cases that even when the applicant satisfies that condition it is entirely discretionary in the Court whether he will be allowed to intervene or not, and the Court may always decline the application where it considers that the interest of the applicant is already adequately represented.

11 The question then becomes whether the interests of the proposed intervenors are already adequately represented on the application from the presence of both Hemispheres and of Allan Fenwick. In that regard, some reference must be had to the considerations that the court looks at in determining whether leave to commence a derivative action will be granted. In *Marc-Jay Investments Inc. v. Levy* (1974), 5 O.R. (2d) 235 (Ont. H.C.), Mr. Justice O'Leary set out the considerations as follows, at p. 237:

> It is obvious that a Judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. Where the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such action is in the interest of the shareholders, then leave to bring the action should be given.

and later on the same page:

> I am not to deny leave to bring an action simply because on a weighing of the evidence I should decide it is unlikely that the action will be successful.

12 The proposed intervenors say that Hemispheres and Allan Fenwick are not in a position to advance the arguments on behalf of them as to why the proposed action does not satisfy this test nor should they bear the burden of trying to advance those arguments. The proposed intervenors contend that they may have information within their possession that would be unknown to Hemispheres and Allan Fenwick and which those parties would consequently not be in a position to place before the court on the hearing of the application. While I accept that theoretical possibility may exist, it seems to me on a motion for leave to intervene as an added party, if such information is in existence, the proposed intervenors had some obligation to place that information, or at least a summary of it, before the court so that the court could consider its likely impact on the application. Not only was such information not placed before me, the proposed intervenors expressly stated that they had no current intention of filing any additional evidence on the application. Instead, they said that they were content to cross-examine the applicants' on their affidavits and to make submissions at the hearing of the application.

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13 Further, assuming that there is some information within the possession of the proposed intervenors that would impact on the outcome of the application, I fail to see why that information cannot be provided by the proposed intervenors to either or both of Hemispheres and Allan Fenwick for their use on the application. Keith Ray is said to be a long standing friend and business associate of Allan Fenwick and is the point man for Hemispheres' accountants. I would have expected that if Hemispheres' accountants had any information that would be of assistance to their client in respect of this matter, they would share that information with Hemispheres regardless of whether they were a target of the proposed derivative action or not. Susan Fenwick is the wife of Allan Fenwick. Again, I would assume that she would share any information she has with her husband. I do not know of any rule or other impediment that would prevent them from providing such information to Hemispheres and to Allan Fenwick to assist them in resisting the application.

14 If one returns to the wording of section 246 of the *Ontario Business Corporations Act*, the court must be satisfied that "the directors" have failed to diligently prosecute the action and it must appear to be in the interests of the corporation that the action be brought. It is clear that the determination of whether leave is to be granted is to be examined principally from the point of view of the corporation. When I consider the wording of the section with the enunciation of the test contained in *Marc-Jay Investments Inc.*, it is apparent that the motion for leave is not intended to be akin to a summary judgment motion as to the likely success of the claim. Rather, the court needs only to be satisfied that there is some merit to the claim to permit it to go forward. It seems to me therefore that there is a fairly strong argument, when all of those considerations are taken into account, that there is no role to be played by the proposed defendants in the application for leave to commence the derivative action.

15 Finally, counsel advised me that there appears to be only one existing authority on the issue as to who should be allowed to participate in the application for leave to commence a derivative action. In *Redipac Recycling Corp., Re* (1998), 9 C.B.R. (4th) 291 (Ont. Bktcy.) D. Lane J. said at para. 12:

> It was incorporated under the *O.B.C.A.* and the bringing of a derivative action on its behalf is governed by s. 246 of that Act which specifically requires notice "to the directors of the corporation." It seems to me that, if the legislature had intended to require a broader notice than that, it would have said so. *In principle there is no reason why the proposed defendants should become involved in a matter that is simply between the complainant and the directors of the company.* No case was drawn to my attention in which it was held that such notice had to be given. The case of *Richardson Greenshields v. Kalmacoff* (1995), 22 O.R. (3d) 577, is not such a case. The proposed defendants in the derivative action were indeed represented at the motion for leave but that was because they were the directors of the corporation and as such were statutorily required to be served. The issue of their status to be present at the motion as proposed defendants could not therefore arise. (emphasis added)

16 The proposed intervenors submitted that Mr. Justice Lane was in error in his conclusion in *Redipac Recycling Corp.* and that I should not follow it. I do agree with their point that the statement by Mr. Justice Lane that the directors of the corporation were "statutorily required to be served" is not technically correct. The *OBCA* strictly requires that the directors be given notice only of the intention to apply and says nothing regarding notice of the application itself. Having said that, however, it strikes me that it would be a most unusual situation where one would not give notice of an application to stipulated parties where a statute required that notice of the intention to bring the application had to be given to such parties. I believe that logic may well explain why Mr. Justice Lane said what he did above. In any event, the quibble over that particular statement does not detract from the fundamental point that Mr. Justice Lane made, and with which I find myself in complete agreement, that there is no reason in principle why the proposed defendants should become involved in an issue that is fundamentally one between the complainants and the directors of the corporation.

17 The proposed intervenors rely on *Haal Securities Ltd. v. Goldhar* (1985), 6 C.P.C. (2d) 225 (Ont. Master), *Intercontinental Precious Metals Inc. v. Cooke* (1993), 88 B.C.L.R. (2d) 101 (B.C. S.C.), and *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 123 D.L.R. (4th) 628 (Ont. C.A.) but those cases do not, as both counsel for the

proposed intervenors fairly conceded, consider the issue directly. In *Haal Securities Ltd.*, it was the company in whose name the derivative action was to be brought that was seeking to intervene. In *Intercontinental Precious Metals Inc.*, a number of other parties had been given notice of the application but the court did not address the issue as to whether that was necessary or not. In *Richardson Greenshields of Canada Ltd.*, the additional parties were all directors of the company concerned. These cases are not therefore of any real assistance to the issue that is before me.

18 Ultimately, I view the issue as being determined by weighing the considerations referred to in the observation made in *M. v. H.* (1994), 20 O.R. (3d) 70 (Ont. Gen. Div.) regarding motions to intervene where Madam Justice Epstein said, at p. 77:

> With all due respect to the detailed analyses contained in other decisions concerning proposed intervenors, I agree with this decision of the Chief Justice. Regardless of whether the proposed intervention is sought under rule 13.01 or rule 13.02, the court's focus should be on determining whether the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original action.

19 In the end result, the proposed intervenors have not satisfied me that their contribution on the application is sufficient to counterbalance the inevitable interference and distraction that the addition of these parties would have on the application. If I were to order these proposed intervenors added as parties, it would effectively establish a precedent that all proposed defendants in a derivative action are entitled to be heard on the application for leave to commence that action. In some derivative actions, depending on the nature of the claims to be advanced, this could involve not only the company's accountants, as is the case here, but also the company's solicitors, bankers, consultants, customers, suppliers, contractors and so on. It is not usual for defendants to get a chance to say, prior to an action being commenced, whether they should be the subject of that action and I see no compelling reason to give them that opportunity here. As it is, there will be two sets of lawyers making the case against leave being granted and there is nothing to suggest that they will not be able to put the case fully and adequately.

20 Finally, I point out that the only issue to be determined in the application is whether the derivative action may be advanced. It does not preclude any of the proposed defendants from exercising their rights, if the action is allowed to proceed, to bring motions to strike out the statement of claim as disclosing no reasonable cause of action nor does it preclude the bringing of a summary judgment motion by any of the proposed defendants. Therefore, their rights to attempt to bring a quick and early end to the litigation are fully preserved.

21 The motion by Keith Ray, KPMG, LLP and Wm. Eisenberg & Co. and the motion by Susan Fenwick for leave to be added as parties to the application are therefore both dismissed.

Sealing the court file

22 I now turn to the motions by Hemispheres and by Allan Fenwick for an order sealing all or a portion of the court file. The motions are based on the assertion that there is material contained in the record that is confidential and would potentially visit significant harm on both Hemispheres and Allan Fenwick if made public through the process of this litigation.

23 In response to my questions, Mr. Jack identified the most sensitive information as falling into two categories: (1) financial information regarding monies taken out of Hemispheres by Allan Fenwick and (2) affidavit material filed from U.S. attorneys which outline the potential exposure that Hemispheres and Allan Fenwick may have to ongoing and complex asbestos litigation in the United States.

24 The moving parties accept that there is a heavy burden on them to satisfy the court that a sealing order is warranted. That burden arises from the presumption that all matters that take place before our courts will be conducted in

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an open and public manner so as to maintain confidence in the judicial system. That presumption was stated by the Supreme Court of Canada in *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.) where Dickson J. said, at p. 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

25 In considering whether a sealing order should be granted, Madam Justice Swinton made the following observation in *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.) at para. 9:

> In determining whether to grant a sealing order, a court must engage in a balancing exercise, although one in which the principle of public access to court proceedings and documents is of fundamental importance. In exceptional cases, courts have granted sealing orders, generally in circumstances where the revelation of trade secrets or financial or other confidential information will cause serious harm to a party, or where the publicity would destroy the subject matter of the litigation [citations omitted].

26 There are, of course, many instances where matters that parties would prefer to keep private become public because the parties become embroiled in litigation. This applies not only to corporations, both public and private, but also to individuals. Many private matters are forced into the public view as a result of the fact that litigation ensues. That is a necessary consequence of maintaining an open and public judicial system.

27 As Madam Justice Swinton observed above, over the years courts have made exceptions to the general principle that all matters before the court must be part of the public record. Matters involving minors are one example. Matters involving trade secrets or secret processes are other examples. Customer lists and pricing information may constitute even other examples. Also, in cases where victims might be precluded, as a result of trauma and embarassment, from pursuing a claim or giving evidence then orders restricting the openness of the proceedings may be justified. In all of these situations, though, the court must be satisfied that there is a need to protect "societal values of superordinate importance" before such restrictions on public access to the proceedings of the courts can be justified — see *MacIntyre v. Nova Scotia (Attorney General)*, *supra* per Dickson J. at p. 186.

28 It is submitted that the information regarding the amount of monies taken out of Hemispheres by Allan Fenwick would adversely affect Hemispheres both in terms of their competitors and in terms of their dealings with their employees because Hemispheres has a unionized work force. While that may be, I have considerable difficulty with the proposition that the protection of this information from being made public can be elevated to the protection of a societal value of superordinate importance. Frankly, it is not clear to me what particular harm would be done to Hemispheres from the disclosure to its competitors that Allan Fenwick is able to withdraw significant sums of money from Hemispheres since it is not clear to me what the competitors would do with that information. Similarly, I assume that the union is aware that Hemispheres is profitable and that it uses that information in its efforts to gain wage increases and other enhancements for its members who are employed by Hemispheres. I suppose that if the union finds out, from the information in this proceeding, that Hemispheres is a great deal more profitable than the union currently considers it to be that might, in turn, cause the union to press even harder for more benefits for its members. Accepting that to be the case, and understanding at the same time the desire of Hemispheres to keep that information private, I am unable to see the societal value that would be protected by shielding that information from public view.

29 I am not satisfied therefore that a compelling reason has been shown to exist that would justify an order that this financial material be sealed in the court record.

30 In terms of the affidavits filed regarding the prospect of Hemispheres and Allan Fenwick becoming embroiled in

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the U.S. asbestos litigation, I note first that the affidavit of Mr. McLean, a U.S. attorney with considerable experience in the asbestos litigation, states that "it is very surprising" that Hemispheres has not already been made a party to that litigation. Mr. McLean also says that it is "very likely" that Hemispheres will eventually be sued in the United States in respect of the asbestos-related litigation. Further, the affidavit evidence establishes that this litigation has been on-going for more than 25 years and in that time between 200,000 and 350,000 individual cases have been commenced. Given the history of this litigation, the length of time that is has gone on and the scope of production and discovery that must inevitably have taken place, I find it difficult to believe that the existence of Hemispheres as a supplier of brake pads containing asbestos to entities in the United States has not already been revealed. I am reinforced in that belief by the fact, as Mr. McLean states in his affidavit, that many of Hemispheres' competitors "have been sued in thousands of asbestos-related product liability actions throughout the United States."

31 In any event, it is no secret that Hemispheres manufactured such products. Its presence in that market place is not a secret nor are its products. The suggestion that the affidavits filed regarding this issue are somehow going to constitute the first alert to the U.S. plaintiffs' attorneys as to the existence of Hemispheres as a target for claims is one that I find difficult to accept. The fact that Hemispheres has not to date been made a party to such litigation could be the result of any number of factors and considerations other than the lone fact suggested here that the U.S. plaintiffs' attorneys have simply failed to wake up to the fact that Hemispheres manufactured such products. However, even assuming that fact is the reason, and assuming even further that this affidavit material would constitute the beacon to draw the attention of the U.S. plaintiffs' attorneys to the presence of Hemispheres, I again fail to see the societal value that would justify shielding Hemispheres from such a result. I tend to agree with Mr. Capern's suggestion, on this aspect of the request, that such an order would have the appearance that the court is assisting in the suppression of evidence. In this respect, Hemispheres' request is tantamount to asking the court to assist it to avoid the potential of possibly being held to account to persons that it may have harmed.

32 It is not uncommon for the launching of one action to be the genesis for the launching of other actions. Class actions are only the most recent example of proceedings that frequently have this result. To suggest that the potential for that result could form the basis for a order to seal the court file from public view would seem to me to establish a very serious precedent. If so, it is one that I am not prepared to run the risk of setting.

33 In the end result, I adopt the following observation of Spence J. in *Publow v. Wilson* (**1994), 36http://ecarswell.westlaw.com/Find/Default.wl?rs=WLCA1.0&vr=2.0&DB=6407&FindType=Y&SerialNum=1994409063C.P.C. (3d) 33** (Ont. Gen. Div.) at p. 39:

> The disclosure of internal corporate information in the course of legal proceedings may almost always have the potential for harm to the company concerned and perhaps to others as well. This consequence of the resort to the courts is not limited to corporate parties in commercial matters; individuals may suffer from the public disclosure which ordinarily accompanies litigation. If the prospect of harm were a sufficient basis for preventing disclosure, a great many litigants might justifiably seek to have their proceedings shielded from public view, whether through a sealing order, an order for in camera proceedings or otherwise. Widespread granting of such orders could tend to diminish public confidence in the administration of justice. These considerations suggest that such orders should be available only in exceptional cases.

I do not find the circumstances of this case make it in any way exceptional.

34 Lastly, on this point, there was some suggestion made by Hemispheres and Allan Fenwick that the applicants intended to use the information filed in these proceedings to harm Hemispheres through actions outside of these proceedings. There is no evidence before me that would credibly suggest any such intention on behalf of the applicants. I would also note that the deemed undertaking rule established by Rule 30.1 of the *Rules of Civil Procedure* fully applies to this application as it does in any other proceeding before this court. Again there is no reason for me to believe that the applicants will not honour their obligations under that rule.

35 The motions for an order sealing the court file are therefore dismissed.

Costs

36 Given that the applicants have been successful in resisting both sets of motions, I do not see any reason why they would not be entitled to their costs of those motions but in case there should be matters of which I am not aware that might impact on that view, the parties may make written submissions to me if necessary. I am also prepared to fix the costs of the motions upon receipt of submissions from counsel in that regard. The applicants shall file their submissions within 10 days of the release of these reasons and the respondents and proposed intervenors shall file their submissions within 10 days thereafter. As always, I would appreciate it if counsel would keep their submissions brief.

Motions dismissed.

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TAB 3

Indexed as:

Sierra Club of Canada v. Canada (Minister of Finance)

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.

[2002] 2 S.C.R. 522

[2002] S.C.J. No. 42

2002 SCC 41

File No.: 28020.

Supreme Court of Canada

2001: November 6 / 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (92 paras.)

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 [page523] 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.

[page524]

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 [page525] 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 [page526] 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.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

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 [page527] issues of when, and under what circumstances, a confidentiality order should be granted.

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

II. Facts

3 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.

4 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.

5 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.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant [page528] filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the Federal Court Rules, 1998, SOR/98-106, and requested a confidentiality order in respect of the documents.

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

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

[page529]

9 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.

10 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

11 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

12 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 [page530] 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 [page531] appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 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.

18 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.

19 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.

[page532]

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 [page533] 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.

24 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.

25 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.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without [page534] 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.

[page535]

31 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.

32 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 prob-

> abilities 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.

[page536]

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 [page537] 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.

37 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.

38 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.

39 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 [page538] 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; [page539] 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.

43 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.

44 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 [page540] 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 [page541] 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.

47 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.

48 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. [page542] 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 [page543] demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 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.

52 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

53 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

[page544]

(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.

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.

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).

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 [page545] 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.

57 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

58 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.

59 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.

60 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 [page546] 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 [page547] 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.

64 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.

65 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 [page548] 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 [page549] 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

70 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.

71 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.

72 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 [page550] 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. 927, [page551] 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.

76 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.

77 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 [page552] 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 [page553] 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.

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

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

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

82 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.

83 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 [page554] 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. [page555] 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".

86 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.

[page556]

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 [page557] 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.

90 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

91 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.

92 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.

[page558]

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.

cp/e/qllls

TAB 4

2006 CarswellOnt 407, 17 C.B.R. (5th) 95

C
2006 CarswellOnt 407

Stelco Inc., 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

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: January 17, 2006
Judgment: January 20, 2006
Docket: 04-CL-5306

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Counsel: Geoff R. Hall for Stelco Applicants

Kyla Mahar for Monitor

Peter Jacobsen for Globe & Mail

Kevin Zych for 8% and 10.4% Stelco Bondholders

Peter Jervis, Karen Kiang for Equity Holders

Sharon White for USW Local 1005

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

S Co. was under protection of Companies' Creditors Arrangement Act — Financial analyst swore affidavit on behalf of certain S Co. equity holders — S Co. objected to release of certain portions of affidavit for public consumption — Redacted version of affidavit, which blacked out certain paragraphs in affidavit and certain exhibits to affidavit, including resignation letter of two members of S Co.'s Board of Directors and other report, was made available for public record — S Co. brought motion to have blacked-out material permanently sealed, on basis that certain portions of affidavit and exhibits referred to and were derived from information obtained by equity holders under non-disclosure agreement with S Co. — Motion dismissed — Blacked-out excerpts of affidavit were not to be permanently sealed, and full unredacted copy of such affidavit was to be made available for public record — Sealing orders cannot be granted merely because parties involved agree to have material sealed or withdrawn — S Co. presented no evidence that having blacked-out material available to public would cause any harm to it or to anyone privy to it — Only principled basis for sealing blacked-out material would be that it was truly irrelevant — In making that determination, court should take expansive view of relevance in order to safeguard principle of openness of court — With respect to exhibits, report that was exhibit had been available on S Co.'s website since its submission — Requirements in s. 110(3) of Canada Business Corporations Act regarding distribution of directors' resignation letters did not affect issue of sealing order.

Cases considered by *Farley J.*:

Knight v. KPMG LLP (1999), 1999 CarswellOnt 989, 20 C.B.R. (4th) 258 (Ont. Gen. Div. [Commercial List]) — followed

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre*) 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522 (S.C.C.) — considered

Vickery v. Nova Scotia (Supreme Court) (1991), 64 C.C.C. (3d) 65, 124 N.R. 95, 104 N.S.R. (2d) 181, 283 A.P.R. 181, [1991] 1 S.C.R. 671, 1991 CarswellNS 461, 1991 CarswellNS 413 (S.C.C.) — distinguished

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 110 — considered

s. 110(1) — considered

s. 110(2) — considered

s. 110(2)(a) — considered

s. 110(3) — considered

MOTION by debtor company for permanent sealing order.

***Farley J.*:**

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1 On behalf of the certain equity holders (EH), Fabrice Taylor (T), a chartered financial analyst employed by Pollitt & Company, stockbrokers, (which is one of the EH) swore an affidavit on December 23, 2005. Stelco (S) objected to certain portions of that affidavit being released for public consumption. A redacted version was made available for the public record which blacked out paragraphs 18-24 (except the first sentence of 23), 26-32, 34 plus exhibits E and F (the Keiper (K) and Woollcombe (W) resignation letter and the Honourable Coulter Osborne report respectively). The EH last week agreed with S that the EH were not going to rely on the blacked out material. S now moves to have the blacked out material permanently sealed; the Globe objects to that result arguing that the blacked out material should be unsealed. I was not made aware of the reason for the EH agreeing to withdraw the excerpts.

2 As there was no factum for S, I have relied on its motion record, the cases which were handed up and submissions of its counsel as to S's side of the hearing on the motion to permanently seal these portions of T's affidavit. The grounds for such sealing were succinctly were put in its notice of motion as:

> **Taylor Affidavit**
>
> 9. In addition to the other materials they have served in respect of the sanction motion, the Equity Holders have served the Taylor Affidavit.
>
> 10. Certain portions of the Taylor Affidavit, specifically paragraphs 18, 19, 20, 21, 22, 23 (except the first sentence), 24, 26, 27, 28, 29, 30, 31, 32 and 34 and exhibits "E" and "F" (collectively, the "Taylor Affidavit Excerpts", refer to and were derived from information and materials which were obtained by the Equity Holders under a non-disclosure agreement they have with Stelco. The Taylor Affidavit Excerpts were never served on the Service List and were filed with the court in confidence. They were then withdrawn by the Equity Holders. By an endorsement of this court dated January 11, 2005, the Taylor Affidavit Excerpts were ordered removed from the public record.
>
> 11. In these circumstances, the unredacted version of the Taylor Affidavit containing the Taylor Affidavit Excerpts ought to be permanently sealed.

3 The Court must always be vigilant in maintaining the principle of ensuring that the interests of justice and public awareness and scrutiny ability be maintained by having an open court system. Sealing orders cannot be granted merely because the parties involved agree to have material sealed — or "withdrawn" (withdrawn in the sense of not being relied upon, as was the case here).

4 S maintains that this situation is not governed by *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.). I think it helpful to appreciate that *Sierra* did not mention any of the openness of court decisions, chief of which would be *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.). However, in his introductory paragraph Iaccobucci, J. speaking for the Court stated at p. 197:

> 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. (emphasis added)

5 In *Knight v. KPMG LLP* (1999), 20 C.B.R. (4th) 258 (Ont. Gen. Div. [Commercial List]), I observed at pp. 260-1:

... I have reviewed again this document and I would confirm that there is nothing contained therein which could be construed as relevant to the injunction motion. It was not a document reasonably or even remotely necessary for Mr. Knight to include so as to prosecute his case. Its only "relevance" was its irrelevance. This should be contra-distincted with the Combination Agreement which does contain relevant elements as to the injunction motion.

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Having determined that there was nothing relevant to the injunction motion, I have absolutely no difficulty in granting a sealing order as to the Information Circular, such sealing order not to be time limited. If the material is not relevant, then it has no juridical purpose. It should not, *ab initio*, have been included in the application record.

The court process cannot be allowed to make public a non-public document which has no relevance to the issue in question. I do not see that section 137 of the *Courts of Justice Act* could be interpreted in any way so as to allow the litigation process to be so perversely used. It is of course completely different where a non-public document is relevant to the issue in question; in those situations then the only resort to sealing should be as Dickson J. in *MacIntyre v. Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.) said at p.403:

> Curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinant importance.
>
> See also *MDS Health Group Ltd. v. Canada (Attorney General)* (1993), 15 O.R. (3d) 630 (Ont. Gen. Div.); *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 35 C.P.C. (3d) 323 (Ont. Gen. Div. [Commercial List]), leave to appeal to Ontario Court of Appeal refused (June 7, 1995), Doc. CA M15773 (Ont. C.A.); *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.); *Dodd v. Cossar* (1998), 54 O.T.C. 129, 16 C.P.C. (4th) 132 (Ont. Gen. Div. [Commercial List]).

6 S has presented no evidence that having the blacked out material would cause any harm to it or to anyone privy to it. Neither is this the type of case as was the situation in *Vickery v. Nova Scotia (Supreme Court)*, [1991] 1 S.C.R. 671 (S.C.C.) where audio and video tapes in a murder trial were excluded on the appeal of the conviction so that the appellant was acquitted by the appeal court. In that respect at p. 681 Stevenson J. concluded that in respect of a subsequent request for the tapes:

> I believe that the Appeal Division was correct in applying the principles in *MacIntyre* and concluding that the interests of Nugent [the person previously acquitted by the Court of Appeal] outweighed those put forward by the appellant [a journalist].

Stevenson J. also drew a distinction as to exhibits and affidavits filed with the Court (see pp. 681-2).

7 The blacked out material in this case was never used. However, it was submitted to the Court. It would seem to me that the only principled basis for sealing same would be that it was truly irrelevant. In making that determination, in my view, the Court should take an expansive view of relevance in order to safeguard the principle of openness of court. That is not to be confused with "semblance of relevance" which is *not* the standard with respect to production and discovery. Something in this latter sense is either relevant or it is not relevant. The only way that one should ever use "semblance" and "relevance" together in that latter sense in my view is that at the particular stage of proceedings, something appears/seems to be "truly" relevant, but that as the parties know more about the case, relevance becomes more focused.

8 Is the blacked out material relevant according to the *Knight* test? I would observe that Brad Fraser, the affiant for BMO Nesbitt Burns Inc. indicated at para. 11:

> In providing advice with respect to indicative enterprise value, BMO Nesbitt Burns has relied upon data and information provided by Stelco and the company's other advisors including management's revised Q4 2005 forecast and the 2006-2009 forecast, the most recent forecast being dated November 11, 2005.

Further Andrew Kramer the affiant for UBS Securities LLC indicated at Exhibit A, para. 2:

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2. In conducting its analysis, UBS, among other things ...

(b) reviewed certain intended financial information and other data relating to the business and financial prospects of Reorganized Stelco including (i) the projections prepared by the management of Stelco.

9 It appears to me that the complaint of K and W as expressed in their resignation letter was that the management of S had a bad forecasting record as to steel prices and that in essence there ought to be no reliance upon any such forecasts of management for any purpose whatsoever. *Whether that conclusion is true or not warranted is not the issue to be decided in this sealing motion.* I merely point out that BMO Nesbitt Burns and UBS considered such material. I pause to note that these firms considered a great deal of other material and would have weighed and analyzed all material with the benefit of their expertise and experience.

10 It would therefore seem to me that the blacked out excerpts of T's affidavit should not be permanently sealed, but rather a full unredacted copy of such affidavit should be made available for the public record. Order accordingly.

11 In addition, I would make the following observations about Exhibits E and F.

12 With respect to Exhibit F, the Osborne Report, this has been available on the S website since its submission on September 21, 2005 (or shortly thereafter). I do appreciate that S's reluctance to have this provided in the public record of T's affidavit was that it did not wish to "cherry pick" what was redacted except on principled grounds.

13 With respect to Exhibit E, the K and W resignation letter, I raised the question of s. 110(2)(3) of the *Canada Business Corporations Act*, as to which S is subject:

S. 110(2) a director who,

(a) resigns,

(b) receives a notice or otherwise learns of a meeting of shareholders called for the purpose of removing the director from office, or

(c) receives a notice or otherwise learns of a meeting of directors or shareholders at which another person is to be appointed or elected to fill the office of director, whether because of the director's resignation or removal or because the director's term of office has expired or is about to expire,

is entitled to submit to the corporation a written statement giving reasons for resigning or for opposing any proposed action or resolution.

S. 110(3) A corporation shall forthwith send a copy of the statement referred to in subsection (2) to every shareholder entitled to receive notice of any meeting referred to in subsection (1) and to the Director unless the statement is included in or attached to a management proxy circular required by section 150. (emphasis added)

No distribution has been made by S of the K and W resignation letter. I was advised that consideration has been given to that section; however, it was not considered applicable for two reasons: Firstly, it was considered that it only applied to situations where there was a meeting of shareholders in light of section 110(1): "A director of a corporation is entitled to receive notice of and to attend and be heard at every meeting of shareholders." Secondly, the resignation letter was addressed to the remaining seven members of the board, not to S, the corporation.

14 As to the second aspect, I would note as follows that (i) the letter was addressed to Mr. Courtney Pratt, not only in his capacity as director, but also in his capacity as President and Chief Executive Officer, and (ii) the collectivity of the directors may be considered the corporation, particularly when the letter refers indiscriminately as to activities of the board of directors and as to activities of S (examples of this are found at the first sentence of the second paragraph on page 8 and the first sentence of the last paragraph on page 10).

15 However, as to the second aspect, I find it reasonable that S did not so circulate the resignation letter before since according to s. 110(3) it need only be sent to "every shareholder entitled to receive notice of any meeting referred to in subsection (1)" and no meeting has been scheduled since the date of the resignation letter. I assume that a copy has been sent to the Director appointed pursuant to the *Canada Business Corporations Act* in any event. One may also observe that s. 110 is not a model of precision and clarity.

16 In any event, my observations with respect to Exhibits E and F are not intended in any way to mean that such exhibits need not be made part of the public record in the Court file.

17 The Globe and S were agreed that there should be no costs. I was appreciative of the considerable efforts to which the Globe and S and their respective counsel dealt with the issues of interim sealing/redaction and of permanent sealing and their cooperative approach to the situation as well as their submissions to the Court.

Order accordingly.

END OF DOCUMENT

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TAB 5

LexisNexis®

Re **Eurofood** IFSC Ltd

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

(Case C-341/04), [2006] All ER (EC) 1078, [2006] BPIR 661

12 JULY, 27 SEPTEMBER 2005

2 MAY 2006

PANEL: JUDGES SKOURIS (PRESIDENT), JANN (RAPPORTEUR), TIMMERMANS, ROSAS, MALENOVSKY (PRESIDENTS OF CHAMBERS), PUISSOCHET, SCHINTGEN, COLNERIC, KLUCKA, LOHMUS, LEVITS

CATCHWORDS:

European Community -- Reference to European Court -- Request for preliminary ruling concerning interpretation of Community law -- Interpretation of regulation -- Insolvency proceedings -- Company wholly-owned subsidiary of parent company incorporated in another member state -- Insolvency proceedings being initiated in both member states -- Whether centre of main interests in member state in which parent company registered or member state in which subsidiary incorporated -- Whether one member state being required to recognise proceedings in another member state where the decision to open those proceedings is against the rules guaranteed by that member state -- Council Regulation (EC) 1346/2000, arts 3(1), 16, 26.

HEADNOTE:

Collective insolvency proceedings were governed by Council Regulation (EC) 1346/2000 which entailed the partial or total divestment of a debtor and the appointment of a liquidator (art 1(1) (Article 1(1), so far as material, is set out at judgment para 3, below)). Pursuant to art 3(1) (Article 3, so far as material, is set out at judgment para 6, below), jurisdiction to open insolvency proceedings rested with the courts of the member states within the territory of which the centre of a debtor's main interests were situated, and, in accordance with art 16 (Article 16, so far as material, is set out at judgment para 8, below), that the law applicable to those proceedings should be that of the member state within the territory where such proceedings were opened. The debtor was a company registered in Ireland, with its registered office in Dublin. It was a wholly-owned subsidiary of a company incorporated in Italy. The Italian company was admitted to extraordinary administration proceedings by the Italian authorities. Subsequently, an application for compulsory winding-up proceedings was commenced against the debtor in the High Court in Ireland, founded on the contention that the debtor was insolvent. The High Court appointed a provisional liquidator. The debtor was also admitted to the extraordinary administration procedure in Italy. The district court in Italy declared it insolvent, taking the view that its centre of main interests was in Italy, and that it had international jurisdiction to determine whether the debtor was in a state of insolvency. Following that, the High Court in Ireland decided that, according to Irish law, the insolvency proceedings in respect of the debtor had been opened in Ireland. It took the view that the debtor's centre of main interests was in Ireland, and that the insolvency proceedings commenced in Ireland were the main proceedings. It also held that the circumstances in which the proceedings had been conducted before the district court in Italy were such as to justify, pursuant to art 26 (Article 26 is set out at judgment para 10, below) of the regulation, the refusal of the Irish courts to recognise decision of that court. It found the debtor insolvent, and made a winding-up order. The debtor appealed to the Supreme Court of Ireland, which stayed the proceedings, and referred for a preliminary ruling under arts 68 and 234 EC (formerly arts 73p and 177 of the EC Treaty) to the Court of Justice of the European Communities a number of questions: (i) for the purposes of art 3(1) what are the determining factors for identifying the centre of main interests of a subsidiary company, where it and its parent company have their respective registered offices in two different member states; (ii) whether the jurisdiction assumed by a court of a member state to open insolvency proceedings might be reviewed by a court of another member state in which recognition has been applied for; (iii) whether the decision whereby a court of a member state, presented with a petition for the liquidation of an insolvent company, appointed, before ordering that liquidation, a provisional liquidator with powers whose legal effect was to derive the company's directors of the power to act, constituted a decision opening insolvency proceedings for the purposes of the first subparagraph of art 16(1); and (iv) whether a member state was required to recognise insolvency proceedings opened in another member state where the decision opening those proceedings were handed down in disregard of procedural rules guaranteed in the first member state by the requirements of its public policy.

Held -- (1) Where a debtor was a subsidiary company whose registered office and that of its parent company were situated in two different member states, the presumption laid down in art 3(1) of Regulation 1346/2000 could be rebutted only if factors which were both objective and ascertainable by third parties enabled it to be established that an actual situation existed which was different from that which, locating it at that registered office, was deemed to reflect. That could be so in the case of a company not carrying out any business in the territory of the member state in which its registered office was situated. By contrast, where a company carried on its business in the territory of the member state where its registered office was situated, the mere fact that its economic choices were or could be controlled by a parent company in another member state were not enough to rebut the presumption laid down by that regulation. Regard had to be had to how much relative weight should be given, on the one hand, to the fact that the subsidiary regularly administered its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the member state where its registered office was situated and, on the other hand, the fact that the parent company was in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary. Article 3(1) provided that, in the case of a company, the place of the registered office should be presumed to be the centre of its main interests in the absence of proof to the contrary. That concept of the centre of main interests was peculiar to the regulation. Therefore, it had an autonomous meaning and should be interpreted in a uniform way, independently of national legislation (see judgment paras 27, 29, 31, 34, 36, 37, below).

(2) The main insolvency proceedings opened by a court of a member state had to be recognised by the courts of the other member states, without the latter being able to review the jurisdiction of the court of the opening state. Article 16(1) laid down a rule of priority which was based on the principle of mutual trust which precluded such a review of jurisdiction. That rule provided that insolvency proceedings opened in one member state are to be recognised in all the member states from the time that they produce their effects in the state of the opening of proceedings. It was that mutual trust which had enabled a compulsory system of jurisdiction to be established, which all the courts were required to respect. In the instant case the courts were required to recognise the decision opening the main insolvency proceedings (see judgment paras 39, 40, 42, 44, below).

(3) A decision to open insolvency proceedings for the purposes of art 16(1) was a decision handed down by a court of a member state to which application for such a decision had been made, based on the debtor's insolvency and seeking the opening of proceedings where that decision involved the divestment of the debtor and the appointment of a liquidator. Such divestment implied that the debtor lost the powers of management that he had over his assets. Regulation 1346/2000 was designed not to establish uniform proceedings on insolvency, but to ensure that cross-border insolvency proceedings operated efficiently and effectively. To that end, it laid down rules which were aimed at securing co-ordination of the measures that had to be taken in regard to an insolvent debtor's assets. The requirement that any judgment opening insolvency proceedings handed down by a court which had jurisdiction be recognised in all the other member states from the time that it became effective in the state of the opening of proceedings laid down a rule of priority in favour of the opening decision which was handed down first. The conditions and formalities required for opening insolvency proceedings were a matter for national law, and varied considerably from one member state to another. It was necessary, in order to ensure the effectiveness of the system established by the regulation, that the recognition principle laid down in the first subparagraph of art 16(1), had to be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings could be opened, could be seriously disrupted if the courts of member states, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. It was in relation to that objective seeking to ensure the effectiveness of the system established by the regulation that the concept of decision to open insolvency proceedings should be interpreted (see judgment paras 48, 49, 51-54, 58, below).

(4) Pursuant to art 26, a member state might refuse to recognise insolvency proceedings opened in another member state where the decision to open the proceedings had been taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoyed. Such a situation could arise where recognition or enforcement

of the judgment delivered in another contracting state was at variance to an unacceptable degree with the legal order of the state in which enforcement was sought as it infringed a fundamental principle. The infringement had to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement was sought or of a right recognised as being fundamental within that legal order. Further, the general principle of Community law that everyone was entitled to a fair legal process was inspired by the fundamental rights which formed an integral part of the general principles of Community law which the Court of Justice enforced. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle was of particular importance. Though the specific detailed rules concerning the right to be heard varied according to the urgency for a ruling to be given, any restriction on the exercise of that right should be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have had the opportunity to challenge the measures adopted in urgency (see judgment paras 63, 65-67, below); Krombach v Bamberski Case C-7/98 [2001] All ER (EC) 584 applied.

INTRODUCTION:

Notes

For the opening of insolvency proceedings, see 7(3) Halsbury's Laws (4th edn) (2004 reissue) para 48.

Baustahlgewebe GmbH v European Commission Case C-185/95 P [1998] ECR I-8417, ECJ.

Erich Gasser GmbH v MISAT Srl Case C-116/02 [2005] All ER (EC) 517, [2003] ECR I-14693, ECJ.

Krombach v Bamberski Case C-7/98 [2001] All ER (EC) 584, [2001] QB 709, [2001] 3 WLR 488, [2000] ECR I-1935, ECJ.

Netherlands v European Commission Joined cases C-174/98 P and C-189/98 P [2000] ECR I-1, ECJ.

Regie Nationale des Usines Renault SA v Maxicar SpA Case C-38/98 [2000] IP & T 1119, [2000] ECR I-2973, ECJ.

Staubitz-Schreiber (Proceedings concerning) Case C-1/04 (2005) Transcript (opinion), 6 September, ECJ.

Turner v Grovit Case C-159/02 [2004] All ER (EC) 485, [2005] 1 AC 101, [2004] 3 WLR 1193, [2004] ECR I-3565, ECJ.

Reference

By decision of 27 July 2004, the Supreme Court, Ireland, referred to the Court of Justice of the European Communities for a preliminary ruling under art 68 EC (formerly art 73p of the EC Treaty) and art 234 EC (formerly art 177 of the EC Treaty) concerning the interpretation of Council Regulation (EC) 1346/2000 (on insolvency proceedings). The reference was submitted in the context of insolvency proceedings concerning the Irish company **Eurofood** IFSC Ltd (**Eurofood**). Observations were submitted on behalf of: Mr Bondi, by G Moss QC and B Shipsey SC, J Gleeson, G Clohessy and E Barrington, Barristers-at-law, and by B O'Neil, D Smith and C Mallon, Solicitors; the Bank of America NA, by MM Collins SC and L McCann SC, and by B Kennedy, Barrister-at-law, and W Day, Solicitor; Mr Farrell, Official Liquidator, by MG Collins SC and D Murphy, Barrister-at-law, and by T O'Grady, Solicitor; the Director of Corporate Enforcement, by A Keating, Principal Solicitor, and C Costello, Barrister-at-law; the certificate/note holders, by D Baxter, Solicitor, D McDonald SC, and J Breslin, Barrister-at-law; Ireland, by D O'Hagan, acting as agent, assisted by D Barniville, Barrister-at-law; the Czech government, by T Bocek, acting as agent; the German government, by W-D Plessing, acting as agent; the French government, by G de Bergues, J-C Niollet and A Bodard-Hermant, acting as agents; the Italian government, by IM Braguglia, acting as agent, assisted by O Fiumara and M Massella Ducci Teri, acting as agents; the Hungarian government, by P Gottfried, acting as agent; the Austrian government, by C Pesendorfer, acting as agent; the Finnish government, by T Pynna and A Guimaraes-Purokoski, acting as agents; the Commission of the European Communities, by C O'Reilly and A-M Rouchaud-Joet, acting as agents. The language of the case was English. The facts are set out in the opinion of the Advocate General.

27 September 2005.

OPINIONBY: ADVOCATE GENERAL JACOBS

OPINION:

THE ADVOCATE GENERAL (FG JACOBS) delivered the following opinion (Original language: English.): 1. The present case, referred by the Supreme Court of Ireland, arises out of the insolvency of the Parmalat group of companies. It concerns in particular the question whether the Insolvency Proceedings Regulation (Council Regulation (EC) 1346/2000 (on insolvency proceedings) (OJ 2000 L160 p 1).) requires that an Irish subsidiary of the Italian holding company Parmalat SpA (Parmalat) should be wound up in Ireland or in Italy.

THE INSOLVENCY PROCEEDINGS REGULATION

2. The regulation is the successor of the European Union Convention on Insolvency Proceedings (Brussels, 23 November 1995) (the Convention), itself the culmination of over 25 years of discussion and negotiation. The Convention did not come into effect since the United Kingdom failed to sign it by the agreed deadline of 23 May 1996 (The background is described in the opinion of Advocate General Ruiz-Jarabo Colomer in Proceedings concerning Staubitz-Schreiber Case C-1/04 (2005) Transcript (opinion), 6 September. See also M Balz The European Union Convention on insolvency proceedings (1996) Am Bankr LJ 485, p 529; I Fletcher Insolvency in Private International Law (1999) (Fletcher), pp 298-301, and P Burbidge Cross border insolvency within the European Union: dawn of a new era (2002) EL Rev 589, p 591.). The text of the regulation is however, for the purposes of the present case, identical in all material respects to the text of the Convention (The differences are described and explained in paras 1.22 and 1.23 of G Moss, I Fletcher and S Isaacs The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2002) (Moss, Fletcher and Isaacs). See also M Virgos and F Garcimartmn The European Insolvency Regulation: Law and Practice (2004) (Virgos and Garcimartmn), para 48(a).). In those circumstances I consider that the explanatory report on the Convention written by Professor Virgos and Mr Schmit (the Virgos-Schmit Report) (The Virgos-Schmit Report, which was the source of many of the recitals in the preamble to the regulation, was never published in the Official Journal, although it exists as a document of the Council of the European Union of 8 July 1996-6500/1/96. The final version of the full text in English may however be found in Moss, Fletcher and Isaacs. See also the article by M Balz cited in footnote 3, above (Balz). Mr Balz chaired the working party of the EU Council Group on Bankruptcy which authored the Convention. He states (at footnote 51) that the Virgos-Schmit Report was 'discussed extensively and agreed to by the expert delegates but, unlike the Convention, was not formally approved by the Council of Ministers. Nevertheless, it will have considerable authority for courts in Member States'.) may provide useful guidance when interpreting the regulation (Similarly the court has on countless occasions referred to the explanatory reports on the Brussels Convention (principally the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C59 p 1) and the Schlosser Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C59 p 71)).).

3. The regulation was adopted on the basis of arts 61(c) and 67(1) EC (formerly arts 73i(c) and 73o(1) respectively of the EC Treaty), on the initiative of Germany and Finland (Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999 (OJ 1999 C221 p 8).). It essentially provides for the allocation of jurisdiction and the applicable law with regard to, and mutual recognition of, insolvency proceedings within its scope, namely 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator' (See art 1(1).). The regulation makes no provision for groups of companies; each company subject to insolvency proceedings is a 'debtor' in its own right for the purpose of the regulation (See further para 117, below.).

4. Recital (2) in the preamble states:

'The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective.'

5. Recital (4) states:

'It is necessary for the proper functioning of the internal market to avoid incentives for the parties [to insolvency proceedings] to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).'

6. The first sentence of recital (11) states:

'This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community.'

7. Recital (13) states:

'The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties.'

8. Recital (16) states:

'The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings . . . [A] liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.'

9. Recital (22) states:

'This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.'

10. Recital (23) states:

'. . . Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus) . . . [T]he lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.'

11. Article 1(1) provides:

'This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.'

12. Article 2 includes the following definitions for the purpose of the regulation:

'. . . (a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C . . .

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.'

13. Annex A includes (under 'Ireland') 'Compulsory winding up by the court'. Annex C includes (under Ireland) 'Provisional liquidator' (Since the facts giving rise to the main proceedings, the annexes to the regulation have been amended by Council Regulation (EC) 603/2005 (OJ 2005 L100 p 1); the amendments are not material to the present case. See further footnote 14, below.).

14. Article 3 of the regulation provides in so far as relevant:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an

establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.'

15. The effect of art 3 is to distinguish between two types of insolvency proceedings. Those falling under art 3(1), namely those opened by the courts of the member state where the centre of the debtor's main interests is situated, are generally referred to as 'main [insolvency] proceedings'. Those falling under art 3(2), namely those opened by the courts of another member state where the debtor possesses an establishment, and limited to the assets situated in that state, are generally referred to as 'secondary [insolvency] proceedings'.

16. Article 4(1) lays down the general rule that 'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'. Article 4(2) specifies that the law of the state of the opening of proceedings 'shall determine the conditions for the opening of those proceedings, their conduct and their closure'.

17. The first subparagraph of art 16(1) provides:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

18. Article 26 provides:

'Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

19. Article 38 provides:

'Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of the insolvency proceedings and the judgment opening the proceedings.'

RELEVANT PROVISIONS OF IRISH LAW

20. Section 212 of the Companies Act 1963 confers on the High Court jurisdiction to wind up any company.

21. Section 215 of that Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

22. Section 220 provides as follows:

'1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

23. Section 226(1) provides that the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the first appointment of liquidators, which by virtue of s 225 is otherwise made at the time the winding-up order is made. Pursuant to s 229(1), a provisional liquidator, once appointed, is obliged to 'take into his custody or under his control all the property and things in action to which the company is or appears to be entitled'.

THE CORPORATE BACKGROUND TO THE INSOLVENCY PROCEEDINGS

24. The following facts-and those summarised in the next section-are taken from the order for reference.

25. **Eurofood** IFSC Ltd (**Eurofood**) is a company incorporated and registered in Ireland. It is a wholly-owned subsidiary of Parmalat, a company incorporated in Italy which operated through subsidiary companies in more than 30

countries worldwide. **Eurofood's** principal objective was the provision of financing facilities for companies in the Parmalat group.

26. **Eurofood's** registered office is at the International Financial Services Centre, Dublin (IFSC). The IFSC was established to provide a location for internationally traded financial services to be provided only to non-resident persons or bodies. **Eurofood** carried on business at the IFSC as required by law.

27. Bank of America NA (Bank of America), a bank established in the United States with branches in Dublin and Milan, managed the day-to-day administration of **Eurofood** in accordance with the terms of an administration agreement.

28. **Eurofood** engaged in the following three large financial transactions:

(a) on 29 September 1998 **Eurofood** issued notes by way of private placement in an aggregate amount of S 80m (to provide collateral for a loan by Bank of America to Venezuelan companies in the Parmalat group);

(b) on 29 September 1998 **Eurofood** issued notes by way of private placement in an aggregate amount of S 100m (to fund a loan by **Eurofood** to Brazilian companies in the Parmalat group);

(c) there was a 'Swap' agreement with Bank of America dated 10 August 2001.

29. **Eurofood's** liabilities under the first two transactions were guaranteed by Parmalat.

30. **Eurofood's** creditors under the first two transactions (the certificate/note holders) are now owed in excess of S 122m. **Eurofood** is unable to pay its debts.

THE INSOLVENCY PROCEEDINGS IN IRELAND AND ITALY

Italy

31. Parmalat was discovered in late 2003 to be in deep financial crisis, which led to the insolvency of many of its key companies.

32. On 23 December 2003 the Italian Parliament passed into law Decree No 347 providing for the extraordinary administration of companies with more than 1,000 employees and debts of no less than 1bn.

33. On 24 December 2003 Parmalat was admitted to extraordinary administration proceedings by the Ministero delle Attivite Produttive (Italian Ministry of Productive Activities). Dr Enrico Bondi was appointed as extraordinary administrator.

34. On 27 December 2003 the Civil and Criminal Court at Parma (the Parma court) confirmed that Parmalat was insolvent and placed it in extraordinary administration.

Ireland

35. On 27 January 2004 Bank of America presented to the High Court of Ireland (the Irish court) a petition for the winding up of **Eurofood**, alleging that **Eurofood** was insolvent and claiming a debt due to it of in excess of S 375m.

36. On the same date Bank of America also applied ex parte for the appointment of a provisional liquidator. On that date the Irish court appointed Mr Pearse Farrell as provisional liquidator to **Eurofood** with powers to take possession of all of its assets, to manage its affairs, to open a bank account in its name and to retain the services of a solicitor.

Italy

37. On 9 February 2004 the Italian Ministry of Productive Activities admitted **Eurofood**, as a group company, to the extraordinary administration of Parmalat.

38. On 10 February the Parma court made an order in which it acknowledged the filing of a petition to declare the insolvency of **Eurofood** and set 17 February 2004 as the date for the hearing of that petition.

39. Mr Farrell was legally represented before the Parma court at that hearing. However, despite an order of the court and what Mr Farrell has described as 'repeated written and verbal requests' to Dr Bondi, he had not received any of the documents filed with the court, including the petition and the papers upon which Dr Bondi proposed to rely.

40. On 20 February 2004 the Parma court gave judgment opening insolvency proceedings concerning **Eurofood**, declaring it to be insolvent, determining that the centre of its main interests was in Italy and appointing Dr Bondi as extraordinary administrator.

Ireland

41. Bank of America's petition for the winding up of **Eurofood** was heard in the Irish court from 2 to 4 March 2004. Bank of America, Mr Farrell, the certificate/note holders and the Director of Corporate Enforcement (The Office of the Director of Corporate Enforcement was established in November 2001 pursuant to the Company Law Enforcement Act 2001. Under that Act, the Director of Corporate Enforcement is responsible for encouraging compliance with company law and investigating and enforcing suspected breaches of the legislation.) were represented. On 23 March 2004 the Irish court ruled that-

'(1) Insolvency proceedings had been opened in Ireland at the date of the presentation of the petition.

(2) **Eurofood's** centre of main interests was in Ireland and therefore the proceedings opened in Ireland as of 27 January 2004 were main insolvency proceedings within the meaning of the Insolvency Proceedings Regulation.

(3) The purported opening of main insolvency proceedings by the Parma court was contrary to recital 22 and art 16 of the Regulation and could not alter the fact that main insolvency proceedings were already extant in Ireland.

(4) The failure of Dr Bondi to put **Eurofood's** creditors on notice of the hearing before the Parma court despite that court's directions on the matter and the failure to furnish Mr Farrell with the petition or other papers grounding the application until after the hearing had taken place all amounted to a lack of due process such as to warrant the Irish courts refusing to give recognition to the decision of the Parma court under art 26 of the Regulation.'

42. In the light of those conclusions and in circumstances where **Eurofood** was grossly insolvent, the Irish court made a winding-up order in respect of **Eurofood** and appointed Mr Farrell as liquidator. The Irish court did not recognise the decision of the Parma court of 20 February 2004.

THE APPEAL AND THE QUESTIONS REFERRED

43. Dr Bondi appealed to the Supreme Court against the judgment of the Irish court. The principal subjects of argument on the hearing of the appeal were whether insolvency proceedings had been first opened in Ireland or Italy, whether the centre of **Eurofood's** main interests was in Ireland or Italy and whether there had been such an absence of fair procedures leading up to the decision of the Parma court that that decision should not be recognised.

44. The Supreme Court decided to stay the proceedings and refer the following questions relating to those three areas of dispute to the Court of Justice of the European Communities for a preliminary ruling:

'(1) Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening . . . insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346/2000?

(2) If the answer to Question (1) is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

(3) Does Article 3 of the said regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

(4) Where,

(a) the registered offices of a parent company and its subsidiary are in two different Member States,

(b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

(5) Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?'

45. Written observations have been submitted by Dr Bondi, Mr Farrell, the Director of Corporate Enforcement, Bank of America, the certificate/note holders, the Austrian, Czech, Finnish, French, German, Hungarian, Irish and Italian governments and the Commission of the European Communities. With the exception of the Austrian, German and Hungarian governments, those parties were also represented at the hearing.

46. Mr Farrell explains that it is the convention that a provisional liquidator does not participate, at the hearing of the winding-up petition, in any argument on the merits of the case; similarly, where the decision of the High Court to wind up the company is subject to appeal to the Supreme Court, the liquidator does not involve himself in the merits of the appeal. Mr Farrell accordingly does not consider it appropriate to urge any answer on the Court of Justice in relation to the questions referred, although he offers observations for the assistance of the court on certain factual matters which he considers to be relevant to the fifth question referred.

THE FIRST QUESTION: THE 'JUDGMENT OPENING INSOLVENCY PROCEEDINGS'

47. By its first question the referring court asks whether, where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor, all with the effect in law of depriving the directors of the company of power to act, that order combined with the presentation of the petition constitutes a 'judgment opening insolvency proceedings' within the meaning of art 16 of the regulation.

48. That question arises because of the chronology of the early stages of the Irish and the Italian proceedings. On 27 January 2004 Bank of America presented to the Irish court a petition to wind up **Eurofood** and that court appointed Mr Farrell as provisional liquidator. On 20 February 2004 the Parma court declared **Eurofood** to be insolvent and appointed Dr Bondi as extraordinary administrator. On 23 March 2004 the Irish court ruled that insolvency proceedings had been opened in Ireland at the date of the presentation of the petition. If the appointment of Mr Farrell in conjunction with the presentation of the petition on 27 January 2004 is a 'judgment opening insolvency proceedings' within the meaning of art 16 of the regulation, the Parma court will be bound by that provision to recognise that judgment.

49. Dr Bondi and the Austrian, French and Italian governments contend that the question should be answered in the negative: the presentation of the petition and the appointment of a provisional liquidator do not constitute a 'judgment opening insolvency proceedings' within the meaning of art 16. Bank of America, the Director of Corporate Enforcement, the certificate/note holders, the Irish, Czech, Finnish and German governments and the Commission take the contrary view.

50. Initially, I will address the position of those latter parties that the first question referred should be answered in the affirmative. I will then examine the arguments of Dr Bondi and the Austrian, French and Italian governments as to why a negative answer should be given.

51. I agree with the submission that the first question calls for an affirmative answer. In my view, that approach follows from the object and purpose, the scheme and the wording of the regulation.

52. Recital (2) in the preamble refers to the objective that 'cross-border insolvency proceedings should operate efficiently and effectively'. Recital (4) refers to the necessity 'to avoid incentives for the parties [to insolvency proceedings] to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)'. Article 16 requires that any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction is to be recognised in all the other member states from the time that it becomes effective in the state where it was delivered. Recital (22) states that recognition of judgments 'should be based on the principle of mutual trust'.

53. Within that framework, and as the Czech government and the Commission stress, it is imperative that recognition should be accorded at an early stage in the proceedings. It is for that reason, presumably, that art 16 requires recognition from the time the judgment becomes effective as a matter of national law and that art 2(f) provides that that rule applies whether the judgment is final or not (See also the Virgos-Schmit Report, which states (para 50): 'All the proceedings listed in Annex A have two ultimate consequences: the total or partial divestment of the debtor and the appointment of a liquidator. However, distortions would arise if the Convention were to apply only from the time when these consequences occur. The initial stages of insolvency proceedings could be excluded from the Convention's system of international cooperation. These consequences are necessary for proceedings to appear in the lists in Annex A. However, once the proceedings have been included, it is sufficient to open proceedings in order that the Convention should apply from the outset.' Balz also states (p 501): 'There is no requirement that all elements of insolvency proceedings be present at the moment of opening. For instance, if a liquidator is generally appointed after the opening of proceedings, the Convention applies to such proceedings from their inception.').

54. In that context, where a national court entertaining a petition for liquidation on the ground of insolvency appoints a provisional liquidator 'with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act', it would seem consistent with the aim of the regulation that that appointment should be regarded as a judgment opening insolvency proceedings.

55. With regard to the wording of the regulation, both 'judgment' and 'insolvency proceedings' are defined.

56. Article 2(a) defines 'insolvency proceedings' as meaning 'the collective proceedings referred to in Article 1(1)' and adds: 'These proceedings are listed in Annex A.' In the case of Ireland, 'compulsory winding-up by the Court' is listed as one of the insolvency proceedings in that annex.

57. It seems therefore that the proceedings before the national court could be considered to be the opening of 'insolvency proceedings' for the purpose of the regulation.

58. Article 2(e) defines ' "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator' as including 'the decision of any court empowered to open such proceedings or to appoint a liquidator'.

59. Article 2(b) defines 'liquidator' as 'any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs' and adds: 'Those persons and bodies are listed in Annex C . . .' For the purposes of Ireland, that list includes a provisional liquidator.

60. It seems therefore that a decision of an Irish court appointing a provisional liquidator, listed in Annex C to the regulation, in the context of a compulsory winding up by the court, listed in Annex A thereto, must be a 'judgment opening insolvency proceedings' within the meaning of art 16. That view has even more force when it is remembered that the appointment of a provisional liquidator is the first form of court order that can possibly be made in a compulsory winding-up procedure under Irish law.

61. I do not consider that the above analysis by reference to the inclusion of the Irish 'provisional liquidator' in Annex C involves reasoning 'backwards and illogically', as described in Dr Bondi's observations. On the contrary, the appointment of such an office-holder seems central to the concept of a 'judgment opening insolvency proceedings'.

62. Admittedly, art 2(e) could be interpreted more narrowly, as defining ' "judgment" in relation to the opening of insolvency proceedings' as including 'the decision of any court empowered to open such proceedings' and, separately, ' "judgment" in relation to . . . the appointment of a liquidator' as including 'the decision of any court empowered to . . . appoint a liquidator'. If that were the case, it could be argued that a decision appointing a liquidator would not constitute a judgment opening insolvency proceedings within the meaning of that definition.

63. However, as the national court points out in the order for reference, the definition in art 2(e) of the appointment of a liquidator as a 'judgment' does not appear to serve any purpose within the regulation if it does not benefit from the recognition provided by art 16. Certainly there are no provisions in the regulation which specifically deal with judgments appointing a liquidator. Moreover-and also as the referring court points out-the appointment of a liquidator is an essential component of the notion of 'collective insolvency proceedings' within the scope of art 1(1).

64. Finally on this point, and as the Director of Corporate Enforcement submits, the definition in art 2(e) may be intended to reflect the reality that in various jurisdictions there are different ways in which insolvency proceedings may be commenced, rather than to make a distinction between a decision of a court opening insolvency proceedings on the one hand and the appointment of a liquidator on the other; the purpose of the definition is accordingly to ensure that the regulation confers automatic recognition on insolvency proceedings opened in both ways.

65. It seems therefore more natural to read art 2(e) as defining ' "judgment" in relation to the opening of insolvency proceedings' as including 'the decision of any court empowered to . . . appoint a liquidator', and hence as supporting the view set out in para 60, above.

66. A number of arguments have been adduced against that view.

67. First, Dr Bondi and the Italian government submit that the regulation distinguishes in particular between the concepts of 'request' and 'opening', which correspond precisely to the Irish steps 'petition' and 'winding-up order'. In that context Dr Bondi and the Italian government cite recital (16) and art 38 of the regulation.

68. Similarly, those parties submit that a 'provisional liquidator' is simply a 'temporary administrator' as referred to in art 38, also described in recital (16) in the preamble as 'a liquidator temporarily appointed prior to the opening of the main insolvency proceedings'; his appointment cannot therefore open the main proceedings.

69. In similar vein, the Austrian government submits that, since a 'temporary administrator' has only limited powers under art 38 of the regulation, he cannot be a 'liquidator' within the meaning of the definition in art 2(b), which refers to 'any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs'.

70. Those arguments however appear to me to disregard the more general provisions of the regulation referred to above and their application to the present case and to misunderstand the more specific aim of art 38. That provision complements art 29, which provides that a liquidator in main insolvency proceedings within the meaning of the regulation may request that secondary proceedings be opened (See para 15, above.). Where a request to open main proceedings has been made but a liquidator within the meaning of the regulation has not yet been appointed, art 38 provides that a 'temporary administrator' appointed by the court with jurisdiction to open main proceedings may take measures to preserve assets of the debtor in another member state 'for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'. A provisional liquidator appointed in proceedings for compulsory winding up by the court in Ireland, however, falls within the definition of 'liquidator' for the purposes of the regulation in general and art 29 in particular (It may be noted that one United Kingdom commentator implicitly took this view in the context of the Convention when discussing the consequences of the appointment of a provisional liquidator in the United Kingdom. At that time, the list in Annex C did not include a provisional liquidator for the United Kingdom (that has since been changed by Regulation 603/2005, cited in footnote 10, above). Fletcher states, in relation to the definition in art 2(f): 'Thus, a judgment opening insolvency proceedings can have extraterritorial effects even if it is not a final judgment, provided that its effects have not been stayed by the court which granted it. This might lead one to suppose that an appointment of a provisional liquidator by a court in the United Kingdom could be considered to carry such consequences. However, it must be borne in mind that recognition under art 16 is only accorded to insolvency proceedings within the scope of the Convention, and expressly listed in the Annexes thereto. Since a provisional liquidator is not included among the types of office holder listed in Annex C, the automatic recognition of such an appointment is precluded' (pp 283, 284).).

71. Moreover the order appointing the provisional liquidator in the present case gives him extensive powers (to take possession of all of **Eurofood's** assets, to manage its affairs, to open a bank account in its name and to retain the services of a solicitor); the provisional liquidator's role is accordingly much wider than the role of the temporary administrator apparently envisaged in art 38.

72. Where, furthermore, a petition is presented for insolvency proceedings of a type listed in Annex A to the regulation and on the same date the court appoints a liquidator of a type listed in Annex C thereto, as in the present case, it

seems clear that 'insolvency proceedings' within the meaning of art 1(1) of the regulation have been opened. I do not see how art 38 can be relevant in those circumstances.

73. More generally, it does not in my view follow that presentation of a petition for compulsory winding up combined with the appointment of a liquidator within the meaning of the regulation cannot be a 'judgment opening insolvency proceedings' within the meaning of art 16 merely because such a petition may be analysed as a 'request for the opening of insolvency proceedings'.

74. It does not in any event seem to me to be that, as argued in the written observations of Dr Bondi, the regulation 'reveals a very clear pattern' with regard to the 'three stages' of 'request', 'temporary appointment' and 'opening'. Apart from art 38, which as explained above concern a specific situation which may arise in the context of secondary proceedings (Article 38, it may be noted, is in Ch III of the regulation, headed 'Secondary insolvency proceedings'.), and a further reference in the third subparagraph of art 25(1), which also concerns interlocutory preservation measures, there is no other suggestion in the body of the regulation that proceedings will necessarily involve a separate 'request' for the opening followed after a lapse of time by the 'judgment opening insolvency proceedings'.

75. Dr Bondi mentions in addition that the 'contrast between the Request and Opening can for example be seen clearly from Article 3(4)'. That provision, however, merely refers to a request for the opening of (secondary) proceedings, with no suggestion of a necessary time lapse between the two stages.

76. Article 38 is thus the only provision in the body of the regulation which makes such a distinction, manifestly an insufficient incidence from which to deduce a 'very clear pattern'. To my mind, art 38 simply provides for a situation which may arise in the context of a national type of insolvency proceeding which does in fact involve two separate stages, between which it may in certain circumstances be appropriate to appoint a temporary administrator; it cannot be deduced from art 38 that all types of insolvency proceeding necessarily involve two stages.

77. It is moreover clear from the preamble that the regulation does not seek to harmonise national law. Recital (11) in the preamble states:

'This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community.'

Nor indeed could legislation based on arts 61(c) and 67(1) EC so harmonise national law.

78. Second, Dr Bondi argues that there is no such insolvency proceeding listed under Ireland in Annex A to the regulation as 'provisional liquidation'. That however is to my mind irrelevant to the present proceedings, which concern compulsory winding up by the court, within the scope of the regulation by virtue of its inclusion in the list in Annex A.

79. Next, a number of arguments are adduced to the effect that proceedings of the type at issue do not fall within the scope of the regulation because for one reason or another they do not satisfy the definition in art 1(1), which refers to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

80. Thus, Dr Bondi submits that a compulsory winding up by the court in Ireland falls within the scope of the regulation only if it is an insolvency proceeding in accordance with art 1(1), and hence only if the national court is satisfied that the insolvency ground of jurisdiction has been proved (It appears that as a matter of Irish law a company may in certain circumstances be compulsorily wound up by the court even where it is not insolvent.). Until the winding-up order is made, there is no finding of insolvency. The Italian government made similar submissions at the hearing.

81. In my view, that argument cannot be accepted. In the present case, the referring court's first question assumes that the petition presented is 'for the winding up of an insolvent company'. In those circumstances, it would not be appropriate for this court to question the underlying premise.

82. Dr Bondi further submits that in the context of a compulsory winding up by the court in Ireland, the statutory system of realising and distributing the assets and seeking and considering creditors' claims takes effect only after the winding-up order is made; only at that point therefore is there truly a 'collective' insolvency proceeding within the meaning of art 1(1) of the regulation.

83. That argument however to my mind misinterprets the scheme of the regulation. While art 1(1) certainly contains a definition of the insolvency proceedings within the scope of the regulation, that provision cannot be construed in isolation from the definitions in art 2.

84. The effect of art 2(a) is that 'the collective proceedings referred to in Article 1(1)' are 'listed in Annex A'. There is consensus among commentators on the regulation that 'once the proceedings have been included in the list, the Regulation applies without any further review by the courts of other member states' (Virgos and Garcimartmn (para 36); see also the Virgos-Schmit Report (paras 49, 50); Moss, Fletcher and Isaacs (paras 3.02, 8.07); Balz, p 502. The situation is slightly different for the condition of insolvency, since in circumstances where the type of proceeding listed in Annex A may be used both where there is insolvency and where there is not, the insolvency condition must in addition be satisfied. In the present case, however, that is not in my view an issue: see para 81, above.). Since compulsory winding up by the court in Ireland is included in Annex A, I do not consider that the application of the regulation to such proceedings may be put in doubt on the ground that certain aspects of the definition in art 1(1) are not satisfied.

85. In any event, the referring court states in the order for reference that the provisional liquidator 'represents and is bound to protect the interests of all creditors and to take possession of the assets'.

86. Finally, the French government refers to the four conditions which on the basis of the wording of art 1(1) must be satisfied in order for insolvency proceedings to fall within the scope of the regulation: the proceedings must be collective, the debtor must be insolvent, there must be partial or total disinvestment of the debtor and a liquidator must be appointed. The French government submits that, since the definition of 'insolvency proceedings' in art 2(a) and Annex A does not include the appointment of a provisional liquidator, such appointment cannot be an 'insolvency proceeding' within the meaning of the regulation.

87. Again however that argument seems to me to betray a misunderstanding of the scheme of the regulation. Compulsory winding up by the court in Ireland is listed in Annex A. The provisional liquidator, mentioned in the list in Annex C, was appointed in the context of such a proceeding. Those factors to my mind suffice.

88. I accordingly conclude on the first question referred that, where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, that order combined with the presentation of the petition constitutes a judgment opening insolvency proceedings for the purposes of art 16 of the regulation.

THE SECOND QUESTION: THE TIME OF THE OPENING OF THE PROCEEDINGS

89. By its second question, which is put only if the first question is answered in the negative, the national court asks whether the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitutes the opening of insolvency proceedings for the purposes of the regulation by virtue of the Irish legal provision (s 220(2) of the Companies Act 1963 (Set out in para 22, above.)) deeming the winding up of the company to commence at the date of the presentation of the petition.

90. Since in my view the national court's first question calls for a positive answer, it is unnecessary to answer the second question referred. However, if it arose, it could be dealt with briefly, along the following lines.

91. Dr Bondi and the Finnish, French, German and Italian governments submit that the second question should be answered in the negative, while Bank of America, the Director of Corporate Enforcement, the certificate/note holders, the Austrian, Czech and Irish governments and the Commission consider that it should be answered in the affirmative. I agree with the latter view.

92. Article 16(1) of the regulation, which concerns the recognition of judgments opening insolvency proceedings, requires recognition from the time a judgment 'becomes effective in the state of the opening of proceedings'. Thus it is national law which determines when the judgment becomes effective. That is consistent with art 4 which provides that in general the law of the state where the proceedings are opened is the law 'applicable to insolvency proceedings and their effects' including the opening, conduct and closure of those proceedings. Recital (23) (Set out in para 10, above.) makes it clear that that law includes procedural as well as substantive rules. I accordingly cannot accept Dr Bondi's assertion that the regulation in some way 'overrides' domestic law provisions. It must also be borne in mind that the regulation was not intended to be a harmonisation measure (See para 77, above.).

93. Section 220(2) of the Irish Companies Act 1963, provides that in the case of a compulsory winding up by the court (such as the proceedings at issue in the present case), the winding up 'shall be deemed to commence at the time of the presentation of the petition for the winding up'.

94. The terms of that provision, applicable by virtue of the regulation, seem to me conclusively to resolve the national court's second question.

95. It might be added that, as the certificate/note holders point out, the Virgos-Schmit Report explicitly recognises the existence of national 'relation back' doctrines, stating that the law of the state of opening of insolvency proceedings-

'determines the conditions to be met, the manner in which the nullity and voidability function (automatically, by allocating retrospective effects to the proceedings or pursuant to an action taken by the liquidator, etc) and the legal consequences of nullity and voidability.' (See para 135 (my emphasis).)

THE THIRD QUESTION: REVIEW OF JURISDICTION

96. By its third question the referring court asks whether, where insolvency proceedings are first opened by a court in the member state in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, a court in another member state has jurisdiction to open main insolvency proceedings.

97. That question will arise where, as in the present case, the courts of two member states assert jurisdiction over the insolvency of a company. The regulation makes no express provision for such a situation. The referring court asks essentially whether in such a situation the court in one of those member states may review the jurisdiction of the court in the other member state.

98. The referring court mentions art 3(1), which states that the courts of the member state within the territory of which the centre of a debtor's main interests is situated are to have jurisdiction to open insolvency proceedings, and art 16(1), which states that any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction pursuant to art 3 is to be recognised in all the other member states.

99. Bank of America, the Director of Corporate Enforcement, the certificate/note holders and the Irish government consider that foreign insolvency proceedings have to be recognised only if the foreign court objectively has jurisdiction; the third question should therefore be answered in the affirmative.

100. Those parties submit that the obligation on the courts of other member states to recognise a judgment opening insolvency proceedings in a given member state pursuant to art 16(1) applies only if the member state in which the insolvency proceedings are opened 'has jurisdiction pursuant to Article 3', and therefore only if the centre of the debtor's main interests is situated in that member state. The courts of only one member state have jurisdiction to open main insolvency proceedings and those are the courts of the member state within whose territory the centre of a debtor's main interests is situated; it is quite clear from the regulation that a company can have only one centre of main interests. The test as to where the centre of a debtor's main interests is situated is an objective one. A court of a member state may not open main insolvency proceedings in respect of a corporate debtor where neither its registered office nor the place where it conducts the administration of its assets on a regular basis in a manner ascertainable by third parties is in that member state. Thus, any court faced with the possibility that insolvency proceedings have been opened in another jurisdiction has to ascertain whether the other court did actually have jurisdiction pursuant to art 3 and more particularly whether (a) the court claiming to have determined the locus of the centre of main interests applied the correct legal criteria and (b) the factual evidence is capable of supporting such a conclusion. Although recital (22) in the preamble to the regulation requires that 'the decision of the first court to open proceedings should be recognised', it is notable that that requirement is not reflected in the main text of the regulation.

101. Dr Bondi, the Austrian, Czech, Finnish, French, Hungarian and Italian governments and the Commission submit that the national court's third question should be answered in the negative. I agree.

102. In my view, that conclusion follows in particular from the principle of mutual trust which underlies the regulation and which is made explicit in recital (22) of the preamble. That recital states:

'Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.' (Unless the public policy exception in art 26 is invoked. Article 26 is the subject of the referring court's fifth question in the present case.)

103. Admittedly, the text of the regulation does not include a provision to the same effect as recital (22) (That is in part for historic reasons. Virgos and Garcimartmn explain that when negotiating the transformation of the Convention into a regulation, the member states decided to incorporate in the preamble those aspects of the Virgos-Schmit Report which were considered especially relevant for the purposes of ensuring the correct understanding of its rules (para 48(a)).). However, the importance of the principle articulated in that recital is confirmed by the Virgos-Schmit Report, which states that the 'courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a Contracting State which claims jurisdiction under Article 3', and is accepted by numerous commentators (Virgos-Schmit Report (para 202(2); see also paras 79, 215, 220); Moss, Fletcher and Isaacs (paras 5.38, 8.47, 8.48, 8.205); Virgos and Garcimartmn (paras 70, 402); Balz, pp 505, 513, and Fletcher, p 288.).

104. The proper remedy for any party to insolvency proceedings who is concerned that the court opening the main proceedings has wrongly assumed jurisdiction under art 3 should be sought in the domestic legal order of the member state where that court is situated, with the possibility of a reference to this court if appropriate (See the Virgos-Schmit Report (para 202) and Fletcher, pp 288-289.).

105. I accordingly conclude in answer to the third question referred that, where insolvency proceedings are first opened by a court in the member state in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other member states do not have jurisdiction to open main insolvency proceedings.

THE FOURTH QUESTION REFERRED: THE 'CENTRE OF A DEBTOR'S MAIN INTERESTS'

106. By its fourth question the referring court asks for guidance on the governing factors in determining the 'centre of a debtor's main interests' within the meaning of art 3(1) of the regulation.

107. Article 3(1), it will be recalled, confers jurisdiction to open insolvency proceedings on the 'courts of the member state within the territory of which the centre of a debtor's main interests is situated' and adds that in the case of a company or legal person 'the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary'. That provision therefore establishes a rebuttable presumption. Recital (13) adds that the centre of main interests 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties'.

108. The fourth question is based on the situation where (i) the debtor is a subsidiary company, (ii) its registered office and that of its parent company are in two different member states and (iii) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state in which its registered office is situated. The national court asks whether in those circumstances the presumption that the centre of the subsidiary's main interests is in the member state of its registered office is rebutted if in addition the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control, and does in fact control, the policy of the subsidiary.

109. Dr Bondi and the Italian government consider that the latter circumstance is sufficient to rebut the presumption; Bank of America, the Director of Corporate Enforcement, the certificate/note holders, the Austrian, Czech, Finnish, French, German, Hungarian and Irish governments and the Commission take the contrary view.

110. I agree that the fact of the parent company's control is not sufficient to rebut the presumption in art 3(1) of the regulation that the centre of main interests of a subsidiary company is situated in the member state where its registered office is to be found. That view seems to me to follow from the scheme and wording of the regulation. Before further analysing the regulation, however, I would like to respond to a number of arguments adduced by Dr Bondi and the Italian government in support of the contrary view.

111. Those two parties rely principally on the Virgos-Schmit Report, which states:

'Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office.' (Paragraph 75. Balz puts it in somewhat different terms (p 504): 'In the case of a mere mailbox registration, the headquarters will be treated as the centre of main interests.')

Dr Bondi and the Italian government submit that if it is to be demonstrated that the centre of main interests is somewhere other than the state where a company's registered office is located, it consequently needs to be shown that the 'head office' type of functions are performed elsewhere. The focus must be on the head office functions rather than simply on the location of the head office because a 'head office' can be just as nominal as a registered office if head office functions are not carried out there. In transnational business the registered office is often chosen for tax or regulatory reasons and has no real connection with the place where head office functions are actually carried out. That is particularly so in the case of groups of companies, where the head office functions for the subsidiary are often carried out at the place where the head office functions of the parent of the group are carried out.

112. I find those submissions sensible and convincing. They do not, however, seem to me very helpful in answering the question. They do not in particular demonstrate that a parent company's control of a subsidiary's policy determines that subsidiary's 'centre of main interests' within the meaning of the regulation.

113. Second, Dr Bondi submits that the 'ascertainability by third parties' of the centre of main interests is not central to the concept of the 'centre of main interests'. That can be seen from recital (13) itself, which states that the 'centre of main interests' 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis', in other words, in the case of a corporation, where its head office functions are exercised. Recital (13) continues 'and [which] is therefore ascertainable by third parties', in other words, it is because the corporation's head office functions are exercised in a particular member state that the centre of main interests is ascertainable there.

114. Again, I agree with that analysis. It does not however seem to me to help, since the national court's fourth question assumes that the subsidiary 'conducts the administration of [its] interests on a regular basis' in the member state where its registered office is situated.

115. Third, Dr Bondi submits that there is an important difference between 'ascertainable' and 'ascertained'. The question of ascertainability involves looking to see where the head office functions are actually carried out: that is an objective process and should not be confused with subjective evidence from particular creditors about where they thought the centre of main interests was. To my mind, however, the distinction between 'ascertained' and 'ascertainable' is not relevant to the issues raised by the national court's fourth question, since both recital (13) and that question use the term 'ascertainable'.

116. Turning to the substance of the fourth question referred, I am of the view that, where the registered offices of a parent company and its subsidiary are in two different member states, the fact (assumed by the referring court) that the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated will normally be decisive in determining the 'centre of [its] main interests'.

117. It is clear that nothing can necessarily be inferred from the fact that a debtor company is a subsidiary of another company. The regulation applies to individual companies and not to groups of companies; in particular it does not regulate the relationship of parent and subsidiary. Under the scheme of the regulation, jurisdiction exists for each debtor with a separate legal entity. Both subsidiary and parent company have separate legal identities. It follows therefore that each subsidiary within a group must be considered individually. That is confirmed by art 3(1), which provides that the place of the registered office of a company 'shall be presumed to be the centre of its main interests in the absence of proof to the contrary', and recital (13) in the preamble, which states that the centre of main interests 'should correspond to the place where the debtor conducts the administration of his interests' (My emphasis. See also the Virgos-Schmit Report (para 76), Virgos and Garcimartmn (para 61) and Balz (p 503).).

118. Although that definition makes no reference to the elements which constitute 'administration', important in the present case where control of policy has been argued to constitute 'administration', it has been suggested that the choice of 'centre of main interests' (See for an interesting account of the background to the concept of the 'centre of main interests' Virgos and Garcimartmn (para 46).) as the principal connecting factor determining the member state with jurisdiction over an insolvent company is intended to provide a test in which the attributes of transparency and objective ascertainability are dominant (Virgos-Schmit Report (para 75); Moss, Fletcher and Isaacs (para 3.10) and Virgos and Garcimartmn (para 53).). Those concepts seem to me to be wholly appropriate elements for determining jurisdiction in the context of insolvency, where it is clearly essential that potential creditors should be able to ascertain in advance the legal system which would resolve any insolvency affecting their interests. It is particularly important, it seems to me, in cross-border debt transactions (such as those involved in the main proceedings) that the relevant jurisdiction for determining the rights and remedies of creditors is clear to investors at the time they make their investment.

119. Where a debtor company which is a subsidiary 'conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member

state where its registered office is situated', the conditions of transparency and ascertainability are by definition satisfied.

120. In contrast, the fact (also assumed in the national court's question) that a debtor company's parent company 'is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary' does not in my view satisfy those conditions.

121. The mere fact that one company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of a subsidiary, even if ascertainable by third parties (There are various requirements, stemming from EC legislation, concerning disclosure by companies of both the procedure for appointing directors and the existence of a parent/subsidiary relationship. However, not all those requirements apply to all companies: the position varies depending on whether the companies concerned are public or private, and in the case of public companies, on whether they are listed. Moreover disclosure in a company's published accounts is inevitably retrospective: since accounts are of necessity prepared and published after the period to which they relate, they will not assist potential creditors of a company in determining the actual and prospective locus of the centre of that company's main interests.), does not demonstrate that it does in fact control that policy. If on the other hand a parent company does control the policy of its subsidiary, that fact may not be readily ascertainable by third parties (It is perhaps for this reason that Virgos and Garcimartmn take the view that 'in the case of subsidiary companies the relevant connection will be the place where the centre of administration (ie head office) of the subsidiary company is located. The fact that the decisions of this subsidiary are taken in accordance with instructions emanating from the parent company or from shareholders living elsewhere does not modify the rule of international jurisdiction over this company' (para 51). See also Virgos and Garcimartmn (para 61).). The national court's question does not mention that the existence of control is so ascertainable.

122. That is not to say that the purely formal criterion of the locus of a subsidiary company's registered office will necessarily dictate the member state whose courts have jurisdiction over any insolvency. An inherent aspect of the 'centre of main interests' concept is to ensure that functional realities are capable of displacing purely formal criteria (See Moss, Fletcher and Isaacs (para 3.11).). Any party seeking to rebut the presumption that insolvency jurisdiction follows the registered office must however demonstrate that the elements relied on satisfy the requirements of transparency and ascertainability. Insolvency being a foreseeable risk, it is important that international jurisdiction (which entails the application of the insolvency laws of a given state) be based on a place known to the debtor's potential creditors, thus enabling the legal risks which would have to be assumed in the case of insolvency to be calculated (See the Virgos-Schmit Report (para 75).).

123. It is significant in my view that in the present case the national court's question is based on the premise that 'the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties'. That description satisfies the definition in recital (13). I consider that strong evidence of overriding and ascertainable control by a parent company would be required to support a finding that the centre of a subsidiary company's main interests is situated at a place other than that which would follow from the explicit terms of recital (13).

124. If therefore it were shown that the debtor's parent company so controlled its policies and that that situation was transparent and ascertainable at the relevant time (and not therefore merely retrospectively), the normal test might be displaced.

125. I would add finally that in determining the centre of a debtor's main interests, each case manifestly falls to be decided on its specific circumstances. For that reason it seems to me that the decisions of national courts referred to in the observations of various parties are not helpful in establishing rules of general application.

126. I accordingly conclude that, where the debtor is a subsidiary company and where its registered office and that of its parent company are in two different member states and the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state in which its registered office is situated, the presumption that the centre of the subsidiary's main interests is in the member state of its registered office is not rebutted merely because the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control, and does in fact control, the policy of the subsidiary and the fact of such control is not ascertainable by third parties.

THE FIFTH QUESTION REFERRED: PUBLIC POLICY

127. The fifth question referred concerns art 26 of the regulation, which provides that a member state may refuse to recognise insolvency proceedings opened in another member state where the effects of such recognition 'would be

manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'.

128. Specifically, the referring court asks whether, where it is manifestly contrary to the public policy of a member state to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, that member state is bound to give recognition to a decision of the courts of another member state purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first member state is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second member state has refused, in spite of requests and contrary to the order of the court of the second member state, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first member state, with any copy of the essential papers grounding the application.

129. I would mention at the outset that if my analysis of the first question referred is correct, the fifth question does not in my view arise, since the Italian proceedings were opened after the Irish proceedings and therefore do not in any event require recognition (at least as main proceedings) under the regulation.

130. Dr Bondi and the Italian government are of the view that the fifth question should be answered in the affirmative, namely to the effect that in the circumstances outlined, the first member state is bound to recognise the decision of the courts of the second member state. Bank of America, the Director of Corporate Enforcement, the certificate/note holders, the Czech, French, German, Hungarian and Irish governments and the Commission essentially take the opposite view.

131. In my view it is clear, first, and as Dr Bondi and the Italian government stress, that the public policy exemption in art 26 is intended to be of limited scope. That is borne out by the inclusion in that provision of the requirement that the effects of recognition should be 'manifestly' contrary to public policy, by the statement in recital (22) in the preamble to the regulation that 'grounds for non-recognition should be reduced to the minimum necessary', and by the Virgos-Schmit Report, which states: 'The public policy exception ought to operate only in exceptional cases.' (See para 204.)

132. Difficulties arise however when those parties-and indeed many of the parties presenting written observations on the fifth question-seek to apply the requirements of art 26 to the facts of the present case.

133. In my view, given the wording of the fifth question referred, it is not open to the parties, or indeed to this court, to depart from the factual assumptions which are woven into the terms in which the question is put.

134. That question explicitly assumes, where the courts of two member states purport to open insolvency proceedings and where recognition of the decision of the court in member state B is sought before the court in member state A, (i) that it is manifestly contrary to the public policy of member state A to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision and (ii) that the court of member state A is satisfied that the decision of member state B has been made in disregard of those principles.

135. It seems to me therefore that it is not relevant to debate the different legal cultures of the two member states concerned or to seek to show that the provisional liquidator's legal rights were in fact safeguarded.

136. I also agree with Dr Bondi and the Italian government that the court's judgment in Krombach v Bamberski (Case C-7/98 [2001] All ER (EC) 584, [2000] ECR I-1935; see further para 138, below. See also Regie Nationale des Usines Renault SA v Maxicar SpA Case C-38/98 [2000] IP & T 1119, [2000] ECR I-2973.) suggests that the court can and should review the limits of what can properly fall within the public policy exception in order for the fundamental goals of recognition and co-operation not to be frustrated.

137. That case concerned art 27(1) of the Brussels Convention, which requires the courts of a contracting state to refuse recognition of a judgment delivered by the courts of another contracting state 'if such recognition is contrary to public policy in the State in which recognition is sought' (The equivalent provision in Regulation (EC) 44/2001 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L12 p 1), is art 34(1); that provision differs from art 27(1) of the Convention however in that, like art 26 of the Insolvency Proceedings Regulation, recognition of a judgment must be 'manifestly contrary to public policy' before it can be refused on that ground.). The court was essentially asked whether, where a court had refused to hear a defendant, recognition of that

court's judgment could be refused under art 27(1) solely on the ground that the defendant had not been present at the hearing.

138. The court noted that art 27(1) should be interpreted strictly, in that it constituted an obstacle to the attainment of one of the fundamental objectives of the Convention, and that recourse should be had to the public policy clause only in exceptional cases (See para 21.). The court continued:

'It follows that, while the Contracting States in principle remain free . . . to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State . . .

It follows from a line of case-law developed by the Court . . . that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question.' (See paras 22, 23 and 42.)

139. In the present case, the referring court states in its fifth question that, in the circumstances there outlined, permitting a decision so reached to have effect would be manifestly contrary to the public policy of the member state concerned. It is apparent from the order for reference that that conclusion was reached after a thorough and searching review of the conduct of the Parma court by the Supreme Court of Ireland.

140. Dr Bondi and the Italian government, citing the Virgos-Schmit Report, submit that the interpretation of public policy by the referring court as manifested in the fifth question is 'unreasonably wide' and 'not covered by art 26' (See para 205.).

141. While I agree with those parties that it follows from Krombach's case that the court must review the limits of national public policy, I consider that their argument overlooks both the proper scope of that decision and the main thrust of the Virgos-Schmit Report.

142. In Krombach's case, the court's statement that it was required to review the limits within which the courts of a contracting state may have recourse to the concept of public policy for the purpose of refusing recognition to a judgment emanating from a court in another contracting state (See para 23, set out in para 138, above.) was immediately followed by a reference to 'the general principle of Community law that everyone is entitled to fair legal process', inspired by the fundamental rights which form an integral part of the general principles of law whose observance the court ensures and which are enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) (See paras 25-27.). The significance of those fundamental rights permeates the court's judgment (See in particular paras 38, 39 and 42-44.). In that light I consider that the requirement of due process in principle falls within the scope of the public policy exception under art 26 of the regulation.

143. The Virgos-Schmit Report seeks to restrict interpretations of public policy to constitutionally protected rights and freedoms and fundamental policies of the requested state of both substance and procedure; indeed it states that public policy may-

'protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another contracting state, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings.'

Creditors whose participation is hindered are expressly mentioned (See para 206.).

144. The requirement of due process may be regarded as particularly important given that the regulation does not permit review of the substance of a decision of which recognition is sought (See Virgos and Garcimartmn (para 406).).

145. The public policy referred to in art 26 of the regulation thus in my view clearly does encompass failures to observe due process where essential procedural guarantees such as the right to be heard and the rights of participation in the proceedings have not been adequately protected. Provided that the conduct which is alleged to infringe public policy falls in principle within the scope of that provision, its terms make it clear that it is for each member state to evaluate whether the judgment of another member state offends the first member state's public policy. If so, the question whether

the infringement alleged has been sufficiently grave to warrant that court's refusing recognition on the basis of art 26 is a matter for its national law (See the Virgos-Schmit Report (para 207).).

146. Dr Bondi and the Italian government further submit that art 26 applies only where the 'effects' of the proposed recognition would be 'manifestly contrary' to the state's public policy. The 'effect' in the present case is that the Irish courts are obliged to recognise that their own insolvency proceedings are 'secondary' and not 'main' proceedings. Those parties contend that it is difficult to see why such a limited 'effect' should be manifestly contrary to Irish public policy.

147. Again however that argument seems to me to disregard the terms in which the question is put. The national court expressly states that it is manifestly contrary to the public policy of the member state concerned to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, and that it is satisfied that the decision in question has been made in disregard of those principles.

148. Finally, Dr Bondi and the Italian government submit that the referring court appears to have failed to appreciate that, even if a case were to come within art 26, the member state whose public policy is involved does not have to refuse recognition. The word 'may' is used in art 26, allowing the member state a discretion whether to refuse recognition. That contrasts with the use of the word 'shall' in art 27 of the Brussels Convention. If-as those parties assert-in substance Mr Farrell obtained a fair hearing in Italy, and given that, if not, he could have sought to redress the alleged procedural deficiencies by an appeal, the referring court should not undermine the system of recognition in the regulation by exercising its discretion to refuse recognition.

149. Again, however, the first point raised above, namely the alleged fairness of the hearing, seems to me to seek to reopen the facts found by the referring court, which states in the question referred that it is satisfied that the decision of the Parma court was 'made in disregard [of the] right to fair procedures and a fair hearing'.

150. With regard to the second point, namely the possibility of redress by appeal, it must be borne in mind that at the early stages of insolvency proceedings time will frequently be of the essence, so that a given procedure must be assessed as it stands. That approach is consistent with the comments in the Virgos-Schmit Report dealing with the similarly urgent context of ex parte preservation measures. The report notes that all the contracting states provide for such measures, and continues:

'Naturally, for these measures to be constitutional, in most States they are subject to special requirements guaranteeing a respect of due process (e.g. cumulatively, evidence of a good prima facie case, serious urgency, lodging of a guarantee by the applicant, immediate notification of the person concerned and the real possibility of challenging the adoption of the measures).' (See para 207.)

The requirement that those conditions be cumulative suggests that failure to observe one, such as immediate notification of the person concerned, may not necessarily be cured by the existence of another, such as the possibility of challenge (It may be noted that the referring court states in the order for reference that that is indeed the case as a matter of Irish law: 'In a like situation, this court would not allow a corresponding decision of any court or administrative body under its jurisdiction to stand. It would consider the want of fair procedures in itself as so manifestly contrary to public policy that it would regard it as having been made without jurisdiction and, consequently, void. Nor would that result be cured by the fact that the decision could be reopened before the same court. Such a fundamental failure to observe fair procedures would taint the entire proceeding.'). The report stresses that whether such measures are recognised 'depends on whether or not they are compatible with the public policy of the requested state in which the judgment is to take effect' (See para 207.).

151. Finally with regard to the wording of art 26, it is correct that that provision, in contrast to art 27(1) of the Brussels Convention, confers a discretion on the court before which recognition is sought. The fact that that court has the option of recognising insolvency proceedings opened in another member state even where the effect of such recognition would be manifestly contrary to its public policy cannot however mean that that will always be the correct course, since that interpretation would deprive art 26 of any effect. In the present case it seems to me that, on the basis of the hypothesis on which the question was put, which is in turn based on findings of fact made by the referring court, there is nothing to suggest that that court incorrectly exercised its discretion by refusing recognition.

CONCLUSION

152. I accordingly conclude that the first, third, fourth and fifth questions referred by the Supreme Court of Ireland should be answered as follows:

(1) Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor, all with the effect in law of depriving the directors of the company of power to act, that order combined with the presentation of the petition constitutes a judgment opening insolvency proceedings for the purposes of art 16 of Council Regulation (EC) 1346/2000 (on insolvency proceedings).

(2) Where insolvency proceedings are first opened by a court in the member state in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other member states do not have jurisdiction under art 3(1) of Regulation 1346/2000 to open main insolvency proceedings.

(3) Where a debtor is a subsidiary company and where its registered office and that of its parent company are in two different member states and the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state in which its registered office is situated, the presumption in art 3(1) of Regulation 1346/2000 that the centre of the subsidiary's main interests is in the member state of its registered office is not rebutted merely because the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control, and does in fact control, the policy of the subsidiary and the fact of such control is not ascertainable by third parties.

(4) Where it is manifestly contrary to the public policy of a member state to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, that member state is not bound by art 16 of Regulation 1346/2000 to give recognition to a decision of the courts of another member state purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first member state is satisfied that the decision in question has been made in disregard of those principles.

DECISION-1:

2 May 2006.

THE COURT OF JUSTICE (GRAND CHAMBER) delivered the following judgment: 1. This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) 1346/2000 (on insolvency proceedings) (OJ 2000 L160 p 1) (the regulation).

2. The reference was submitted in the context of insolvency proceedings concerning the Irish company **Eurofood** IFSC Ltd (**Eurofood**).

LEGAL CONTEXT

Community legislation

3. According to art 1(1) thereof, the regulation applies 'to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

4. According to art 2 of the regulation, headed 'Definitions'-

'For the purposes of this Regulation:

(a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C . . .

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not . . .'

5. Annex A to the regulation, concerning the insolvency proceedings referred to in art 2(a) of the regulation, mentions under Ireland the procedure of 'compulsory winding up by the Court'. By way of liquidators referred to in art 2(b) of the regulation, Annex C indicates, in relation to Ireland, the 'provisional liquidator'.

6. Concerning the determination of the court having jurisdiction, art 3(1) and (2) of the regulation provide:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.'

7. Concerning the determination of the law to be applied, art 4(1) of the regulation provides:

'Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened . . .'

8. Concerning the recognition of insolvency proceedings, art 16(1) of the regulation states:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

9. Article 17(1) of the regulation states:

'The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings . . .'

10. However, according to art 26 of the regulation-

'Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

11. According to art 29(a) of the regulation, the liquidator in the main proceedings may request the opening of secondary proceedings.

12. Article 38 of the regulation provides that, where the court of a member state which has jurisdiction pursuant to art 3(1) appoints a temporary administrator, that temporary administrator-

'shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.'

National legislation

13. Section 212 of the Companies Act 1963 (the Companies Act) confers on the High Court jurisdiction to wind up any company.

14. Section 215 of the Companies Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

15. Section 220 of the Companies Act provides:

'1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

16. Section 226(1) of the Companies Act provides that the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition. The appointment of the liquidator, pursuant to s 225, is otherwise made at the time the winding-up order is made. Pursuant to s 229(1), a provisional liquidator, once appointed, is obliged to 'take into his custody or under his control all the property and things in action to which the company is or appears to be entitled'.

BACKGROUND AND QUESTIONS REFERRED FOR A PRELIMINARY RULING

17. **Eurofood** was registered in Ireland in 1997 as a 'company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly-owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.

18. On 24 December 2003, in accordance with Decree Law No 347 of 23 December 2003 concerning urgent measures for the industrial restructuring of large insolvent undertakings (GURI No 298 of 24 December 2003 p 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator of that undertaking.

19. On 27 January 2004, the Bank of America NA applied to the High Court, Ireland, for compulsory winding-up proceedings to be commenced against **Eurofood** and for the nomination of a provisional liquidator. That application was based on the contention that that company was insolvent.

20. On the same day the High Court, on the strength of that application, appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf.

21. On 9 February 2004, the Italian Minister for Production Activities admitted **Eurofoods** to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

22. On 10 February 2004, an application was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma), Italy, for a declaration that **Eurofoods** was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that **Eurofood's** centre of main interests was in Italy, held that it had international jurisdiction to determine whether **Eurofoods** was in a state of insolvency.

23. By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of **Eurofood** had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of **Eurofood** was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to art 26 of the regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that **Eurofood** was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

24. Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'(1) Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening . . . insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346/2000?

(2) If the answer to Question (1) is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

(3) Does Article 3 of the said regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company con-

ducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

(4) Where,

(a) the registered offices of a parent company and its subsidiary are in two different Member States,

(b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

(5) Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?'

25. By order of the President of the Court of Justice of 15 September 2004, the application by the Supreme Court that the accelerated procedure provided for in the first subparagraph of art 104a of the Rules of Procedure be applied to the present case was rejected.

THE QUESTIONS

The fourth question

26. By its fourth question, which should be considered first since it concerns, in general, the system which the regulation establishes for determining the competence of the courts of the member states, the national court asks what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different member states.

27. The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the member state where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.

28. Article 3 of the regulation makes provision for two types of proceedings. The insolvency proceedings opened, in accordance with art 3(1), by the competent court of the member state within whose territory the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that they apply to the assets of the debtor situated in all the member states in which the regulation applies. Although, subsequently, proceedings under art 3(2) may be opened by the competent court of the member state where the debtor has an establishment, those proceedings, described as 'secondary proceedings', are restricted to the assets of the debtor situated in the territory of the latter state.

29. Article 3(1) of the regulation provides that, in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

30. It follows that, in the system established by the regulation for determining the competence of the courts of the member states, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

31. The concept of the centre of main interests is peculiar to the regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

32. The scope of that concept is highlighted by the 13th recital of the regulation, which states that 'the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with art 4(1) of the regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

35. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the member state in which its registered office is situated.

36. By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the regulation.

37. In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different member states, the presumption laid down in the second sentence of art 3(1) of the regulation, whereby the centre of main interests of that subsidiary is situated in the member state where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the member state in which its registered office is situated. By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the regulation.

The third question

38. By its third question, which should be examined second, since it concerns the recognition system established by the regulation in general, the referring court essentially asks whether, by virtue of arts 3 and 16 of the regulation, a court of a member state, other than the one in which the registered office of the undertaking is situated, and other than the one in which that undertaking conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened, must be regarded as having jurisdiction to open the main insolvency proceedings. The referring court is thus essentially asking whether the jurisdiction assumed by a court of a member state to open main insolvency proceedings may be reviewed by a court of another member state in which recognition has been applied for.

39. As is shown by the 22nd recital of the regulation, the rule of priority laid down in art 16(1) of the regulation, which provides that insolvency proceedings opened in one member state are to be recognised in all the member states from the time that they produce their effects in the state of the opening of proceedings, is based on the principle of mutual trust.

40. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those states of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings (see by analogy, in relation to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (OJ 1978 L304 p 36) (the Brussels Convention), Erich Gasser GmbH v MISAT Srl Case C-116/02 [2005] All ER (EC) 517, [2003] ECR I-14693 (para 72), Turner v Grovit Case C-159/02 [2004] All ER (EC) 485, [2004] ECR I-3565 (para 24)).

41. It is inherent in that principle of mutual trust that the court of a member state hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to art 3(1) of the regulation, ie examine whether the centre of the debtor's main interests is situated in that member state. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see para 66 of this judgment).

42. In return, as the 22nd recital of the regulation makes clear, the principle of mutual trust requires that the courts of the other member states recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43. If an interested party, taking the view that the centre of the debtor's main interests is situated in a member state other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the member state in which they were opened, the remedies prescribed by the national law of that member state against the opening decision.

44. The answer to the third question must therefore be that, on a proper interpretation of the first subparagraph of art 16(1) of the regulation, the main insolvency proceedings opened by a court of a member state must be recognised by the courts of the other member states, without the latter being able to review the jurisdiction of the court of the opening state.

The first question

45. By its first question, the referring court essentially asks whether the decision whereby a court of a member state, presented with a petition for the liquidation of an insolvent company, appoints, before ordering that liquidation, a provisional liquidator with powers whose legal effect is to deprive the company's directors of the power to act, constitutes a decision opening insolvency proceedings for the purposes of the first subparagraph of art 16(1) of the regulation.

46. The wording of art 1(1) of the regulation shows that the insolvency proceedings to which it applies must have four characteristics. They must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator.

47. Those forms of proceedings are listed in Annex A to the regulation, and the list of liquidators appears in Annex C.

48. The regulation is designed not to establish uniform proceedings on insolvency, but, as its second recital states, to ensure that 'cross-border insolvency proceedings . . . operate efficiently and effectively'. To that end, it lays down rules which, as its third recital indicates, are aimed at securing 'coordination of the measures to be taken regarding an insolvent debtor's assets'.

49. By requiring that any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction pursuant to art 3 be recognised in all the other member states from the time that it becomes effective in the state of the opening of proceedings, the first subparagraph of art 16(1) of the regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the regulation explains: '[t]he decision of the first court to open proceedings should be recognised in the other member states without those member states having the power to scrutinise the court's decision'.

50. However, the regulation does not define sufficiently precisely what is meant by a 'decision to open insolvency proceedings'.

51. The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one member state to another. In some member states, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other member states, certain essential findings, which may be quite time consuming, must be made before proceedings are opened. Under the national law of certain member states, the proceedings may be opened 'provisionally' for several months.

52. As the Commission of the European Communities has argued, it is necessary, in order to ensure the effectiveness of the system established by the regulation, that the recognition principle laid down in the first subparagraph of art 16(1) of the regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the member states in which the regulation applies, could be seriously disrupted if the courts of those states, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.

53. It is in relation to that objective seeking to ensure the effectiveness of the system established by the regulation that the concept of 'decision to open insolvency proceedings' must be interpreted.

54. In those circumstances, a 'decision to open insolvency proceedings' for the purposes of the regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the member state of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in art 1(1) of the regulation, are present.

55. Contrary to the arguments of Mr Bondi and the Italian government, that interpretation cannot be invalidated by the fact that the liquidator referred to in Annex C to the regulation may be a provisionally-appointed liquidator.

56. Both Mr Bondi and the Italian government acknowledge that, in the main proceedings, the 'provisional liquidator' appointed by the High Court, by decision of 27 January 2004, appears amongst the liquidators mentioned in Annex C to the regulation in relation to Ireland. They argue, however, that this is a case of a provisional liquidator, in respect of whom the regulation contains a specific provision. They note that art 38 of the regulation empowers the provisional liquidator, defined in the 16th recital as the liquidator 'appointed prior to the opening of the main insolvency proceedings', to apply for preservation measures on the assets of the debtor situated in another member state for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings. Mr Bondi and the Italian government infer from that that the appointment of a provisional liquidator cannot open the main insolvency proceedings.

57. In that respect, it should be noted that art 38 of the regulation must be read in combination with art 29, according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another member state. That art 38 thus concerns the situation in which the competent court of a member state has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex C to the regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another member state, may request that preservation measures be taken over the assets of the debtor situated in that member state. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex C to the regulation and ordered that the debtor be divested.

58. In view of the above considerations, the answer to the first question must be that, on a proper interpretation of the first subparagraph of art 16(1) of the regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a member state to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

The second question

59. In the light of the answer given to the first question, there is no need to reply to the second question.

The fifth question

60. By its fifth question, the referring court essentially asks whether a member state is required, under art 17 of the regulation, to recognise insolvency proceedings opened in another member state where the decision opening those proceedings was handed down in disregard of procedural rules guaranteed in the first member state by the requirements of its public policy.

61. Whilst the 22nd recital of the regulation infers from the principle of mutual trust that 'grounds for non-recognition should be reduced to the minimum necessary', art 26 provides that a member state may refuse to recognise insolvency proceedings opened in another member state where the effects of such recognition would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

62. In the context of the Brussels Convention, the Court of Justice has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in art 27, para 1, of the convention is reserved for exceptional cases (see Krombach v Bamberski Case C-7/98 [2001] All ER (EC) 584, [2000] ECR I-1935 (paras 19, 21)).

63. Considering itself competent to review the limits within which the courts of a contracting state may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another contracting state, the court had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order (see Krombach's case (paras 23, 37)).

64. That case law is transposable to the interpretation of art 26 of the regulation.

65. In the procedural area, the court has expressly recognised the general principle of Community law that everyone is entitled to a fair legal process (see Baustahlgewebe GmbH v European Commission Case C-185/95 P [1998] ECR I-8417 (paras 20, 21), Netherlands v European Commission Joined cases C-174/98 P and C-189/98 P [2000] ECR I-1 (para 17) and Krombach's case (para 26)). That principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the court enforces, drawing inspiration from the constitutional traditions common to the member states and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).

66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

67. In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of art 26 of the regulation, a member state may refuse to recognise insolvency proceedings opened in another member state where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

68. Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale Civile e Penale di Parma. In that respect, it should be observed that the latter court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.

COSTS

69. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court of Justice, other than the costs of those parties, are not recoverable.

On those grounds, the Court of Justice (Grand Chamber) hereby rules:

(1) Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different member states, the presumption laid down in the second sentence of art 3(1) of Council Regulation (EC) 1346/2000 (on insolvency proceedings), whereby the centre of main interests of that subsidiary is situated in the member state where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the member state in which its registered office is situated. By contrast, where a company car-

ries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by that regulation.

(2) On a proper interpretation of the first subparagraph of art 16(1) of Regulation 1346/2000, the main insolvency proceedings opened by a court of a member state must be recognised by the courts of the other member states, without the latter being able to review the jurisdiction of the court of the opening state.

(3) On a proper interpretation of the first subparagraph of art 16(1) of the regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a member state to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

(4) On a proper interpretation of art 26 of the regulation, a member state may refuse to recognise insolvency proceedings opened in another member state where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

TAB 6

2002 CarswellOnt 1047

Rodaro v. Royal Bank

Frank Rodaro, Franro Engineering (Ontario) Limited, Heritage Glen North Limited and Heritage Glen West Limited, 740484 Ontario Limited and Kingswood Community Corporation, Plaintiffs/Respondents/Appellants by Cross-Appeal and Royal Bank of Canada and Barbican Properties Inc., Defendants/Appellants/Respondents by Cross-Appeal

Ontario Court of Appeal

Doherty, Weiler, Feldman JJ.A.

Heard: December 10-12, 2001
Judgment: March 26, 2002
Docket: CA C33844, C33883

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Proceedings: reversing 2000 CarswellOnt 281 (Ont. S.C.J.)

Counsel: *Catherine Francis*, *Tamara Vanmeggelen*, for Appellant, Royal Bank of Canada

Paul Macdonald, *Brett Harrison*, for Appellant, Barbican Properties Inc.

Timothy H. Gilbert, *Robert D. Minnes*, *Jean Claude J. Rioux*, for Respondents / Cross-Appellants

Subject: Corporate and Commercial; Torts; Property; Contracts; Civil Practice and Procedure

Creditors and debtors --- General — Relationship of debtor and creditor

Bank agreed to advance loan to developer — Developer alleged that bank made long-term commitment to fund entire building project — Developer fell into arrears on loan payments and bank sought to realize security in property by selling debt to assignee — Trial judge dismissed developer's action for damages for breach of contract and breach of fiduciary duty — Bank did not breach loan agreement and did not have fiduciary duty towards developer — No contract to fund entirety of project arose out of meetings between developer and bank — Developer appealed — Appeal dismissed — There was no basis upon which to interfere with trial judge's findings of fact that provided basis for his rejection of arguments for existence of contract to fund entire project.

Contracts --- Nature of contract — What constitutes contract

Bank agreed to advance loan to developer — Developer alleged that bank made long-term commitment to fund entire building project — Developer fell into arrears on loan payments and bank sought to realize security in property by selling debt to assignee — Trial judge dismissed developer's action for damages for breach of contract and breach of fiduciary duty — Bank did not breach loan agreement and did not have fiduciary duty towards developer — No contract to fund entirety of project arose out of meetings between developer and bank — Developer appealed — Appeal dismissed — There was no basis upon which to interfere with trial judge's findings of fact that provided basis for his rejection of arguments for existence of contract to fund entire project.

Choses in action --- Assignability — Miscellaneous issues

Bank agreed to advance loan to developer — Developer alleged that bank made long-term commitment to fund entire building project — Developer fell into arrears on loan payments and bank sought to realize security in property by selling debt to assignee — During sale negotiations, bank made appraisals of project available to assignee, which included information from developer's business plan — Assignee moved under power of sale — Trial judge dismissed developer's action for damages for breach of contract — Developer appealed — Appeal dismissed — Assignment was valid — Bank assigned only its rights to collect debt and realize on security but assigned no obligations as it had none since at time developer was in default on loan — Assignment had no adverse effects on developer's obligations and did not adversely affect his position as he was entitled to raise any defence applicable to bank against assignee's attempt to collect on debt or realize on security — Bank's entitlement to assign its benefits under agreement existed apart from contractual terms and was not limited by contractual provisions referable to assignment of interests in agreement.

Trade and commerce --- Trade secrets and confidential information — Elements of action

Bank agreed to advance loan to developer — Developer fell into arrears on loan payments and bank sought to realize security in property by selling debt to assignee — During sale negotiations, bank made appraisals of project available to assignee, which included information from developer's business plan — Assignee sought to proceed via foreclosure in order to take over development of project, but as it was unable to secure developer's consent, it proceeded via sale — Trial judge allowed developer's action for damages and held that misuse of confidential information caused detriment to developer in form of lost opportunity — Trial judge declared payment obligations under debt and guarantee were unenforceable and were set aside — Bank and assignee appealed — Appeal allowed — Lost opportunity analysis could not be applied as it was not pleaded or raised by developer at any stage of proceedings and there was no evidence that disclosure of confidential information by bank to assignee caused developer to lose opportunity described by trial judge — Evidence established that developer lost opportunity to negotiate with assignee for reasons that had nothing to do with disclosure of information — Injection of novel theory of liability into case via reasons for judgment was fundamentally unfair to bank and assignee — There was strong evidence that developer would not have negotiated with bank or assignee.

Cases considered by *Doherty J.A.*:

Bank of Montreal v. Wilder, 47 B.C.L.R. 9, 149 D.L.R. (3d) 193, 1983 CarswellBC 219 (B.C. C.A.) — referred to

Bank of Montreal v. Wilder, [1986] 2 S.C.R. 551, 32 D.L.R. (4th) 9, 70 N.R. 341, [1987] 1 W.W.R. 289, 8 B.C.L.R. (2d) 282, 37 B.L.R. 290, 1986 CarswellBC 370, 1986 CarswellBC 763 (S.C.C.) — referred to

Cadbury Schweppes Inc. v. FBI Foods Ltd., 167 D.L.R. (4th) 577, 1999 CarswellBC 77, 1999 CarswellBC 78, 83 C.P.R. (3d) 289, 235 N.R. 30, 42 B.L.R. (2d) 159, 117 B.C.A.C. 161, 191 W.A.C. 161, 59 B.C.L.R. (3d) 1, [1999] 5 W.W.R. 751, [1999] 1 S.C.R. 142, [2000] F.S.R. 491 (S.C.C.) — considered

Canadian Imperial Bank of Commerce v. Sayani (1993), 83 B.C.L.R. (2d) 167, 33 B.C.A.C. 85, 54 W.A.C. 85, 11 B.L.R. (2d) 28, [1994] 2 W.W.R. 260, 1993 CarswellBC 240 (B.C. C.A.) — referred to

Canadian Imperial Bank of Commerce v. Sayani, 11 B.L.R. (2d) 217 (note), [1994] 3 W.W.R. lxvi (note), 87

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B.C.L.R. (2d) xxxii (note), 171 N.R. 244 (note), 51 B.C.A.C. 306 (note), 84 W.A.C. 306 (note), [1994] 1 S.C.R. vi (S.C.C.) *Canadian Imperial Bank of Commerce v. Sayani*, 11 B.L.R. (2d) 217 (note), [1994] 3 W.W.R. lxvi (note), 87 B.C.L.R. (2d) xxxii (note), 171 N.R. 244 (note), 51 B.C.A.C. 306 (note), 84 W.A.C. 306 (note), [1994] 1 S.C.R. vi (S.C.C.) — referred to

Domowicz v. Orsa Investments Ltd., 15 O.R. (3d) 661, 1993 CarswellOnt 1860 (Ont. Gen. Div.) — referred to

Eastwalsh Homes Ltd. v. Anatal Developments Ltd., 12 O.R. (3d) 675, 62 O.A.C. 20, 100 D.L.R. (4th) 469, 30 R.P.R. (2d) 276, 1993 CarswellOnt 587 (Ont. C.A.) — referred to

Eastwalsh Homes Ltd. v. Anatal Developments Ltd., 34 R.P.R. (2d) 90 (note), 104 D.L.R. (4th) vii, 67 O.A.C. 79 (note), 15 O.R. (3d) xvi, 162 N.R. 399 (note), [1993] 3 S.C.R. vi (S.C.C.) — referred to

ICAM Technologies Corp. v. EBCO Industries Ltd. (1993), 85 B.C.L.R. (2d) 318, 52 C.P.R. (3d) 61, 36 B.C.A.C. 298, 58 W.A.C. 298, [1994] 3 W.W.R. 419, 11 B.L.R. (2d) 205, 1993 CarswellBC 322 (B.C. C.A.) — referred to

ICAM Technologies Corp. v. EBCO Industries Ltd., [1994] S.C.C.A. No. 23 (S.C.C.) — referred to

International Corona Resources Ltd. v. Lac Minerals Ltd., 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — referred to

Montgomery v. Ryan, 16 O.L.R. 75, 11 O.W.R. 279, 1908 CarswellOnt 49 (Ont. C.A.) — referred to

Ticketnet Corp. v. Air Canada, 154 D.L.R. (4th) 271, 105 O.A.C. 87, 1997 CarswellOnt 4273 (Ont. C.A.) — referred to

Ticketnet Corp. v. Air Canada (1998), 230 N.R. 400 (note), 115 O.A.C. 399 (note) (S.C.C.) — referred to

Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd., [1902] 2 K.B. 660, 51 W.R. 81 (Eng. C.A.) — referred to

Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd., [1903] A.C. 414, [1900-03] All E.R. Rep. 386, 52 W.R. 143 (U.K. H.L.) — referred to

Tournier v. National Provincial & Union Bank of England (1923), [1924] 1 K.B. 461, [1923] All E.R. Rep. 550, 29 Com. Cas. 129 (Eng. C.A.) — referred to

Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd., 1995 CarswellOnt 3293 (Ont. Gen. Div. [Commercial List]) — referred to

460635 Ontario Ltd. v. 1002953 Ontario Inc., 1999 CarswellOnt 3428, 127 O.A.C. 48 (Ont. C.A.) — considered

APPEAL bank and developer from judgment reported at 2000 CarswellOnt 281, [2000] O.J. No. 272 (Ont. S.C.J.), allowing developer's action for damages for misuse of confidential information; CROSS-APPEAL by developer from judgment dismissing developer's action for damages for breach of contract and breach of fiduciary duty.

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***Doherty J.A.*:**

Overview

1 Over a number of years, Mr. Frank Rodaro, an engineer and land developer, purchased 751 acres of land south of Barrie, Ontario.[FN1] In the early 1980s, the lands were annexed by the City of Barrie. By 1988, Mr. Rodaro was prepared to develop the lands. He put together a potentially profitable proposal calling for development of the property, mostly with residential subdivisions, in phases over several years (the "project"). Two of Mr. Rodaro's lawyers, Saul Shulman and Paul Sullivan, held small interests in the project.

2 In 1988, the Royal Bank of Canada ("RBC") was active as a lender in the real estate development market. Beginning in 1988, RBC advanced funds towards the development of the project. By the spring of 1992, RBC had advanced some $20 million. Its security included a $50 million debenture over the entire project.

3 Initially, the development went well. Unfortunately, a recession in 1990 led to the collapse of the real estate market in Ontario. This collapse and other circumstances (*eg.* a falling out among the partners) resulted in serious difficulties with the project. By April 1992, Mr. Rodaro was still struggling to complete Phase I. RBC advised Mr. Rodaro that he was in default on the loans. This was followed in June 1992 by notice that RBC would not advance any further funds. In July 1992, RBC assigned its debt and related security to Barbican Properties Inc. ("Barbican"), a development company owned in part by RBC. On September 24, 1992, Barbican demanded payment in full of the outstanding loans by no later than October 9, 1992. Repayment was not made and on that date, Mr. Rodaro commenced this litigation. Barbican issued notices of sale in December 1992 and January 1993. The lands were eventually sold in 1996. Those sales left a shortfall on the debt of about $11.8 million.

4 Mr. Rodaro advanced many claims against RBC and Barbican. In essence, he alleged that through various improper means RBC and Barbican took the project from Mr. Rodaro and thereby deprived him of the potential profit from the project.

5 RBC defended on the basis that it had acted as a lender only and had advanced funds in accordance with the terms of various loan agreements made with Mr. Rodaro. RBC claimed that by the spring of 1992, those loans were in default and it had lost all confidence in Mr. Rodaro's ability to bring the project to fruition. RBC made a business decision to assign the debt to Barbican.

6 It was Barbican's position that the assignment was proper and that it had legitimately exercised its rights and took proper steps to realize on its security. Barbican counterclaimed for the $11.8 million shortfall after the sale of the lands.

7 The evidence at trial lasted 92 days. Near the end of Mr. Rodaro's case, the parties agreed that the quantification of his damages would be dealt with in a later proceeding, described as phase 2 of the trial. It was also agreed that the determination of liability and damages on the counterclaim would be left to phase 2.

8 The reasons of Spence J. fill some 300 pages (see [2000] O.J. No. 272 (S.C.J.) (QL)). They provide a detailed review of the evidence and comprehensively address the numerous factual and legal issues raised at trial. Those reasons were of great assistance to this court.

9 Spence J. found against Mr. Rodaro on all issues except one. He found that RBC had improperly given confidential business information, provided to it by Mr. Rodaro, to Barbican, in the course of the negotiations which led to the assignment in July of 1992. This business information had been provided to RBC by Mr. Rodaro in the course of his attempts in late 1991 and early 1992 to secure further financing from RBC. Spence J. held that the disclosure of the information had caused Mr. Rodaro to lose an opportunity to sell his interest in the project at the same time that RBC

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assigned its debt. Spence J. valued that opportunity at a minimum of $1 million but left the assessment of the actual value of the lost opportunity to phase 2. Finally, Spence J. held that if Mr. Rodaro had been given the opportunity to negotiate the sale of his interest in the project with Barbican that sale would have included the elimination of the debt owed to RBC and assigned to Barbican. Accordingly, Spence J. held that the debt and security (including Mr. Rodaro's personal guarantee for $1 million) could not be enforced.

II

Nature of the Appeals

10 RBC and Barbican appeal, contending that they did not misuse confidential information belonging to Mr. Rodaro. They contend that RBC was entitled to assign its debt to Barbican and that it was also entitled to share the information provided by Mr. Rodaro with Barbican in the course of the negotiations culminating in that assignment. RBC and Barbican further argue that the "lost opportunity" theory of damages developed in the reasons of Spence J. is unsound in law and is unsupported by the pleadings, evidence or argument advanced at trial. They maintain that Mr. Rodaro's theory at trial was that the misuse of the confidential information, in combination with other improper acts, caused Mr. Rodaro to lose the project and the profits flowing from the development of the project. RBC and Barbican submit that Spence J. properly rejected this argument but erred in going on to find a causal link between the disclosure of information and damages suffered by Mr. Rodaro on a theory that had no legal or factual basis.

11 Barbican also submits that the trial judge improperly declared the debt and security held by Barbican unenforceable against Mr. Rodaro. Barbican contends that in so holding, the trial judge effectively dismissed the counterclaim despite the agreement between the parties that both liability and damages on the counterclaim would be determined in phase 2 of the trial.

12 Mr. Rodaro cross-appeals. In the cross-appeal he renews most of the arguments unsuccessfully advanced on his behalf at trial. He claims that the trial judge erred in failing to find that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC agreed to provide ongoing, long-term funding for the entire project. Mr. Rodaro submits that the bank repeatedly breached the terms of that "umbrella" agreement in 1990, 1991 and 1992.

13 Mr. Rodaro further contends that the trial judge erred in finding that the relationship between RBC and Mr. Rodaro was simply that of borrower and lender. He argues that the evidence demonstrates a special relationship such as to make RBC a fiduciary. Mr. Rodaro submits that the trial judge should have found that RBC breached its fiduciary obligations repeatedly, culminating in the spring of 1992 when in combination with Barbican, it effectively took Mr. Rodaro's project for its own use.

14 Mr. Rodaro also contends that the trial judge erred in finding that officials of RBC did not make negligent misrepresentations concerning the availability of additional financing by RBC in 1991 and 1992. Mr. Rodaro maintains that those misrepresentations caused him to desist from seeking alternate financing or other equity partners until it was too late to save the project.

15 Mr. Rodaro also argues that the trial judge erred in dismissing the conspiracy claim against RBC and Mr. Rodaro

III

The Cross-Appeal

16 It is convenient to address the cross-appeal first. Most of the arguments made in support of the cross-appeal are

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the same arguments that were advanced at trial. In the main, those arguments failed because of the factual findings made by Spence J. Those findings must be accepted in this court unless it can show that they are unreasonable, based on a material misapprehension of the evidence, or tainted by a failure to consider material, relevant evidence.

17 None of the factual findings that are integral to Spence J.'s rejection of the various claims can be set aside by this court. They are firmly rooted in the evidence. While I do not propose to deal separately with each of the fact-bound arguments advanced by counsel, I will examine counsel's argument that the trial judge erred in failing to find that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC committed to fund the entire project. I will consider this submission in some detail, first because it was central to the case advanced by Mr. Rodaro at trial, and second, because it provides an excellent example of how Spence J. approached and determined the many arguments made before him.

18 By late August 1988, RBC had provided some funding for the project. It was anxious to provide additional funding on appropriate terms. Mr. Rodaro and his advisers met with bank officials on August 23, 1988. Mr. Rodaro claimed that the "umbrella" agreement emerged from this meeting.

19 Spence J. thoroughly reviewed the evidence of the three witnesses who were among those at the August 23 meeting. He rejected Mr. Rodaro's evidence that RBC committed to fund the needs of the entire project as those needs developed over time, even if there was a downturn in the economy or the real estate market. Spence J. accepted the evidence of Mr. Peter Conrod, the RBC account manager who attended the meeting, and of Mr. Shulman, Mr. Rodaro's lawyer at the time,[FN2] that there was no commitment by RBC to finance the project put forward at the meeting. Rather, RBC merely extended an invitation to Mr. Rodaro to create a long-term relationship which would permit Mr. Rodaro to make specific submissions for loans to finance the project.

20 After reviewing the evidence of the participants in the meeting, Spence J. went on to consider the evidence of the events following that meeting to determine whether any of those events suggested that the "umbrella" agreement relied on by Mr. Rodaro in fact existed. Spence J. reviewed these events in detail, including the placing of a $50 million debenture on the property by RBC in the summer of 1989. He ultimately concluded that the events following the meeting were inconsistent with Mr. Rodaro's claim that he and RBC had arrived at an agreement to fund the entire project at the August meeting. Spence J. placed considerable weight on Mr. Rodaro's failure to raise the existence of the "umbrella" agreement with RBC until very late in his relationship with RBC.

21 Spence J. next turned to the applicable law. He accepted that parties could enter into a general "umbrella" agreement whereby the nature of their ongoing relationship was established while the detailed terms were left to subsequent discrete agreements: *Bank of Montreal v. Wilder* (1983), 149 D.L.R. (3d) 193 (B.C. C.A.), aff'd. on other grounds, [1986] 2 S.C.R. 551 (S.C.C.). He held, however, that entirely apart from the evidence of those at the meetings that no such agreement was made, the agreement put forward by Mr. Rodaro was so void of terms (*eg.* there was no maturity date agreed upon) that it could not amount to an agreement in law.

22 After a careful and detailed review of the evidence, the submissions and the applicable legal principles, Spence J. at paragraph 219 concisely stated his crucial finding of fact:

> . . . the discussions that occurred in late August 1988 involved an invitation by the Bank to Rodaro to establish a banking relationship, and not an offer of financing. None of the events and matters that occurred subsequent to the communications of the fall of 1988 had the effect of creating an umbrella agreement for the financing of the Project.

23 The reasons of Spence J. demonstrate that he appreciated the argument advanced on behalf of Mr. Rodaro, understood the legal principles relied on in support of that argument, reviewed and understood the relevant evidence, made the necessary credibility assessments and made the necessary findings of fact. Those findings were open to him

on the evidence and doomed the appellant's claim based on the existence of an "umbrella" agreement to fund the entire project.

24 Spence J. approached the other submissions made on behalf of Mr. Rodaro in the same thorough way that he considered the "umbrella" agreement argument. There is no basis upon which to interfere with the findings of fact that provide the basis for his rejection of those arguments.

25 I would dismiss the cross-appeal with costs.

IV

The Appeal

26 The appeal brought by RBC and Barbican focuses on the assignment of Mr. Rodaro's debt to Barbican by RBC. There are essentially three issues raised by the appeal:

- Could RBC assign the debt to Barbican?

- Was RBC entitled to share Mr. Rodaro's confidential business information with Barbican in the course of negotiating the assignment?

- If the disclosure was improper, did the trial judge err in holding that the disclosure caused detriment or damage to Mr. Rodaro in that it caused him to lose the opportunity to negotiate the sale of his interest in the project?

(a) Was the assignment valid?

(i) Factual Background

27 By the summer of 1991, the project was in difficulty primarily, but not exclusively, because of the ongoing recession. RBC had soured on the financing of real estate projects. In August 1991, the status of the loans to Mr. Rodaro was downgraded and the supervision of the account was transferred to the "special loans" division of the RBC. RBC informed Mr. Rodaro that he should look for new equity for his project as RBC was not prepared to fund the project beyond the end of 1991. In October 1991, RBC retained the firm of Drivers Jonas Chartered Surveyors ("Drivers Jonas") to conduct an appraisal of the project. Drivers Jonas delivered its report in December 1991. The report indicated that the "as is" value of the project was well in excess of the funds advanced to that date by RBC. Although RBC had concerns about the accuracy of some of the projections in the Drivers Jonas report, it elected to provide some additional financing to Mr. Rodaro and to extend the maturity date on the loans to March 1992.

28 In the early part of 1992, Mr. Rodaro and RBC had discussions pertaining to further loans and the extending of the deadline for repayment of those loans. Mr. Rodaro wanted to borrow an additional $4.6 million. During these negotiations, Mr. Rodaro gave RBC a detailed business plan relating to the project's long-term development. RBC was prepared to advance additional funds but on very strict terms. One of the terms would effectively allow RBC to take over the project if Mr. Rodaro defaulted on the loan. Mr. Rodaro was not prepared to agree to the terms proposed by RBC.

29 The loans matured on March 1, 1992 and were in a default position from that time forward. Different bank officials pursued two different options. One group looked at the possibility of further financing for the project, while another looked at the possibility of selling the debt to a third party. In connection with the possibility of further financing, RBC arranged for Drivers Jonas to prepare an update of the earlier appraisal. RBC provided Drivers Jonas

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with a copy of the business plan Mr. Rodaro had given to RBC earlier in the year to assist Drivers Jonas in preparing its updated appraisal. Drivers Jonas provided that appraisal in early June 1992.

30 The officials within RBC responsible for pursuing the option of selling the debt contacted Barbican in April 1992. Barbican had a successful track record in acquiring and working out distressed real estate for RBC. In the course of the negotiations with Barbican, RBC provided Barbican with a great deal of information concerning the project and the status of the debt. That information included both appraisals prepared by Drivers Jonas.

31 By June 1992, RBC had decided that it would not make any additional advances to Mr. Rodaro. It had also decided to sell the debt to Barbican. In late June, RBC advised Mr. Rodaro that it would advance no further funds and that it was pursuing an opportunity to sell its loan position to another entity.

32 RBC agreed to sell its debt and security in the project to Barbican effective July 31, 1992. In September, Barbican demanded repayment. There were two options at that point in time. Barbican could, if it got Mr. Rodaro's co-operation, foreclose and effectively take over the project, or Barbican could, if Mr. Rodaro would not co-operate, move under power of sale. Mr. Rodaro did not co-operate and Barbican moved under power of sale.

(ii) Analysis

33 Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties: *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.*, [1902] 2 K.B. 660 (Eng. C.A.) at p. 668, aff'd., [1903] A.C. 414 (U.K. H.L.); *Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd.*, [1995] O.J. No. 2610 (Ont. Gen. Div. [Commercial List]) at paras. 10-14; and P.S. Atiyah, *The Law of Contract*, 4th ed. (Oxford: Clarendon Press, 1989) at pp. 378-79.

34 RBC assigned only its rights to collect the debt and realize on the security to Barbican. It assigned no obligations. Indeed, it had no obligations at the time of the assignment as Mr. Rodaro was in default on the loan. The assignment had no adverse effects on the obligations owed by Mr. Rodaro and did not adversely affect his position as he was entitled to raise any defence applicable to RBC against any attempt by Barbican to collect on the debt or realize on the security. RBC assigned to Barbican the right to collect a debt and realize on the security. Those rights were in no way personal in nature.

35 Mr. Rodaro does not suggest that the assignment contravenes any statutory provision or offends public policy. He maintains that RBC specifically agreed to limit its right to assign the debt by the terms of the November 1991 loan agreement between Mr. Rodaro and RBC. The relevant clause provides:

> This agreement shall be binding upon and enure to the benefit of the Bank and the Borrower and their respective successors, and permitted assigns. The Bank may assign or sell participations in or transfer all or any portion of its rights, benefits and obligations under this agreement to any other financial institution ("Assignee"). After any assignment or transfer, the term "Bank" as used in this agreement, shall be deemed to refer to the Assignee to the extent of its interest.
>
> In assigning, transferring or participating all or any part of its rights or obligations as aforesaid, the Bank may reveal to potential Assignees or participants all or any information regarding the Borrower and related corporations as the Bank deems necessary or desirable.
>
> The Borrower shall not assign all or any of its interest in this agreement without the prior written consent of the

Bank. [Emphasis added.]

36 The first sentence of the clause recognizes that the agreement is assignable. The second sentence, which is the crucial sentence, permits RBC to assign "its rights, benefits and obligations" to "any other financial institution". Barbican is not a financial institution. The final sentence in the clause prohibits Mr. Rodaro from assigning any interest in the agreement without RBC's permission.

37 Like Spence J., I do not read the second sentence in the above clause as limiting RBC's right to assign its benefits under the agreement to Barbican without the consent of Mr. Rodaro. In my view, the sentence broadens the assignment rights RBC would otherwise have by permitting RBC to assign "rights, benefits and obligations" to a financial institution without Mr. Rodaro's consent. On a plain reading, the assignment clause expands rather than restricts RBC's assignment rights. RBC's entitlement to assign its benefits under the agreement to Barbican existed apart from any contractual terms and was not in any way limited by the contractual provisions referable to the assignment of interests in the agreement. The assignment was valid.

38 RBC and Barbican advanced several alternative arguments in support of their claim that the assignment was valid. They also argued that the validity of the assignment was irrelevant to the substantive issues raised in the main action or in the counterclaim. In the light of my conclusion that there were no limitations on RBC's right to assign its benefits under its loan agreement with Mr. Rodaro, I need not address these submissions.

(b) Did RBC improperly disclose Mr. Rodaro's confidential information to Barbican?

39 In late 1991 and early 1992, Mr. Rodaro and RBC were negotiating a possible extension and/or expansion of the loan facility RBC had made available to Mr. Rodaro. In the course of these negotiations, Mr. Rodaro provided RBC with his business plan for the project. That plan described Mr. Rodaro's development plan, marketing strategy and financial projections. That information was made available to Drivers Jonas by RBC in late 1991 and 1992 and is reflected in the reports prepared by Drivers Jonas. Mr. Rodaro agreed that Drivers Jonas could have access to the business information he had given to RBC. The reports were prepared to assist RBC in deciding whether to make a new loan to Mr. Rodaro.

40 The Drivers Jonas reports were given to Barbican by RBC when Barbican was considering taking an assignment of Mr. Rodaro's debt. Mr. Rodaro was not asked if the reports could be supplied to Barbican. By virtue of receipt of the Drivers Jonas reports Barbican became privy to the business plan that Mr. Rodaro had provided to RBC.

41 Spence J. found that the business plan provided to RBC by Mr. Rodaro was confidential information. He said:

> [837] The Business Plan is the kind of information that is typically and properly considered confidential. [Paul] Dinner [the RBC account manager for the Phase I loans] thought the Business Plan for the Project was confidential information. The Barbican submission admits that the Business Plan was confidential in nature, but claims that it ceased to have that status when the loans ceased to be in good standing. I do not accept this contention. The Business Plan was given to RBC for its consideration whether to provide support for the Project by making further loans. It is not different from providing information to a prospective investor. The information is provided for the purpose indicated. Whether the existing facility was in good standing is not relevant. The Business Plan information was confidential.

42 Spence J. went on to hold that RBC's disclosure of this confidential information to Barbican was *prima facie* improper. He next considered whether RBC was entitled to disclose this information in the course of negotiating the assignment of the debt. RBC contended that since Mr. Rodaro was in default on the loans, it was entitled to disclose this information to potential purchasers of the debt. RBC relied on those authorities which hold that a bank can disclose otherwise confidential information of a debtor where necessary to "protect its own interests": *Tournier v. Na-*

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tional Provincial & Union Bank of England (1923), [1924] 1 K.B. 461 (Eng. C.A.); and *Canadian Imperial Bank of Commerce v. Sayani* (1993), [1994] 2 W.W.R. 260 (B.C. C.A.) at p. 264, leave to appeal refused, [1994] 1 S.C.R. vi (S.C.C.).

43 Spence J. accepted that RBC was entitled to disclose some but not all of the information that it disclosed to Barbican in order to protect its interests. He said:

> [912] The distinction between the confidential business information and the confidential account information might be put this way. The confidential business information is provided by the customer and belongs to it, not the Bank. The account information pertains to the dealings between the Bank and the customer, and arises from those dealings. It does not belong to the customer but the implied term in the contract is that it will only be used by the Bank for the protection of its interest in the debt. If the Bank sold the debt when it was in default, as in the present case, and provided only the account information of the kind described above, it would be fair to consider that the Bank was in effect selling the collection right in respect of the debt, which is only one step removed from the Bank taking steps itself to collect directly. In such a case, it would probably be reasonable to imply a consent to the disclosure of that information. But that is not the case here: both confidential business information and account information were disclosed to Barbican via the Drivers Jonas reports.

44 The distinction drawn by Spence J. between "business information" and "account information" is problematic. All of the information in question related to the fiscal viability of the project and was information any potential assignee of RBC's debt would want. In the context of a proposed assignment, it was very much in the interest of RBC to make full disclosure of all of this information to a potential assignee. Failure to disclose relevant information could leave the bank open to a subsequent action by the assignee.

45 The distinction drawn by Spence J. also seems inconsistent with his finding that RBC had an unqualified right to assign its benefits under its agreement with Mr. Rodaro. If RBC could not disclose information relevant to the project to potential assignees without Mr. Rodaro's permission, then its assignment rights were far from unqualified. It is at least arguable that RBC's unqualified right to assign its benefits under the agreement with Mr. Rodaro implied the right to make such disclosures as are essential to the exercise of that right: *Montgomery v. Ryan* (1908), 16 O.L.R. 75 (Ont. C.A.); I. Baxter, *The Law of Banking*, 4th ed. (Toronto: Carswell 1992) at p. 57.

46 In addition, the assignment clause set out above in paragraph 35 authorized RBC to disclose to a "potential assignee" all or any information regarding the borrower and related corporations as the bank deemed necessary. Spence J. made no direct reference to this clause when considering whether the bank had improperly disclosed confidential information to Barbican. Again, it is at least arguable that under the terms of this agreement, Mr. Rodaro had agreed that the bank could disclose all information it had about him and the project if it deemed that disclosure necessary in the context of assigning its benefits under the agreement to a third party. Given the broad language of this provision, it may well be that the onus fell on Mr. Rodaro to seek the bank's agreement not to disclose any information which would otherwise be disclosable under this provision.

47 Because of the conclusion I have reached with respect to the question of whether any detriment was caused to Mr. Rodaro even if the bank improperly disclosed confidential information to Barbican, I need not come to any final determination of whether the bank acted improperly in disclosing all of the information it had referable to the project to Barbican. For the purpose of determining whether the disclosure caused any detriment to Mr. Rodaro, I will assume that Spence J. correctly held that at least some of the information was improperly disclosed to Barbican by RBC.

(c) Did the disclosure cause detriment to Mr. Rodaro's

48 Disclosure of confidential information is actionable if it results in detriment or damage to the confider or wrongful gain to the confidant: *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574

(S.C.C.) at pp. 638-39, per LaForest J.; and *ICAM Technologies Corp. v. EBCO Industries Ltd.* (1993), 52 C.P.R. (3d) 61 (B.C. C.A.) at p. 63, leave to appeal to S.C.C. abandoned, [1994] S.C.C.A. No. 23 (S.C.C.); P. Perell, *Breach of Confidence to the Rescue* (2002), 25 Advocates Q. 199 at p. 205.

49 Having concluded that RBC and Barbican had misused Mr. Rodaro's confidential business information in coming to their agreement to assign Mr. Rodaro's debt to Barbican, the trial judge turned to the question of whether that misuse had caused any detriment to Mr. Rodaro. Mr. Rodaro made two arguments at trial. First, he argued that through the misuse of the confidential information, RBC and Barbican effectively took over the project which properly belonged to him. The trial judge rejected this argument, fundamentally because the assignment of the debt by RBC to Barbican did not deprive Mr. Rodaro of anything. On the trial judge's findings, it left him in exactly the same position, that is, in default on the debt and subject to the remedies available to the lender. It made no difference whether RBC or Barbican held the debt and security following default. The relevant passages from the trial judge's reasons are set out below:

> [1020] The constituent elements in the argument are (i) the defendants took the property and (ii) the taking was wrongful. The conclusion reached in this decision is that there was wrongful conduct - specifically, misuse of confidential information - and that the conduct did cause a loss or deprivation to the plaintiffs. But it is going too far to say that the loss or deprivation was of the Project property itself. To reach that conclusion, it would be necessary to ignore the rights that the Bank held under its security, which after March 1, 1992 was enforceable. It would also be necessary to ignore the fact that what the Bank's transaction with Barbican was designed to do was not to appropriate and sell the property, but simply to sell the debt and the security, which the Bank had a right to do. Both of these considerations must be taken into account in determining what it was that the actions of the Bank deprived the plaintiffs of.
>
> [1021] Equally, it is important that the Bank proposed not to realize on the security, but to sell the debt and security. From the evidence, it is clear that the Bank wanted to get the Rodaro loan off its books. The debt was in default. The transaction with Barbican would result in RBC transferring the debt to Barbican and obtaining instead a new debt from a new borrower, Barbican. So the Bank wanted to sell the debt rather than take realization proceedings, and it did so. This is important to the view about damages that is set out below.
>
> [1030] The key problem with the plaintiffs' hypothesis is that RBC could not, by the assignment to Barbican, obtain assurance of an equity interest in the Project.
>
> [1031] The assignment to Barbican was of the debt and the security, not the property itself. Consequently, for any equity in the property to be acquired, there would have to be a foreclosure, which (it seems to be common ground) would require the consent or non-opposition of Rodaro. (If the matter were to be required to go to power of sale there was no suggestion that RBC would be in a better position if the security was being realized upon by Barbican than if it was being realized upon by the Bank itself). On this basis the assignment to Barbican could not and did not enhance RBC's prospects of obtaining an equity interest in the property. It still depended on what Mr. Rodaro would decide to do in respect of the rights he held. The plaintiffs do not overcome this objection to their hypothesis and it is not apparent how they could.

50 Mr. Rodaro's second argument in support of his claim that his damages equalled the potential profits from the project proceeded along the following lines. RBC would not have been able to assign its debt to Barbican without divulging the confidential information. In the absence of an assignment to Barbican, RBC would have continued to fund the project and with that funding, Mr. Rodaro could have completed the project.

51 The trial judge examined the evidence relating to the Bank's decision in the spring of 1992 not to fund the project any further in some detail. He concluded that there was "no basis" upon which to find that RBC would have funded the project if it had not been able to assign the debt to Barbican. He said:

[1097] However, the sale of the debt was a different undertaking from the decision not to fund, and in principle, the decision not to fund could have been followed by a decision to accept the default and realize on the security rather than selling the debt. Accordingly, there is no basis to assert a legal presumption that, contrary to the fact of the decision of Mr. Grant and Mr. McDermid, RBC would have funded the project if it could not have sold the debt to Barbican in the manner it did. . . .

52 Spence J.'s findings that RBC and Barbican did not "take" the project and that there was no connection between RBC's decision not to continue funding and the misuse of confidential information in the course of the assignment of the debt to Barbican are grounded in the evidence and cannot be reversed in this court.

53 The trial judge went on, however, to find that Mr. Rodaro had suffered detriment in the form of a lost opportunity. This concept is best explained in the trial judge's own words:

[1098] This does not mean the plaintiffs suffered no loss as a result of the improper use of their confidential information. <u>The plaintiffs suffered the deprivation of any opportunity to benefit from a sale of the debt and security carried out in a manner which used their information properly, i.e. with their permission.</u> That opportunity may have had value. It must be taken that RBC considered it to be in its own best interest, once it decided not to fund, to sell the debt on terms it was prepared to accept to a satisfactory developer and that it wished to use the plaintiffs' information to do so. The plaintiffs, it is fair to assume, might well not want such a sale to happen. However, the alternative facing them was that the lender would resort to a realization procedure. On this basis, <u>what the plaintiffs lost was the opportunity to choose between receiving the best possible sale terms they could have obtained for their interest as part of the package along with the sale of the debt and security to a developer acceptable to RBC, or alternatively, accepting the consequences of realization procedures.</u>

[1100] <u>If RBC had negotiated with the plaintiffs to develop an offer for the sale of the Project as a package consisting of (i) the debt held by RBC and (ii) the remaining equity interest of the plaintiffs, to an acceptable developer with loan terms like those RBC gave to Barbican at a price to be negotiated, and if a package with those elements had been exposed to the market, there might have been a different outcome.</u>

[1101] By proceeding as it did to sell the debt to Barbican, using the confidential information of the plaintiffs, RBC deprived the plaintiffs of the opportunity to receive the benefit of any offer that might have been made in response to a package offer made on the basis outlined above and the opportunity to decide on their course of action in the light of the outcome of the offer process.

[1103] <u>It is reasonable to suppose that if the matter had proceeded as hypothesized above, Barbican would have offered the $1 million amount contemplated in its discussions with RBC. RBC and Barbican had concluded such an offer would be satisfactory. Perhaps one or more other developers would have offered more.</u> On the evidence, the purpose of such an offer by Barbican was to take over the equity position of the plaintiffs. It should be inferred that the intention was, in effect, to bring the equity and debt together in the new owner and to remove the involvement of the plaintiffs in the Project. On this basis, it should be taken that any such offer if accepted would have led to the elimination (through merger of the debt and the equity or otherwise) of the outstanding debt and guarantee owing by the plaintiffs to RBC. Thus the plaintiffs would have been left with $1 million (or a larger sum from another developer) and would no longer have had any obligations in respect of the debt and the guarantee.

[1105] Accepting foreclosure could not have been as beneficial to the plaintiffs as accepting an offer as described above. Therefore, the reasonable course for the plaintiffs would have been to accept the offer and not face realization proceedings. This would be so unless the plaintiffs expected that power of sale proceedings would provide a better result. However, in power of sale proceedings, RBC would have been entitled to receive repayment of its debt immediately whereas the package offer on the terms of the Barbican deal would have offered

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instead non-recourse financing to the purchaser. For this reason, it should be taken that a power of sale proceeding would not likely have been as beneficial to the plaintiffs as the package offer, and the plaintiffs would reasonably have understood this. On this basis, it would be reasonable to conclude that the plaintiffs would have accepted the package and would not have required power of sale proceedings.

[1106] The view expressed above takes into account that the decision the plaintiffs actually took was to resist foreclosure with the result that power of sale proceedings were initiated. The plaintiffs should not be prejudiced by that decision. In the circumstances, they were confronted with a transaction about which they had not been consulted and which lacked their consent and, whether or not they had reason at the time to know it, was flawed by the improper use of confidential information. If matters had instead proceeded in accordance with the package offer scenario developed above, the plaintiffs would have had good reason to consider that the matter was proceeding in accordance with all legal requirements and therefore to recognize and assess their options as set out above. [Emphasis added.]

54 RBC and Barbican submit that Spence J.'s "lost opportunity" approach to establish that Mr. Rodaro suffered damages as a result of the disclosure of the confidential information is "legally flawed". They argue that damages for lost opportunity are available only if a plaintiff is deprived of a "legal entitlement or property interest".

55 The authorities relied on by RBC and Barbican do not support the proposition advanced by them. If as a result of a defendant's breach of contract, or negligence, a plaintiff loses a reasonable probability of realizing some economic benefit, the plaintiff is entitled to be compensated for that lost opportunity. The quantification of that loss may have to take into account contingencies and variables personal to the plaintiff and will often prove difficult. Nevertheless, the plaintiff is entitled to compensation: *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (Ont. C.A.) at pp. 689-90, leave to appeal refused, [1993] 3 S.C.R. vi (S.C.C.); *Domowicz v. Orsa Investments Ltd.* (1993), 15 O.R. (3d) 661 (Ont. Gen. Div.) at p. 678; *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271 (Ont. C.A.), leave to appeal refused, [1998] S.C.C.A. No. 4 (S.C.C.); and H. Pitch, *Damages for Breach of Contract*, (Toronto: Carswell, 1985) at pp. 29-46.

56 Mr. Rodaro did not establish a breach of contract or negligence. He did, however, establish an improper disclosure by RBC to Barbican of his confidential information. If that disclosure resulted in detriment to Mr. Rodaro, he was entitled to be compensated. In some cases, the improper disclosure of confidential information will cause the loss of valuable economic opportunities. The loss of potential profits is perhaps the best example of an opportunity lost through the misuse of confidential information. In my view, a lost opportunity analysis can be used to determine whether the misuse of confidential information has caused detriment to the person whose information was improperly disclosed. Resort to a lost opportunity analysis to determine detriment and eventually to quantify that detriment is consistent with the law's command that confidences be respected.

57 The lost opportunity approach was used to determine damages in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), a case involving misuse of confidential information. Binnie J., after stressing at pp. 158-60 that courts must fashion remedies for breach of confidence and other misuses of confidential information that are sensitive to the circumstances of each case, opted for a lost opportunity quantification of the plaintiff's loss. He said at pp. 181-82:

> The concept of the "lost opportunity" is particularly apt here. . . . The respondent's "lost opportunity" was that the appellants, using these confidential production techniques, entered the marketplace with Caesar cocktail a year earlier than would otherwise have been the case. The respondents were not entitled to be free of competition from the appellants. Apart from the clam juice limitation, they were only entitled to be free of the appellant's competition which used the respondents' confidential information. . . . The respondents' entitlement is to no more than restoration of the full benefit of this lost but time limited opportunity.

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58 The lost opportunity analysis adopted by Spence J. was theoretically sound. I am satisfied, however, that it could not be applied in this case. First, it was never pleaded or otherwise raised by Mr. Rodaro at any stage of the lengthy proceedings. Second, there was no evidence that the disclosure of the confidential information by RBC to Barbican caused Mr. Rodaro to lose the opportunity described by Spence J. To the contrary, to the extent that the evidence speaks to the loss of the opportunity at all, it demonstrates that Mr. Rodaro "lost" the opportunity to negotiate with Barbican for reasons that had nothing to do with the disclosure of the information to Barbican.

59 Mr. Rodaro did not plead that RBC's improper disclosure to Barbican deprived him of the opportunity to negotiate a "package deal" involving the sale of the debt and his equity in the project. At no time during the months of trial or the course of lengthy argument did Mr. Rodaro suggest that the improper disclosure had caused him to lose the opportunity described by Spence J. That theory appeared for the first time in the reasons of Spence J.

60 It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 (Ont. C.A.) at para. 9:

> . . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . . .

61 By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.

62 In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how Spence J.'s lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by Mr. Rodaro and were therefore subject to the adversarial process were found wanting by Spence J.

63 Spence J. erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal. However, I am also satisfied that the lost opportunity analysis could not succeed on this evidence.

64 Given that Mr. Rodaro did not plead or argue the lost opportunity approach adopted by Spence J., it is not surprising that he led no evidence in support of that approach. Counsel for Mr. Rodaro does not suggest that there was any direct evidence to support the lost opportunity analysis. He submits, however, that Spence J. was entitled to draw inferences from the evidence as to what likely would have happened had there not been improper disclosure of the confidential information: *Cadbury Schweppes Inc., supra*, at p. 186.

65 I accept that Spence J. was entitled to draw inferences from the evidence. I also accept that in doing so, he could consider what a reasonable person in the position of Mr. Rodaro would have done but for the improper disclosure of the confidential information. However, where, as here, the lost opportunity identified by Spence J. was never identified by Mr. Rodaro at any stage in the proceedings, and was not touched on at all in the evidence, I think Spence J.'s findings that the opportunity existed and was lost as a result of the improper disclosure of confidential information amount to speculation and not inference.

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66 Had Mr. Rodaro chosen to advance the lost opportunity theory eventually devised by Spence J., he would have had to lead evidence to show that the opportunity existed and that he would have taken advantage of that opportunity. The first inquiry is objective, but the second is directed to what Mr. Rodaro would have done. Had Mr. Rodaro led such evidence, Spence J. would have had to evaluate it and determine the likelihood of Mr. Rodaro taking the opportunity to negotiate had RBC not improperly disclosed the confidential information. The likelihood of Mr. Rodaro taking that opportunity would have been reflected eventually in the quantification of the damages. However, if on the evidence there was no chance that Mr. Rodaro would have pursued the negotiation, then it cannot be said that the disclosure of the confidential information caused any detriment to Mr. Rodaro. Because lost opportunity was no part of Mr. Rodaro's case, there is no evidence as to what Mr. Rodaro would have done but for the improper disclosure of the information and there is no evidence that the disclosure in any way caused him not to pursue the opportunity to negotiate with Barbican.

67 Not only does the record offer no support for the claim that Mr. Rodaro would likely have negotiated had the bank presented him with the opportunity described by Spence J., there is strong evidence that he would not have negotiated with RBC or Barbican. After RBC assigned the debt, Barbican was prepared to negotiate with Mr. Rodaro. Barbican wanted to proceed by way of foreclosure and take over the development of the project. It could do so only with Mr. Rodaro's consent and was prepared to pay $1,000,000 to secure that co-operation.

68 Mr. Rodaro wanted no part of any negotiation with Barbican. Instead, he immediately commenced this litigation seeking $100,000,000 in damages. He also caused the property to be encumbered by a construction lien that was later ordered removed by the court and described as fraudulent. Mr. Rodaro clearly wanted a fight and not a negotiated settlement. He firmly believed that RBC was trying to cheat him out of a project that was worth many millions of dollars. He was not prepared to negotiate his departure from the project.

69 Spence J. was alive to Mr. Rodaro's reaction to Barbican's attempt to negotiate once Barbican had taken over the debt. Spence J. regarded the situation faced by Mr. Rodaro after the assignment as entirely different from the situation contemplated by his lost opportunity theory. I do not agree. On both scenarios, the bargains proposed were essentially the same. In exchange for stepping aside and allowing someone else to develop the project, Mr. Rodaro's debt to RBC would be eliminated and he would have received an additional cash payment. Mr. Rodaro had no knowledge at the time that Barbican had been given confidential information when he summarily rejected Barbican's attempts to negotiate with him. I see no connection between Barbican's possession of that information and the perceived bargaining positions of Mr. Rodaro and Barbican either before or after the assignment. All Mr. Rodaro had to offer to Barbican was his consent to foreclosure so Barbican could take over the project. There is no evidence that the potential value of that consent to Barbican was somehow diminished or otherwise affected by RBC's disclosure of Mr. Rodaro's business information to Barbican.

70 Mr. Rodaro's refusal to bargain with Barbican after the assignment was made is cogent evidence that he never would have entered into the kind of bargaining contemplated by Spence J. Even if it could be said that a reasonable person would have entered into such bargaining, that opportunity had no value to Mr. Rodaro since his actions demonstrate that he would not have taken advantage of it.

71 For the reasons set out above, Spence J. erred in holding that the misuse of the confidential information caused detriment to Mr. Rodaro in the form of a lost opportunity. As this was the only basis upon which Mr. Rodaro succeeded at trial, it follows that the appeal should be allowed and Mr. Rodaro's action against RBC and Barbican dismissed in its entirety. It follows, therefore, that the order of Spence J., declaring the payment obligations under the debt and guarantee to be unenforceable against the respondents, also must be set aside.

72 I would allow the appeal, set aside the judgment of Spence J. and in its place render judgment dismissing all claims against RBC and Barbican. Barbican's counterclaim remains outstanding.

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73 RBC and Barbican are entitled to their costs at trial and on appeal.

Appeal allowed; cross-appeal dismissed.

FN1 Mr. Rodaro acted through various corporate entities in the course of the transactions at issue in this action. For convenience, we will refer to Mr. Rodaro personally rather than to the various corporate actors, some of whom are parties to this action.

FN2 Although Mr. Shulman was Mr. Rodaro's lawyer at the time of the meeting, by the time he testified at trial his firm had been sued by Mr. Rodaro.

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TAB 7

1993 CarswellBC 47, 77 B.C.L.R. (2d) 62, [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, J.E. 93-674

1993 CarswellBC 47

Amchem Products Inc. v. British Columbia (Workers' Compensation Board)

WORKERS' COMPENSATION BOARD and others v. AMCHEM PRODUCTS INCORPORATED and others;

WORKERS' COMPENSATION BOARD and others v. T & N PLC;

WORKERS' COMPENSATION BOARD and others v. THE FLINTKOTE COMPANY

Supreme Court of Canada

La Forest, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: May 25, 1992
Judgment: March 25, 1993
Docket: Doc. 22256

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Counsel: *J.J. Camp, Q.C. Petrick G. Foy* and *J. Fiorante*, for appellants.

Bryan Williams, Q.C., and *Terrance A. Kowalchuk*, for respondents Amchem Products Incorporated and others.

James A. Macaulay, Q.C., and *Kenneth N. Affleck*, for respondent T & N plc.

Subject: Civil Practice and Procedure; Torts; Family; International

Conflict of Laws --- Torts — Choice of law — Forum conveniens — General.

Injunctions --- Availability of injunctions — General.

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — General.

Conflict of laws — Jurisdiction of domestic courts — Stay of proceedings — Forum conveniens — Plaintiffs mostly resident and receiving injury in British Columbia bringing action in Texas against American asbestos companies — Companies applying in British Columbia for anti-suit injunction restraining Texas proceedings — Court outlining test for "inconvenient forum.".

Injunctions — Injunctions generally — Conduct subject to restraint — Legal proceedings — Plaintiffs mostly resident and receiving injury in British Columbia bringing action in Texas against American asbestos companies — Companies applying in British Columbia for anti-suit injunction restraining Texas proceedings — Court considering test for granting anti-suit injunction restraining foreign proceedings — Court denying injunction.

Conflict of laws — Principle of comity — Comity demanding that Canadian court respect foreign court's assumption of jurisdiction where foreign court acting on basis consistent with our rules.

One hundred and ninety-four individuals who claimed to have been injured by asbestos or to be dependants of deceased persons affected by asbestos brought action in Texas against 33 asbestos companies. Most, but not all, of the claimants were residents of British Columbia when the injuries were sustained. The British Columbia Workers' Compensation Board had a subrogated interest in most of the claims and directed the action. None of the asbestos companies had any connection with the province. Most were incorporated and had their principal place of business in the United States, although there was no concentration of them in any single state. Although none of the companies was incorporated in Texas, most of them carried on business there and one maintained a principal place of business there. Two of the companies were Canadian. The Texas District Court found jurisdiction and venue in Texas because the companies had not shown that they did not carry on business there. The companies' motion in Texas to dismiss the action was dismissed, as was their subsequent appeal. A trial date was set. The companies then obtained an ex parte "anti-suit" injunction in British Columbia restraining the continuation of the Texas proceedings. Those claimants who were not British Columbia residents then obtained an "anti-anti-suit" injunction in Texas to prevent the companies from obtaining similar injunctions against them in Canada. Later the British Columbia Supreme Court granted the companies' contested application for an anti-suit injunction. The trial judge held that while Texas was not a "wholly inappropriate forum," British Columbia was "a more natural" one. He minimized the gravity of the disadvantage to the companies of a Texas venue. However, he found that the claimants were acting oppressively through the Texas proceedings because Texas does not recognize the doctrine of "inconvenient forum" and because the Texas court had issued the "anti-anti-suit" injunction. The Court of Appeal dismissed the claimants' appeal. They appealed to the Supreme Court of Canada.

Held:

Appeal allowed.

While the courts have become more tolerant of the systems of other countries in an increasingly international world, this does not mean that "forum shopping" is now to be encouraged. An action should be tried in the jurisdiction that has the closest connection with the action and the parties, and not merely where one litigant will secure a juridical advantage. There are two remedies to control the choice of forum. A stay of proceedings enables the court of the forum chosen by the plaintiff to stay the action at the defendant's request if the case should be tried elsewhere. An anti-suit injunction is granted by the domestic court at the request of a defendant, actual or potential, in a foreign suit. While the injunction operates personally on the plaintiff in a foreign suit and not on the foreign court itself, it has the latter effect and therefore raises serious issues of comity. The domestic court is in effect determining the matter of jurisdiction for the foreign court. An anti-suit injunction should only be granted when a foreign court has departed from our own test of "inconvenient forum" to an extent which justifies our courts refusing to respect its assumption of jurisdiction because of the serious injustice occasioned.

The test for "inconvenient forum" is whether the defendant has *clearly* shown some other forum to be appropriate for the pursuit of the action. If this first condition is established, the plaintiff has the onus of showing that justice requires that the trial take place in its proposed forum. Juridical advantage should be weighed with the other factors in identifying the appropriate forum in the first condition. A party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides.

The domestic court should not generally entertain an application for an anti-suit injunction if there is no foreign proceeding pending. The order results in a permanent injunction which ordinarily is granted only after trial. To maintain comity, the decision of the foreign court should not be pre-empted until a proceeding has been launched in

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that court and the defendant has sought a stay from the foreign court, and failed to obtain it. The domestic court must then proceed to hear the injunction application only if it is alleged to be the most appropriate forum and is potentially an appropriate forum. The first step on the injunction application is to determine whether the domestic forum is the natural forum, that is, the forum that has the closest connection with the action and the parties. The domestic court as a matter of comity must recognize that the foreign court has assumed jurisdiction. If, applying the principles relating to "inconvenient forum," the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and dismiss the application. In most cases the foreign court's decision will indicate whether it acted on principles similar to those that obtain here. If not, the domestic court must consider whether the result is consistent with those principles. Where the domestic court concludes that the foreign court assumed jurisdiction on a basis inconsistent with those principles, it must go to the second step. The court will not grant an anti-suit injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive it, having regard to the extent that the plaintiff and the facts are connected to that forum. Any loss of advantage to the foreign plaintiff must be weighed against any loss of advantage to the defendant if the action is tried in the foreign jurisdiction. Thus loss of juridical advantage will also be considered in step two.

The result is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule relating to "inconvenient forum," the Canadian court will respect that decision. Our courts' policy respecting comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having observed the rules of comity, cannot expect its decision to be respected on the basis of comity. Here the trial judge erred in his application of both branches of the rule. He gave undue weight to the absence of an "inconvenient forum" rule in Texas and to the "anti-anti-suit" injunction granted by the Texas court. The finding of sufficient connection with Texas was supported by the evidence. The Texas court's application of the Due Process Clause of the United States Constitution was consistent with our rules relating to "inconvenient forum." Respecting the second step, the companies failed to establish that continuation of the Texas proceedings would unjustly deprive them of a legitimate juridical advantage. The anti-anti-suit injunction was not a demonstration of disrespect for the British Columbia proceedings which disentitled the Texas court's decision to the respect which comity affords.

Cases considered:

Aikmac Holdings Ltd. v. Loewen, [1989] 6 W.W.R. 759, 42 C.P.C. (2d) 139, 66 Man. R. (2d) 295 (C.A.) — *considered*

Allied-Signal Inc. v. Dome Petroleum Ltd. (1988), [1989] 5 W.W.R. 326, 67 Alta. L.R. (2d) 259 (Q.B.) — *considered*

Antares Shipping Corp. v. "Capricorn" (The), [1977] 2 S.C.R. 422, 65 D.L.R. (3d) 105, 7 N.R. 518 — *considered*

"Atlantic Star" (The); "Atlantic Star" (The) (Owners) v. "Bona Spes" (The) (Owners), [1974] A.C. 436, [1973] 2 All E.R. 175, [1973] 2 W.L.R. 795 (H.L.) — *considered*

Avenue Properties Ltd. v. First City Development Corp. (1986), [1987] 1 W.W.R. 249, 7 B.C.L.R. (2d) 45, 32 D.L.R. (4th) 40 (C.A.) — *considered*

British Airways Board v. Laker Airways Ltd., [1985] A.C. 58, [1984] 3 W.L.R. 413, [1984] 3 All E.R. 39 (H.L.) — *referred to*

Bushby v. Munday (1821), 5 Madd. 297, 56 E.R. 908 — *considered*

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Castanho v. Brown & Root (U.K.) Ltd., [1981] A.C. 577, [1981] 1 All E.R. 143, [1980] 3 W.L.R. 991 (H.L.) — *considered*

Club Mediterranee N.Z. v. Wendell, [1989] 1 N.Z.L.R. 216 (C.A.) — *considered*

Cole v. Cunningham, 133 U.S. 107 (1890) — *referred to*

Cooper Estate v. Canadian Home Assurance Co. (1986), 29 D.L.R. (4th) 419, 18 C.C.L.I. 279, 10 C.P.C. (2d) 195, 73 N.S.R. (2d) 230, 176 A.P.R. 230 (C.A.) — *considered*

de Dampierre v. de Dampierre, [1988] A.C. 92, [1987] 2 W.L.R. 1006, [1987] 2 All E.R. 1 (H.L.) — *considered*

Dow Chemical Co. v. Alfaro, 786 S.W. 2d 674, certiorari denied 59 U.S.L.W. 3460 (Tex., 1991) — *referred to*

Gau Shan Co. v. Bankers Trust Co., 956 F. 2d 1349 (6th Circ., 1992) — *referred to*

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984) — *considered*

Hunt v. T & N plc, [1990] 2 S.C.R. 959, (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321 — *considered*

International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945) — *considered*

Kornberg v. Kornberg (1990), [1991] 2 W.W.R. 594, 30 R.F.L. (3d) 238, 76 D.L.R. (4th) 379, 47 C.P.C. (2d) 58, 70 Man. R. (2d) 182, leave to appeal to S.C.C. refused [1991] 1 S.C.R. x, [1991] 4 W.W.R. lxv, 32 R.F.L. (3d) 157, 48 C.P.C. (2d) 29, 79 D.L.R. (4th) vii, 135 N.R. 318, 319, 78 Man. R. (2d) 159 — *considered*

Laker Airways v. Sabena, Belgian World Airlines, 731 F. 2d 909 (1984) — *considered*

Milliken v. Meyer, 311 U.S. 457, 85 L. Ed. 278, 61 S. Ct. 339 (1940) [rehearing denied 312 U.S. 712, 85 L. Ed. 1143, 61 S. Ct. 548 (1941)] — *considered*

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81 — *applied*

National Mutual Holdings Pty. Ltd. v. Sentry Corp. (1989), 87 A.L.R. 539 (Fed. Ct.) — *considered*

Pennoyer v. Neff, 95 U.S. 714 (1878) — *referred to*

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981) — *considered*

Rockware Glass Ltd. v. MacShannon, [1978] A.C. 795, [1978] 2 W.L.R. 362, [1978] 1 All E.R. 625 (H.L.) — *considered*

Rowan Companies Inc. v. DiPersio (1990), 69 D.L.R. (4th) 224, 41 C.P.C. (2d) 257, 96 N.S.R. (2d) 181, 253 A.P.R. 181 (C.A.) [leave to appeal to S.C.C. refused (1990), 98 N.S.R. (2d) 360, 263 A.P.R. 360, 116 N.R. 323,

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1993 CarswellBC 47, 77 B.C.L.R. (2d) 62, [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, J.E. 93-674

72 D.L.R. (4th) vii] — *considered*

SNI Aérospatiale v. Lee Kui Jak, [1987] 3 All E.R. 510 (P.C.) — *applied*

South Carolina Insurance Co. v. Assurantie Maatshappij "De Zevan Provincien" N.V., [1987] A.C. 24, [1986] 3 W.L.R. 398, [1986] 3 All E.R. 487 (H.L.) — *referred to*

Spiliada Maritime Corp. v. Cansulex Ltd.; "Spiliada" (The), [1987] A.C. 460, [1986] 3 W.L.R. 972, [1986] 3 All E.R. 843 (C.A.) — *considered*

St. Pierre v. South American Stores (Gath & Chaves) Ltd., [1936] 1 K.B. 382 (C.A.) — *considered*

Unterweser Reederei GmbH v. M/S Bremen, 428 F. 2d 888 (5th Circ., 1970) — *considered*

Voth v. Manildra Flour Mills Pty. Ltd. (1990), 65 A.L.J.R. 83, 97 A.L.R. 124 (H.C.) — *considered*

Statutes considered:

Law and Equity Act,R.S.B.C. 1979, c. 224

s. 36*considered*

Texas Civil Practice and Remedies Code

s. 71.031*considered*

United States Constitution

14th Amendment, s. 1*considered*

Rules considered:

English Rules of the Supreme Court 1965

O. 11*considered*

Words and phrases considered:

comity

Appeal from judgment of British Columbia Court of Appeal, (1990), [1991] 1 W.W.R. 243, 50 B.C.L.R. (2d) 218, 75 D.L.R. (4th) 1, 44 C.P.C. (2d) 1, dismissing appeal from judgment of Esson C.J.S.C., (1989), [1990] 2 W.W.R. 601, 42 B.C.L.R. (2d) 77, 65 D.L.R. (4th) 567, 38 C.P.C. (2d) 232, granting anti-suit injunction restraining continuation of proceedings in Texas.

The judgment of the court was delivered by *Sopinka J.*:

1 This is an appeal from the grant of an interlocutory injunction restraining tort proceedings in a foreign court. The

issue requiring determination in this case is whether the anti-suit injunction issued in British Columbia which seeks to prevent the appellants from pursuing their action against the respondents in Texas should be set aside. The resolution of this issue requires an examination of our rules of private international law relating to forum non conveniens and anti-suit injunctions.

2 As noted by A.V. Dicey and J.H.C. Morris, *The Conflict of Laws*, vol. 1 (11th ed., 1987), at p. 391:

> This topic has become of increasing modern importance as a result of a variety of factors including the greater ease of communication and travel; the tendency of courts in many countries to extend their jurisdiction over events and persons outside their territory; and a greater awareness of foreign laws and procedures, which in turn may lead to "forum-shopping."

Facts

3 The individual appellants consist of 194 persons who have suffered injury which they claim is due to exposure to asbestos or who are dependents of deceased persons affected by asbestos. In July of 1988, nine of the individual appellants commenced an action in the Texas District Court, Harrison County, Texas, seeking damages from the respondent asbestos companies. Eventually, the number of individual plaintiffs swelled to 194 in number. In all but 40 of these claims, the Workers' Compensation Board of British Columbia ("the Board") has a subrogated interest, by virtue of having paid compensation in the form of disability or death benefits to workers whose health was adversely affected by exposure to asbestos, and hence is dominus litis. Any damages recovered beyond the Board's interest are to be paid to the claimants. The appellant, Cassiar Mining Corporation (hereinafter "Cassiar") is a British Columbia corporation which has mined asbestos in that province. It was named a defendant in the action in British Columbia by the respondent asbestos companies although no injunction was sought against it. It is alleged that in any actions in British Columbia by the appellants, the respondent asbestos companies would seek contribution and indemnity from Cassiar. Most of the claimants are or were residents of the pro@_vince of British Columbia at the time the injuries were sustained, although some of the claimants are residents of Alberta, Manitoba, New Brunswick and the American state of Washington.

4 The respondents are all companies involved in the manufacture, sale or supply of asbestos and asbestos products. None of the respondents has any connection with the province of British Columbia. Most of the asbestos companies were incorporated and have their principal place of business and manufacture in the United States, although there is no concentration of them in any single state. Although none of the respondents was incorporated in the State of Texas, most of them carry on business in that state in the form of asbestos manufacturing plants. Certain of the respondents have maintained their principal asbestos manufacturing facilities (Garlock, Inc.) or corporate headquarters (National Gypsum Company and Flexitallic Gaskett Company) in Texas at various times. The respondent, National Gypsum, maintains a principal place of business in Texas. One respondent, Carey Canada Inc., is a Quebec company with its principal place of business in Quebec. Carey Canada is a sub sidiary of an American corporation. T & N plc (hereinafter "T & N") is a company incorporated in the United Kingdom which carried on business in Texas through a licensee who had offices in Houston and San Antonio, Texas.

5 The appellants allege that the respondent asbestos companies, with the possible exception of T & N and Carey Canada Inc., engaged in the following tortious conduct in the United States: making decisions pertaining to the manufacture of various asbestos-containing products; failing to provide adequate warnings and instructions for the use, application and removal of asbestos-containing products; failing to notify workers and others likely to be exposed of the dangers of asbestos exposure known to the asbestos companies; and conspiring to suppress knowledge of those dangers. This Court has recently held in a related asbestos case that the conspiracy action should not be struck out as disclosing no reasonable cause of action (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 [49 B.C.L.R. (2d) 273, [1990] 6 W.W.R. 385]).

6 The appellants allege that exposure to asbestos occurred in various jurisdictions, including the United States, Canada (British Columbia, Alberta, Manitoba, Quebec and New Brunswick) and Europe. The respondents, on the other hand, submit that virtually all of the alleged exposure occurred while the appellants were resident and working in British Columbia. On December 19, 1988, Baxter J. of the Texas District Court found jurisdiction and venue in Harrison County, Texas, under s. 71.031 of the Texas *Civil Practice and Remedies Code*, on the basis that the asbestos companies had not discharged the onus of showing that they did not carry on business in Texas. According to the respondents, this ruling was not appealed because, under Texas law, such a ruling on jurisdiction cannot be appealed until after trial of the action.

7 After the action was commenced in Texas, most of the 33 corporate defendants filed special appearances challenging jurisdiction and venue and seeking a stay of the action on the grounds that Texas was forum non conveniens. Six of the defendants, however, including one of the respondents on this appeal (Owens-Corning Fiberglas Corporation), filed "general answers" which are seen in Texas law to concede in personam jurisdiction. The claimants (appellants in this action) opposed the forum non conveniens motion in Texas on the ground that forum non conveniens had no application because the doctrine had been statutorily abolished in Texas (see: *Dow Chemical Co. v. Alfaro*, 786 S.W. 2d 674, certiorari denied 59 U.S.L.W. 3460 (1991)). On July 14, 1989, Leggat J. of the Texas District Court dismissed without reasons the companies' motion to dismiss due to forum non conveniens. The District Court subsequently denied a motion to reconsider this decision and the asbestos companies petitioned the Texas Supreme Court for leave to file a writ of mandamus with respect to the forum non conveniens issue. This petition was overruled, and a further motion to reconsider that decision was denied by the Texas Supreme Court. A scheduling order was made in September, 1989 setting a jury trial for December 10, 1989.

8 In November, 1989, the asbestos companies brought applications in the Supreme Court of British Columbia seeking anti-suit injunctions against the appellants, in order to prevent the continuation of the Texas actions. The asbestos companies also brought a claim for abuse of process. On November 10, 1989, an ex parte injunction was granted by Cowan J. restraining the continuation of the Texas proceedings. On November 20, 1989, those claimants who were not residents of British Columbia, sought and obtained an injunction in Texas to prevent the respondents from obtaining similar injunctions against them in Canada. This is referred to as an "anti-anti-suit" injunction. It expired on December 8, 1989.

9 T & N brought separate proceedings in British Columbia because it is its position that the facts relating to it are different from the other respondents, in that T & N was sued in Texas as if it were an American company. It had been linked to a Pennsylvania company with which it had licensing and other agreements for the sale of asbestos in the United States. T & N states that a company by the name of Atlas had the exclusive right to distribute all of their products in Canada. Hence, T & N submits, the claimants could not have been exposed to its products.

10 The asbestos companies' applications were heard by Esson C.J.S.C. who granted the injunctions, on terms, including a requirement that the respondents attorn to the jurisdiction of the British Columbia courts should the appellants bring fresh actions in that province. The asbestos companies' claim for abuse of process was struck out. The appellants appealed to the Court of Appeal for British Columbia, which dismissed their appeals. At the hearing of the appeal, the Flintkote Company pursued a cross-appeal for abuse of process. The Court of Appeal upheld the striking of this claim and dismissed the cross-appeal.

11 On May 12, 1992, I granted a motion to adduce further evidence so that this Court would have before it a more complete record of the proceedings in the Texas courts, the connection of the respondents to that jurisdiction, and the proceedings that have taken place in the rest of Canada since the injunction was granted.

Judicial History

Supreme Court of British Columbia (1989), 42 B.C.L.R. (2d) 77 [[1990] 2 W.W.R. 601]

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1993 CarswellBC 47, 77 B.C.L.R. (2d) 62, [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, J.E. 93-674

12 The asbestos companies claimed the following relief:

13 (a) a declaration that British Columbia is the natural forum for the trial of the matters raised in the Texas action;

14 (b) a declaration that the asbestos companies are not liable to the claimants in respect of any of the matters raised in the Texas action;

15 (c) an injunction restraining the defendants in this action from taking any step in Texas to obtain an order enjoining the asbestos companies from seeking the relief claimed in this action;

16 (d) an injunction restraining the present defendants from further prosecuting the Texas action; and,

17 (e) a claim for damages for abuse of process.

18 Esson C.J.S.C. noted that the doctrine of forum non conveniens was not applicable to the Texas courts. Describing the introduction of anti-suit injunctions to Canadian jurisprudence as relatively new, Esson C.J.S.C. then directed his attention to English jurisprudence for guidance. In particular, he took *Castanho v. Brown & Root (U.K.) Ltd.*, [1981] A.C. 557 (H.L.), and *SNI Aérospatiale v. Lee Kui Jak*, [1987] 3 All E.R. 510 (P.C.) (hereinafter "*SNI*"), as "highly persuasive authority" because they dealt directly with anti-suit injunctions. The principle Esson C.J.S.C. drew from these cases was that if the local court decides that its jurisdiction is the natural forum for the adjudication of the dispute, and that the plaintiff is acting oppressively through the foreign proceedings, the local court can enjoin the plaintiffs from proceeding with the foreign action, if doing so would be in the interests of justice.

19 In applying these principles to the case at bar, Esson C.J.S.C. held that, while Texas is not a "wholly inappropriate forum", British Columbia was "a more natural" one. This being insufficient to decide the issue, he went on to balance the "juridical convenience" to the appellants in continuing the Texas proceedings against the disadvantage to the respondents. In his view, the refusal of Texas to apply the doctrine of forum non conveniens was a factor weighing in favour of a finding of oppression. Although the rules of comity would dictate that British Columbia defer to the decision of the Texas court on the question of whether proceeding in that jurisdiction would be oppressive, since there was no consideration of this issue on the merits, Esson C.J.S.C. concluded that no deference should be paid to the Texas court. Esson C.J.S.C. considered the fact that the Texas court had enjoined the respondents from seeking an anti-suit injunction against the non-British Columbia claimants by way of an anti-anti-suit injunction to be a further factor indicating oppression.

Court of Appeal (1990), 50 B.C.L.R. (2d) 218 [[1991] 1 W.W.R. 243]

20 Hollinrake J.A., writing for McEachern C.J.B.C. and Taggart J.A., stated that Esson C.J.S.C. did not err in principle or otherwise such that the appeal should be successful. Hollinrake J.A., however, did hold different views on the issue of natural forum and the significance of the want of the doctrine of forum non conveniens.

21 Firstly, Hollinrake J.A. stated that although most of the case law involved an application for a stay of domestic proceedings, and not an anti-suit injunction restraining foreign proceedings, the principles applicable to a stay must be considered as a guide when determining the principles applicable to an application for an anti-suit injunction. He decided that the principles enunciated in *SNI* should be adopted. Hollinrake J.A. commented that the absence of the doctrine of forum non conveniens played a significant role in his conclusion that British Columbia is "the one and only natural forum for this action".

22 Hollinrake J.A. was of the view that comity was of little importance because the injunction is not directed to

the foreign court but only to the appellants who were British Columbia residents. The fact that the appellants had not commenced concurrent actions in British Columbia was not of sufficient importance, because if it were of importance, any claimant could avoid an anti-suit injunction merely by not commencing an action in the jurisdiction where the anti-suit injunction is sought.

23 McEachern C.J.B.C. agreed with Hollinrake J.A., but wrote concurring reasons for judgment adding that all courts should ensure that their citizens do not bring proceedings other than in the natural forum, that is, the one with the closest connection to the litigation.

The Issue

24 The issue to be determined is on what principles should a court exercise its discretion to grant an anti-suit injunction and how these principles apply in this appeal.

Choosing the Forum in Modern Litigation

25 This Court has not considered this question since its decision in *Antares Shipping Corp. v. "Capricorn" (The)*, [1977] 2 S.C.R. 422. Meanwhile, the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "the substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.

26 This does not mean, however, that "forum shopping" is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others.

27 The courts have developed two forms of remedy to control the choice of forum by the parties. The first and more conventional device is a stay of proceedings. This enables the court of the forum selected by the plaintiff (the domestic forum) to stay the action at the request of the defendant if persuaded that the case should be tried elsewhere. The second is the anti-suit injunction, a more aggressive remedy, which may be granted by the domestic court at the request of a defendant or defendants, actual or potential, in a foreign suit. In the usual situation the plaintiff in the domestic court moves to restrain the defendant or defendants from launching or continuing a proceeding in the courts of another jurisdiction. Occasionally, as in this case, the defendants in a foreign jurisdiction who allege that the plaintiff in that jurisdiction has selected an inappropriate forum seek an injunction from the courts of the alleged appropriate forum, in which no proceeding is pending, to restrain continuation of the foreign proceedings. While the restraining order operates in personam on the plaintiff in the foreign suit and not on the foreign court itself, it has the latter effect and therefore raises serious issues of comity.

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28 Although both the remedy of a stay and an injunction have as their main objectives the selection of an appropriate forum for the trial of the action, there is a fundamental difference between them which is crucial to the development of the principles which should govern each. In the case of the stay the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court. Any doubts that a foreign court will not regard this as a breach of comity are dispelled by reading the reaction of Wilkey J. of the District of Columbia Circuit of the United States Federal Court of Appeal in *Laker Airways v. Sabena, Belgian World Airlines*, 731 F. 2d 909 (1984), in which the British courts restrained Laker from continuing an anti-trust suit in United States courts against British airlines. In assessing the role of comity in the formulation of the principles which should inform the exercise of this power, I adopt the definition of comity approved by Justice La Forest in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [52 B.C.L.R. (2d) 160, [1991] 2 W.W.R. 217], at p. 1096:

> Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

29 It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. See Richard W. Raushenbush, "Antisuit Injunctions and International Comity" (1985), 71 Va. Law Rev. 1039, and *Laker Airlines*, supra. A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the poten tial fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.

30 While the above scenario is one we should strive to attain, it has not yet been achieved. Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the forum non conveniens test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti-suit injunction. This then indicates the general tenor of the principles that underlie the granting of this form of relief. In order to arrive at more specific criteria, it is necessary to consider when a foreign court has departed from our own test of forum non conveniens to such an extent as to justify our courts in refusing to respect the assumption of jurisdiction by the foreign court and in what circumstances such assumption amounts to a serious injustice. The former requires an examination of the current state of the law relating to the stay of proceedings on the ground of forum non conveniens, while the latter, the law with respect to injunctions and specifically anti-suit injunctions.

Forum Non Conveniens

31 The law of Canada and other common law countries on this subject evolved from the law of England which was most recently restated by the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.; "Spiliada" (The)*, [1987] A.C. 460. In setting out the principles which should guide a British court, Lord Goff, who delivered the main judgment, stated at p. 477 that "on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions". The English approach has gone through several stages of evolution tending to a broader acceptance of the legitimacy of the claim of other jurisdictions to try actions that have

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connections to England as well as to such other jurisdictions. Other common law jurisdictions have either accepted the principles in *Spiliada*, or an earlier version of them.

32 Earlier English cases declined to apply the principle of forum non conveniens, which was a Scottish principle, preferring a rule which required a party who had been served within the jurisdiction to establish: (1) that the continuation of the action would cause an injustice to him or her because it would be oppressive or vexatious or constitute an abuse of the process, and (2) that stay would not cause an injustice to the plaintiff. The foundation for this rule was not balance of convenience for the trial of the action but rather abuse of the rights of the parties. A different test applied with respect to cases in which service outside the jurisdiction was necessary. In such a case an order for service ex juris was required and the plaintiff had to show that England was the appropriate forum and that the rule authorizing such service was otherwise complied with. In *"Atlantic Star" (The); "Atlantic Star" (The) (Owners) v. "Bona Spes" (The) (Owners)*, [1973] 2 All E.R. 175, the House of Lords was urged to adopt the principle of forum non conveniens from the Scottish law and to discontinue the test which required proof that the action was oppressive or vexatious as a prerequisite to a stay. The House of Lords declined to adopt the Scottish doctrine but opined that since the words "oppressive and vexatious" were flexible (indeed they had never been satisfactorily defined), liberalization of the English rule could be achieved in the application of those terms. In *Rockware Glass Ltd. v. MacShannon*, [1978] 2 W.L.R. 362, those words were discarded in favour of a more liberal and flexible test which required the defendant to establish: (1) that there is another forum to which the defendant is amenable in which justice can be done at substantially less inconvenience or expense, and (2) that the stay did not deprive the plaintiff of a legitimate personal or juridical advantage if the action continued in the domestic court. This was substantially the same as the Scottish rule of forum non conveniens.

33 In *Spiliada*, supra, the House of Lords restated the rule and elaborated on its application. In particular, the court dealt with its application in what it considered two different circumstances. In the "as of right" cases in which the defendant was served in the jurisdiction, the burden of proof that a stay should be granted was on the defendant who was required to show that there is another forum which is clearly more appropriate for the trial of the action. This so-called "natural forum" is the one with which the action has the most real and substantial connection. If this first condition is established, a stay will be granted unless the plaintiff establishes special circumstances by reason of which justice requires that the trial take place in England. Mere loss of a juridical advantage will not amount to an injustice if the court is satisfied that substantial justice will be done in the appropriate forum. In cases in which service is effected ex juris, the burden is on the plaintiff throughout and is the obverse of that applicable in cases as of right; that is, the plaintiff must show that England is clearly the appropriate forum. Lord Goff provided some guidance with respect to the relevant factors that determine the appropriate forum. While not intending to provide an exhaustive list, His Lordship referred to the principal factors in his reasons at p. 478:

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

34 These principles were reaffirmed in *de Dampierre v. de Dampierre*, [1987] 2 W.L.R. 1006 (H.L.). The case provides an interesting illustration of the application of the second branch of the rule. The petitioner wife resisted a stay of her divorce proceedings in England on the ground that in France, where her husband had also commenced proceedings, she would be deprived of support if her conduct was found to be the exclusive cause of the break-up of the marriage. Having found that the husband had satisfied the first condition establishing France as the appropriate forum, the loss of this juridical advantage was considered not sufficient to work an injustice in that substantial justice would still be done under the matrimonial regime obtaining in France.

35 In Australia, the High Court, while not adopting all of the wording of *Spiliada*, has enunciated principles that the court acknowledged would likely yield the same results in the majority of cases. See *Voth v. Manildra Flour Mills Pty. Ltd.* (1990), 65 A.L.J.R. 83, at p. 90. The test for a stay is whether the forum selected by the plaintiff is clearly

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inappropriate rather than whether there is another forum that is clearly more appropriate. The same test applies in "as of right" and "service ex juris" cases. In New Zealand the applicable test is the *Spiliada* test which was adopted in *Club Mediterranee N.Z. v. Wendell*, [1989] 1 N.Z.L.R. 216 (C.A.). The United States Federal Courts apply similar principles in actions in those courts. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court of the United States approved of the decision of the District Court which dismissed an action brought in California by the administratrix of the estates of Scottish citizens involved in an air crash in Scotland against the American manufacturers of the aircraft. The test applied by the District Court judge was whether the relevant factors clearly pointed to a trial in the alternative jurisdiction. The test was applied on the basis of a presumption in favour of the plaintiff's choice of forum, the impact of which was lessened when the home forum was not selected.

36 The current state of the law in Canada is summed up adequately by Ellen L. Hayes in "*Forum Non Conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992), 26 U.B.C. Law Rev. 41, at pp. 42-43:

> The status of the doctrine of *forum non conveniens* in Canada is unclear. In general terms the Canadian courts have looked to English authorities when considering *forum non conveniens* issues. Their specific approach, however, is not consistent. The most recent cases from the Western provinces refer to the current English test, but at the same time resist adopting a comprehensive test or rule which would result in an "overly legalistic approach." The Ontario courts, on the other hand, have fallen behind the English courts' development of the doctrine and continue to apply a test which has now been replaced by the House of Lords. There is confusion in many of the cases as to whether the test is different when the defendant is served within the jurisdiction rather than *ex juris*, where the burden of proof lies and the weight to be given personal or juridical advantages to the plaintiff of proceeding in the home jurisdiction. [Footnotes omitted.]

The only recent decision of this court on the subject is *Antares*, supra, which, while an admiralty case in the Federal Court, discusses the general principles relating to forum non conveniens. At p. 448, Ritchie J., for the majority, stated the test that should be applied when the court is asked to stay an action on this ground:

> In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

The case was decided before *Spiliada* and *MacShannon*. It is significant that there is no mention in the statement of general principles of any requirement that the domestic proceeding be shown to be oppressive or vexatious. There is no specific discussion of the second condition of the English rule but it is clear from the judgment that a principal factor in the determination that there was no alternative forum more convenient than Canada was the fact that it was the only jurisdiction in which the plaintiff could obtain an effective judgment. The ship, which was the subject of the suit, had been arrested in Quebec and the bond posted to obtain its release was security for enforcement of any judgment obtained in Canada. No such security was available in the other jurisdictions which were potential appropriate fora for the action. Accordingly, Canada was the most convenient forum for both "the pursuit of the action" and "for securing the ends of justice".

37 In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. The law in England was evolved by reworking a passage from the reasons of Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.*, [1936] 1 K.B. 382, which contained two conditions. In its original formulation the second condition required the court to ensure that there was no injustice to the plaintiff in granting the stay. No doubt this was because the oppression test concentrated largely on the effects on the defendant of being subjected to a trial in England. When the first condition moved to an examination of all the factors that are

designed to identify the natural forum, it seems to me that any juridical advantage to the plaintiff or defendant should have been considered one of the factors to be taken into account. The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

38 Finally, I observe that *Antares*, supra, was a case in which leave to serve ex juris was required. The court did not, however, consider this an important matter in formulating the test. It seems to me that whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors. If the defendant resides out of the jurisdiction this is a factor whether or not service is effected out of the jurisdiction. Residence outside of the jurisdiction may be artificial. It may have been arranged for tax or other reasons notwithstanding the defendant has a real and substantial connection with this country. The special treatment which the English courts have accorded to ex juris cases ap pears to be based on the dictates of O. 11 of the English rules which imposes a heavy burden on the plaintiff to justify the assertion of jurisdiction over a foreigner. In most provinces in Canada, leave to serve ex juris is no longer required except in special circumstances and this trend is one that is likely to spread to other provinces. This phenomenon was considered by the High Court of Australia in *Voth*, supra, in reaching its conclusion that the test should be the same for service ex juris cases and others. Whether the burden of proof should be on the plaintiff in ex juris cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service ex juris where no order is required, then the rule must govern. The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties. While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff. This was the position adopted by McLachlin J.A. (as she then was) in *Avenue Properties Ltd. v. First City Development Corp.* (1986), 7 B.C.L.R. (2d) 45 [[1987] 1 W.W.R. 249]. She emphasized that this had particular application where there were no parallel foreign proceedings pending.

39 This review establishes that the law in common law jurisdictions is, as observed by Lord Goff in *Spiliada*, remarkably uniform. While there are differences in the language used, each jurisdiction applies principles designed to identify the most appropriate or appropriate forum for the litigation based on factors which connect the litigation and the parties to the competing fora. A review of the law of Japan by Ellen L. Hayes in the study to which I refer above (at p. 63) led her to conclude that similar principles are applied there. Regard for the principles of international comity to which I have referred suggests that in considering an anti-suit injunction the fact that a foreign court has assumed jurisdiction in circumstances which are consistent with the application of the above principles is an important factor militating against granting an injunction.

Anti-Suit Injunctions

England

40 The English courts have exercised jurisdiction to restrain proceedings in a foreign court and to stay domestic actions since 1821. Leach V.C. in *Bushby v. Munday*, supra, at p. 307 and p. 913, stated the rule as follows:

> Where parties Defendants are resident in England, and brought by *subpoena* here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other Court of Justice, whether in this country, or in a foreign country.

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The sentiment expressed at that time was that the relief sought, whether an injunction or a stay, operated in personam and was not intended to interfere with the other court. Thus viewed, the question to be determined was whether the ends of justice required the issuance of an injunction or a stay. In deciding that an injunction should be granted in *Bushby v. Munday*, supra, the Vice-Chancellor made findings that the English Court was a more convenient jurisdiction; and, that the proceedings in Scotland, due to procedural law, were less likely to elicit the truth. Leach V.C. concluded (at p. 308 and p. 913) that the English court should pursue its superior means for determining both law and fact.

41 The same test evolved for anti-suit injunctions and stays, based on the judgment of Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.*, supra. Where these requirements were met, the court would exercise its discretion in granting the stay or enjoining the foreign proceedings. The principles governing the issuance of a stay and an anti-suit injunction remained identical until the House of Lords' decision in *The Atlantic Star*, supra, when the English jurisprudence regarding stays of domestic proceedings underwent the first of the modifications to which I have referred. In *The Atlantic Star*, the House of Lords held that the words "oppressive" and "vexatious" should be interpreted liberally. After the decision in *The Atlantic Star*, it was unclear whether the principles governing the issuance of an anti-suit injunction remained the same or whether they evolved along with the principles governing a stay of domestic proceedings. The House of Lords directly considered this question in *Castanho v. Brown & Root (U.K.) Ltd.*, supra, which involved an application for an anti-suit injunction. Lord Scarman pronounced, at p. 574, that "the principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."Lord Scarman approved the reformulation of the principles as set out by Lord Diplock in *The Atlantic Star*, supra, and concluded at p. 575, that:

> ... to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, *and* (*b*) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction. [Emphasis in the original.]

Lord Scarman emphasized that the "critical equation" in an application for a stay or an anti-suit injunction was between the advantage to the plaintiff and the disadvantage to the defendants. For the purposes of this determination, the prospect of higher damages in the foreign jurisdiction was a legitimate juridical advantage for a plaintiff. The House of Lords applied the law as set out in *Castanho*, supra in two succeeding cases involving applications to enjoin foreign proceedings (*British Airways Board v. Laker Airways Ltd.*, [1985] A.C. 58, and *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] A.C. 24).

42 This test, in so far as it regarded anti-suit injunctions, did not withstand the scrutiny of the Judicial Committee of the Privy Council. In 1987, the Privy Council overturned the liberalized principles that the House of Lords enunciated. The definitive statement of law was pronounced in *SNI*, supra: an anti-suit injunction will not be issued by an English court unless it is shown that the foreign proceedings will be oppressive or vexatious. It was made clear that the traditional principles as summarized in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.*, supra, were to govern applications to restrain foreign proceedings. Thus, the liberalized principles formulated in *Spiliada*, supra, in the context of an application for a stay of domestic proceedings were not to apply to anti-suit injunctions because to do so would be inconsistent with the principles of comity and would disregard the fundamental requirement that an injunction will only be available where it is required to address the ends of justice.

43 In coming to his conclusion on the law in *SNI*, Lord Goff considered the long history of English law as well as American and Scottish authorities. He stated, at p. 519 that the following basic principles were beyond dispute:

> First, the jurisdiction is to be exercised when the "ends of justice" require it ... Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but

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> against the parties so proceeding or threatening to proceed ... Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy ... Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution ... [Cites omitted.]

In considering the above principles, Lord Goff set out the following test (*SNI*, supra, at p. 522):

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

This analysis represents the current test for issuance of an anti-suit injunction in England.

The United States of America

44 Although American courts have exercised the equitable power to restrain parties subject to their jurisdiction from litigating in another forum (see *Cole v. Cunningham*, 133 U.S. 107 (1890)), most American jurisdictions allow parallel foreign proceedings for in personam actions. Anti-suit injunctions are used only when "necessary to protect the jurisdiction of the enjoining court or to prevent the litigant's evasion of the important public policies of the forum" (*Laker Airways v. Sabena, Belgian World Airlines*, supra, at p. 927). As in the case of other jurisdictions, the power to issue such injunctive relief must be exercised with extreme caution because, although in theory the order operates in personam, an anti-suit injunction "effectively restrict[s] the foreign court's ability to exercise its jurisdiction" (*Laker Airways*, supra, at p. 927).

45 In American jurisprudence there are no precise rules governing the issuance of anti-suit injunctions; rather, the equitable circumstances are examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice. A court is to be guided by two tenets. Firstly, the fundamental corollary to concurrent jurisdiction must be respected: parallel proceedings in concurrent in personam actions are allowed to proceed simultaneously. Second, impedance of the foreign jurisdiction is to be avoided. (See *Laker Airways*, supra, at pp. 926-27.)

46 As noted by one author, when faced with foreign courts of concurrent jurisdiction, not all American courts abide by the rule favouring parallel proceedings. Richard W. Raushenbush, "Antisuit Injunctions and International Comity", at pp. 1049-50 describes two distinct approaches which have developed. Under the "liberal" approach to anti-suit injunc tions, a court will be willing to grant an injunction where the proceedings are duplicative in nature, and they "(1) frustrate a policy of the forum issuing the injunction; (2) [are] vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) ... prejudice other equitable considerations" (per *Unterweser Reederei, GmbH v. M/S Bremen*, 428 F. 2d 888 (5th Circ., 1970)), at p. 890. The "conservative" approach, as exemplified by Wilkey J. in *Laker Airways*, supra, advances the view that issuing anti-suit injunctions to prevent duplicative litigation is inconsistent with the rule permitting parallel proceedings in concurrent in personam actions. In the application of the "conservative" approach (at p. 927), anti-suit injunctions are only deployed when it becomes "necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum". Often an applicant is additionally required to establish the conventional requirements for issuance of an injunction: a likelihood of success on the merits, a risk of irreparable injury, a lack of significant harm to the defendant, and a public interest in issuing an injunction. (See *Gau Shan Co. v. Bankers Trust Co.*, 956 F. 2d 1349

(6th Circ., 1992).)

47 As observed by Lord Goff in *SNI*, there is no suggestion in American jurisprudence that applications for stays of proceedings and anti-suit injunctions are governed by the same principles.

Australia

48 The Federal Court — General Division has discussed the English and American authorities regarding anti-suit injunctions: Gummow J. in *National Mutual Holdings Pty. Ltd. v. Sentry Corp.* (1989), 87 A.L.R. 539, at p. 563, concluded that:

> The conduct of foreign proceedings which have a tendency to interfere with the due process of the domestic court may, in the circumstances of a particular case, generate the necessary equity to enjoin those foreign proceedings as vexatious or oppressive ...

He added three observations. First, "in Australia, there is the further consideration that where a court has begun to exercise the judicial power of the Commonwealth in relation to a particular matter, it has the exclusive right to exercise or control the exercise of the functions which form part of that power or are incidental to it: cf *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 C.L.R. 460 at 471-3, 474 ..."Secondly, "it is also to be asked whether effectual relief can be obtained in the courts of the foreign country ... cf White and Tudor's *Leading Cases in Equity* [(9th ed., vol. 1)] pp. 635-6."And lastly, "a relevant consideration is the existence of substantial reasons of benefit for the plaintiff in bringing the foreign proceedings: [*SNI*] (at 893-4)."

49 The High Court of Australia has not specifically considered the principles upon which an anti-suit injunction will be granted.

Canada

50 Canadian jurisprudence is not widely developed on this subject matter. Even the early cases, however, admonished that the power to restrain foreign proceedings should be exercised with great caution and that the strict purpose of such injunctions was to prevent the abuse of the courts by vexatious actions. There is no decision of this Court on the point.

51 Two recent Nova Scotia decisions dealt with anti-suit injunctions. *Cooper Estate v. Canadian Home Assurance Co.* (1986), 29 D.L.R. (4th) 419 (N.S.C.A.), predated the English judgment of *SNI*. In that case, an injunction was granted upon MacKeigan J.A.'s findings that the foreign action involving the same parties was of no value to the respondents since if its resolution was the same as the domestic action, it would not add to the domestic judgment, and, if the judgment were not the same, it would not be recognized in the domestic jurisdiction because of what would be considered to be a jurisdictional error. Without discussion of the governing principles, the injunction was granted. In the later Nova Scotia case of *Rowan Companies Inc. v. DiPersio* (1990), 69 D.L.R. (4th) 224, which was decided after *SNI*, an anti-suit injunction was refused by the Court of Appeal. Jones J.A., delivering the judgment for the court, stated that the balance of convenience favoured the respondent. The factors he relied on were that the action was brought in the lex loci delicti which was the appropriate forum and that the applicant carried on business in the foreign jurisdiction where, presumably, some of the witnesses resided. He found, at p. 240, that the action could not be termed "frivolous or vexatious."

52 In the recent Alberta Queen's Bench decision in *Allied-Signal Inc. v. Dome Petroleum Ltd.* (1988), 67 Alta. L.R. (2d) 259 [[1989] 5 W.W.R. 326], Medhurst J. purported to apply the English principles enunciated in *SNI* in an action for an anti-suit injunction. He stated, at p. 266:

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1993 CarswellBC 47, 77 B.C.L.R. (2d) 62, [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, J.E. 93-674

> After considering all of the submissions that have been made, it is my view that these applications before me should be decided on the basis of which forum is more suitable for the ends of justice in determining the issues in dispute. This includes a consideration of the tripartite test for obtaining interlocutory injunctions in other proceedings.

Medhurst J. concluded that on the basis of the forum conveniens test the injunction should be granted. He added that the injunction might also be justified on two further grounds: (1) the foreign action is oppressive due to the risks of inconsistent findings and subsequent actions for contribu tion and indemnity, and (2) the tripartite test for granting interim injunctions which includes consideration of the public interest and private interests of the parties was satisfied.

53 *Kornberg v. Kornberg* (1990), 30 R.F.L. (3d) 238 [[1991] 2 W.W.R. 594] (Man. C.A.) (leave to S.C.C. refused [1991] 1 S.C.R. x), is a case which applied the *SNI* principles. The majority of the Court of Appeal recognized that the principles applicable to an anti-suit injunction were not the same as those applicable to a stay of domestic proceedings. Philp J.A., writing for the majority, held that an anti-suit injunction should not be granted unless continuing the foreign proceedings would lead to injustice to the other party or the pursuit of the foreign proceedings was vexatious and oppressive. This decision was in contrast to the Manitoba Court of Appeal decision in *Aikmac Holdings Ltd. v. Loewen*, [1989] 6 W.W.R. 759, which applied the English approach in *Castanho*, supra, which was overruled in 1987 by the Privy Council in *SNI.*

54 No consistent approach appears to emerge from these cases other than recognition of the principle that great caution should be exercised when invoking the power to enjoin foreign litigation.

The Test

55 In my view, the principles outlined in *SNI* should be the foundation for the test applied in our courts. These principles should be applied having due regard for the Canadian approach to private international law. This approach is exemplified by the judgment of this Court in *Morguard*, supra, in which La Forest J. stressed the role of comity and the need to adjust its content in light of the changing world order. I now turn to the formulation of the test in light of the foregoing.

56 First, it is useful to discuss some preliminary aspects of procedure with respect to anti-suit injunctions. As a general rule, the domestic court should not entertain an application for an injunction if there is no foreign proceeding pending. While quia timet injunctions are granted by the courts, that is done only if the applicant establishes that some threatened action by the defendant will constitute an actionable civil wrong. In general, an injunction is a remedy ancillary to a cause of action. See Case Comment: Elizabeth R. Edinger (1992), 71 Can. Bar Rev. 117, at p. 127. In this respect the anti-suit injunction is unique in that the applicant does not have to establish that the assumption of jurisdiction by the foreign court will amount to an actionable wrong. Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.

57 If the foreign court stays or dismisses the action there, the problem is solved. If not, the domestic court must proceed to entertain the application for an injunction but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum. In any case in which an action has been commenced in the domestic forum, it can be expected that the domestic forum is being put forward as an appropriate forum by the plaintiff. In resisting a stay, the plaintiff will also contend that there is no other forum which is clearly more appropriate and that, therefore, the defendant has not complied with the test which I have outlined above. If no action has been commenced in the domestic forum, it has no juridical basis for entertaining an application for an injunction unless it is contended by the applicant

that the action should have been commenced in the domestic forum as the more appropriate place of trial and it is potentially an appropriate forum.

58 The first step in applying the *SNI* analysis is to determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the test relating to forum non conveniens. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

59 In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the *SNI* test. I prefer the initial formulation of that step without reference to the terms "oppressive or vexatious". At p. 522, Lord Goff states:

> This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. *So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.* [Emphasis added.]

That case was decided on the basis of the injustice to *SNI* by reason of the loss of juridical advantages in Brunei but not available to it in Texas. The characterization of this loss as oppressive added nothing to the analysis. This is especially so since neither "oppressive" nor "vexatious" was satisfactorily defined in *SNI* nor, from my reading of the cases, anywhere else. If flexibility is the desired objective, it is achieved by the use of the term "injustice" which, in addition, is more in keeping with the language of the statutes which provide for injunctive relief. For example, the British Columbia *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 36, authorizes an injunction when "it appears to the court to be just or convenient".

60 When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum. I pointed out in my discussion of the test for determining the forum non conveniens that loss of juridical advantage is one of the factors and it will have been considered in step one. It will also be considered in the second step to determine whether, apart from its influence on the choice of the most appropriate forum, an injustice would result if the plaintiff is allowed to proceed in the foreign jurisdiction. The loss of a personal or juridical advantage is not necessarily the only potential cause of injustice in this context but it will be, by far, the most frequent. Indeed most of the authorities involve loss of juridical advantage rather

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than personal advantage. Nonetheless, loss of personal advantage might amount to an injustice if, for example, an individual party is required to litigate in a distant forum with which he or she has no connection. I prefer to leave other possible sources of injustice to be dealt with as they arise.

61 The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the forum non conveniens, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

Application of Principles to this Appeal

62 I would allow the appeal on the ground that Esson C.J.S.C. (the trial judge) erred in his application of both branches of the rule relating to anti-suit injunctions which I have outlined above. First, with respect to the choice of forum, the first step in the test, having concluded that the Texas court did not apply a forum non conveniens test, he failed to consider whether, notwithstanding that fact, the decision was consistent with applicable principles of private international law. Second, although he was of the view that the alleged loss of juridical advantage had little substance, he decided that the Texas proceedings were oppressive. In respect of both branches of the rule he gave undue weight to the absence of a forum non conveniens rule in Texas and to the anti-anti-suit injunction granted by the Texas court.

63 The trial judge found that Texas was not a "wholly inappropriate forum". While he held that British Columbia was a more natural forum than Texas, he also held that the United States was a natural forum and that some state other than Texas was a more natural forum but did not specify which state that was. Indeed, he stated that he would have difficulty in concluding that any particular state was the natural forum. All of the asbestos companies had some connection with Texas and some had a substantial connection. The conclusion is reinforced by reason of the position taken by the respondents in the proceedings before the trial judge that they were not contesting the assumption of jurisdiction over them by the Texas courts. This could only be so if the respondents had a connection to Texas. They had no connection to British Columbia. The acts which were the foundation of the claim took place outside of British Columbia and in the United States. The action had been commenced there and had progressed to the point that a trial date had been set. In finding that both British Columbia and the United States were natural fora, the trial judge must have been of the opinion that an action in the appropriate state in the United States could be justified on the basis of forum non conveniens principles. The term "natural forum" is by definition the forum that has the closest connection with the parties and the case. The finding that both the United States and British Columbia were natural fora would suggest that one was not clearly more appropriate than the other. It is not clear that any other state in the United States was clearly a more appropriate forum and since the case was presented on the basis that it was a contest between Texas and British Columbia, it was not relevant that some other state in the United States was more appropriate. The selection of Texas by the plaintiffs could be justified on the basis that no other forum was clearly more appropriate. As pointed out by the trial judge, Texas might be the natural forum for some of the asbestos companies but not others but neither side was suggesting that the case be decided on an individual basis. In these circumstances, if some weight is given to the choice of forum by the plaintiff in the absence of related litigation pending elsewhere, the decision of the Texas court could be recognized having due regard for the principles of comity to which I have referred above. It appears from the trial judge's reasons that he might have come to this conclusion [p. 104] "on the basis of the facts and submissions *other than those relating to the decisions made in Texas*" (emphasis added). These decisions are respectively the decision as to the application of forum non conveniens principles in Texas law and the anti-anti-suit injunction. These decisions in his view disentitled the Texas court to the respect that comity customarily affords. On the basis of the test I have outlined above, this would be sufficient to allow the appeal and dismiss the application for an injunction. In the alternative, however, had I come to the conclusion that the application for an injunction satisfied this part of the test, I would have concluded that it failed the second step of the analysis.

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64 With respect to the second step of the test, I am of the view that the respondents failed to establish that continuation of the proceedings would deprive them of a legitimate juridical advantage of which it would be unjust to deprive them by proceeding in Texas. The principal disadvantages to which reference was made were: (1) the inability to claim over against the appellants Workers' Compensation Board and Cassiar, and (2) the presence of other actions against some of the respondents brought in British Columbia by other claimants. The trial judge found little substance in these complaints. With respect to the inability to claim over against Workers' Compensation Board, it was based not on any legal impediment but on the inability to gather evidence against them if the action proceeded in Texas. As for Cassiar, the trial judge found that the basis for a possible claim over was very tenuous. With respect to (2), he discounted the importance of this because, in light of the enormous scale of the asbestos litigation, there was nothing unusual about the existence of actions in several jurisdictions. In my opinion the trial judge was right to minimize the gravity of these disadvantages. Moreover, these did not represent a loss of advantages that the respondents could reasonably have expected to have, based on their previous connection to British Columbia. As with the first step of the analysis, the trial judge found that the second step was satisfied not by reason of the loss of juridical or other advantages but because the Texas court, by failing to apply the forum non conveniens rule and by issuing the anti-anti-suit injunction, rendered the proceedings in Texas oppressive.

65 With due respect to the trial judge, the principle of comity to which I have referred does not require that the decision of the foreign court be based on the doctrine of forum non conveniens. Many states in the United States and other countries do not apply that principle. Indeed, until comparatively recent times, it was not applied in England. Does this mean that a decision of the courts of one of these countries which, in the result, is consistent with the application of our rules would not be entitled to respect? The response must be in the negative. It is the result of the decision when measured against our principles that is important and not necessarily the reasoning that leads to that decision. Moreover, while the Texas courts do not apply a forum non conveniens test as such, they are required to comply with s. 1 of the Fourteenth Amendment to the Constitution of the United States which operates to limit the power of a state to assert in personam jurisdiction over a non-resident defendant. See *Pennoyer v. Neff*, 95 U.S. 714 (1878). The due process requirements are satisfied when in personam jurisdiction is asserted over a non-resident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.": *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), at p. 316, quoting *Milliken v. Meyer*, 311 U.S. 457 (1940), at p. 463. Blackmun J., delivering the opinion of the Court, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), at p. 414, held that "even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation."In the instant case, the Texas court assumed jurisdiction on the basis of the fact that some of the respondents are resident in that state and carry on business or some are not resident but carry on business in that state. The finding of sufficient contact with Texas is supported by the evidence and hence, the jurisdiction in Texas was asserted according to the Due Process Clause. This was conceded by the respondent asbestos companies. In my opinion, the application of this provision, which is a constitutional requirement, is consistent with our rules of private international law relating to forum non conveniens. The comments of Vaughan Black in his case comment, "The Standard for Issuing Antisuit Injunctions In Canada" (1991), 44 C.P.C. (2d) 30, at pp. 31-32, are apt:

> The Texas courts, like all American courts, apply the due process clause of the 14th Amendment of the United States Constitution as a check against overbroad "long-arm" jurisdiction. As interpreted, that constitutional provision will not permit a court to assume jurisdiction over a nonresident defendant unless there are minimum contacts between the defendant and the forum. This limitation on territorial jurisdiction is a significant one. Indeed, there are instances where Canadian courts have refused to employ the doctrine of forum non conveniens to stay actions brought before them but where, if an analogous suit where brought before an American court, it would almost certainly have been dismissed as lacking the minimum forum contacts required by the U.S. Constitution (e.g. *Robinson v. Warren* (1982), 31 C.P.C. 305, 55 N.S.R. (2d) 147, 114 A.P.R. 147 (C.A.)). In other words, the Texas courts do have a responsible way to ensure that suits brought before them neither encroach on the sovereignty of foreign jurisdictions nor subject out-of-state defendants to a forum which has an insufficient

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connection to the subject matter of the suit, but this is derived not from the common law doctrine of forum non conveniens but rather from the U.S. Constitution. The adjudication of geographically complex cases may require decision makers to be flexible and even imaginative when inquiring into the nature of foreign legal systems.

66 With respect to the Texas injunction the Texas court was apparently advised that these claimants were not subject to the jurisdiction of the British Columbia court and therefore not bound by the ex parte injunction granted by Cowan J. I do not regard this as an attempt to defeat the proceedings in British Columbia and the injunction did not have this ef fect. It was therefore wrong to visit the conduct of some of the claimants on the entire class so as to enjoin them from proceeding in Texas. In the circumstances, this action on the part of the Texas court was not a demonstration of disrespect for the British Columbia proceedings so as to disentitle the decision of the Texas court to the ordinary respect which comity affords. Moreover, it had little if any relevance to the issue of injustice which is the second step in the *SNI* analysis. The extent of the disadvantage occasioned by being subject to an action in Texas is not affected by the inability to stop some of the plaintiffs from continuing those proceedings. The issue of injustice is resolved on the assumption that the respondents are subject to those proceedings.

67 I have concluded therefore that the learned trial judge erred in the exercise of his discretion in respect of the matters that I have outlined above. The court of appeal dismissed the appeal essentially for the reason that in their view the trial judge had properly exercised his discretion and that, therefore, the court of appeal was not permitted to interfere. Many of the principles applied by the trial judge were affirmed by Hollinrake J.A. with whom McEachern C.J.B.C. and Taggart J.A. agreed. Without intending any disrespect to those reasons, it is not necessary to repeat what I have said with respect to those principles. One matter requires special comment. I do not agree that because an anti-suit injunction does not directly operate on the foreign court but in personam on the plaintiff in that court, comity is not involved. The reaction of Wilkey J. in *Laker*, supra, and, indeed, of Esson C.J.S.C. in this case, demonstrates that, whatever the form of restraint, the court whose proceeding is effectively restrained regards it as an interference with its jurisdiction.

Disposition

68 I would allow the appeal, set aside the orders below and dismiss the application for an injunction. I see no basis for differentiating between T & N and the other respondents. If the action is to proceed in Texas, it is a proper party to the litigation. It would make little sense to require the claimants to pursue a separate action against one company in British Columbia. The appellants are entitled to costs both here and in the courts below.

Appeal allowed.

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TAB 8

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

In re

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS, ET AL.

Debtors in Foreign Proceedings.

Chapter 15
Case No. 09-16709 (MG)
Jointly Administered

MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING AND ENFORCING CANADIAN AMENDED SANCTION ORDER AND PLAN IMPLEMENTATION ORDER

APPEARANCES:

ALLEN & OVERY LLP
Attorneys for the Foreign Representative
1221 Avenue of the Americas
New York, NY 10022
By: Ken Coleman, Esq.
Amélie Baudot, Esq.
Rowena White, Esq.

DIANA G. ADAMS
United States Trustee for Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004
By: Brian S. Masumoto, Esq.

MARTIN GLENN
United States Bankruptcy Judge

I. INTRODUCTION

The petitions in this chapter 15 case were filed on November 10, 2009. Ernst & Young Inc. is the court-appointed monitor ("Monitor") and authorized foreign representative of Metcalfe & Mansfield Alternative Investments II Corp., and the other foreign petitioners (together, "Metcalfe" or "Petitioners"). The Petitioners are debtors in proceedings (the "Canadian Proceedings") under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"), commenced on March 17, 2008 and pending before the Ontario Superior Court of Justice (Commercial List) ("Ontario Court"). The Canadian Proceedings were initiated by the Pan-Canadian Investors Committee for the Third-Party Structured Asset-Backed Commercial Paper ("Investors Committee") in order to effect the restructuring of all outstanding third-party (non-bank sponsored) Asset Backed Commercial Paper ("ABCP") obligations, estimated to have a face value at the time of commencement of approximately CAN$ 32 billion. The ABCP restructuring is said to be the largest restructuring in Canadian history.

The Amended Sanction Order and Plan Implementation Order (the "Canadian Orders") were entered by the Ontario Court on June 5, 2008 and affirmed on appeal by unanimous decision of the Ontario Court of Appeal on August 18, 2008. On September 19, 2008, the Canada Supreme Court denied review. The Plan Implementation Order became effective on January 12, 2009. The Plan approved by the Ontario Court was first approved by an overwhelming vote of ABCP Noteholders (96% in number and value of all Noteholders present and voting). On January 21, 2009, new Plan Notes and cash were distributed to existing Noteholders, and assets of the Conduits (described below) were transferred to newly created Master Asset Vehicles securing the new Plan Notes. In May 2009, additional cash was distributed to Noteholders. The Ontario Court has also granted the Monitor's motion to make a final cash distribution to the Noteholders.

The Monitor seeks recognition of the Canadian Proceedings as a foreign main proceeding under Bankruptcy Code § 1517, and also seeks an order enforcing the Canadian Orders in the United States. Notice of the filing of the chapter 15 petitions and of the relief being sought has been given by mail, email and publication. The deadline for filing objections in this Court was December 16, 2009. No objection to the requested relief was timely filed. One untimely submission was filed on December 21, 2009.[1] (ECF # 26.) The Court held the recognition hearing on December 23, 2009.

It is clear that the Canadian Proceedings should be recognized as a foreign main proceeding. The only issue here arises from the inclusion in the Canadian Orders of a very broad third-party non-debtor release and injunction. During the initial hearing in this case on November 23, 2009, the Court requested that the Monitor's counsel brief whether this Court could properly enter an order enforcing the third-party non-debtor release and injunction. On December 17, 2009, the Monitor's counsel filed a Supplemental Memorandum of Law in Support of Chapter 15 Petitions for Recognition of Foreign Proceedings and Related Relief (ECF # 24) addressing the issue raised by the Court.

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1 The submission (not denominated as an objection) was filed by Michael Miles, M.Sc., who purports to be the "Chairperson of the Retail ABCP Owners Committee." Referring to himself, Miles states "I am a former owner of Canadian Non Bank Asset Backed Commercial Paper and Chairperson of the Canadian Retail ABCP Owners' Committee." The membership and status of the "Committee" is not described. Neither Miles nor anyone purporting to act on behalf of the Committee appeared at the December 23, 2009 recognition hearing. The submission acknowledges that the "[Plan] included a deal in which approximately 1800 'retail' owners such as myself . . . had our losses repaid in compensation for voting to support restructuring. One of the provisions of this deal was that it gave blanket immunity from lawsuits to all Companies or individuals involved in the manufacture, credit rating, sale or restructuring of Canadian ABCP." Thus, Miles appears to acknowledge that the Plan approved by the Ontario Court, which he apparently supported, included non-debtor release and injunction provisions.

Miles points to recent action by Canadian securities regulators announcing fines against certain financial institutions that marketed ABCP, and ongoing investigations of others (including US institutions that would obtain the benefit of the non-debtor release and injunction). Miles asserts that the release and injunction "would deny the right of ABCP owners to file a lawsuit in U.S. courts against international and U.S. banks who were the asset providers to the Canadian Non Bank ABCP trusts sold to both Canadian and American-affiliated investors." The submission concludes by requesting "that you closely review the request by [the Monitor] to ensure that the benefit of US Security law (which is more stringent that [*sic*] that in Canada) remain available to potential plaintiffs."

The Canadian Orders and the relief sought from this Court have no effect on any police or regulatory actions brought by securities regulators in Canada or the United States. The enforceability of the non-debtor release and injunction on private civil actions in the United States is the focus of this decision.

For the reasons that follow, the Court concludes the Canadian Orders—including the non-debtor release and injunction—should be enforced in the United States. This opinion discusses only the issues raised by the inclusion of the third-party non-debtor release and injunction.

II. BACKGROUND

An understanding of the Canadian ABCP market, the various players in the market, how the market nearly collapsed, how the restructuring Plan sought to address these problems and the roles played by third-party non-debtors in the Plan, is helpful in considering the issues raised by the requested relief. The uncontroverted facts described below are taken from the Verified Petition for Recognition of Foreign Proceedings and Enforcement of Canadian Order Relating to the Restructuring of the Canadian Asset-Backed Commercial Paper Market (ECF # 2).

A. Investors Purchase ABCP Notes

There are 47 series of ABCP affected by the Plan. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets that would support and collateralize repayment of each series of ABCP. The assets that "backed" ABCP were sold to the Conduits by various financial institutions (the "Asset Providers"). These assets can be divided into two general categories: (i) exclusively "traditional" securitized assets such as residential and commercial mortgages, credit card receivables and auto-loans, and (ii) collateralized debt obligations ("CDOs"), which are not specific to one type of debt but are a type of asset-backed security and structured credit product. Most of the CDOs were synthetic, thus gaining credit exposure to a portfolio of fixed income assets (without owning those assets) through the use of credit default swaps.

The assets that backed the ABCP were generally long or medium-term assets while the ABCP were short-term obligations of the Issuer Trustees, thus resulting in an inherent timing mismatch between the cash generated by the underlying long-term assets and the cash needed to repay maturing ABCP. Before mid-August 2007, the timing mismatch was addressed by reinvesting or "rolling" existing ABCP at maturity. New ABCP was continually being sold thus generating funds to repay maturing ABCP where investors required payment. The Asset Providers (all beneficiaries of the non-debtor release and injunction provisions) include: Bank of America, N.A., Canadian Imperial Bank of Commerce, Citbank, N.A., Deutsche Bank AG, HSBC Bank USA, N.A., Merrill Lynch International, Royal Bank of Canada, Royal Bank of Scotland, Swiss Re Financial Products Corporation, UBS AG and Wachovia Bank N.A. and their respective affiliates. The Issuer Trustees also entered into back-up liquidity arrangements with third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.

Certain of the Asset Providers also entered into derivative contracts with the Conduits. The vast majority of underlying assets were derivative contracts in the form of credit default swaps. A credit default swap is a contract under which one party (the "Protection Buyer") seeks to protect itself against a defined credit event or pool of credit events. The Protection Buyer pays fees to another party (the "Protection Seller") who undertakes to pay the Protection Buyer if a credit event occurs. A number of the Conduits assumed the role of Protection Seller under credit default swaps with an Asset Provider acting as Protection Buyer.

Of the CAN$26 billion in credit default swaps underlying the ABCP, approximately CAN$17.4 billion were "Leveraged Super Senior" ("LSS") swaps. These swaps are leveraged because the amount of credit protection sold is greater than the amount of collateral posted as security. The LSS swaps contain triggering events that entitle the Protection Buyer to make margin calls for additional collateral from the Protection Seller to ensure that the Protection Buyer continues to have sufficient security. Most of the triggers in the LSS swaps were mark-to-market triggers based on the market value of the swap. The mark-to-market triggers required the Protection Seller to post additional collateral based on an increase in the amount the Protection Buyer would have to pay a third party to enter into a replacement swap that would preserve the economic value of the current swap for the Protection Buyer.

The majority of the financial assets held by each Conduit that entered into LSS swaps were pledged to the Asset Providers as security. Therefore, if a secured swap was declared to be in default, the Asset Provider had the right to terminate the swap and satisfy any termination payment by enforcing its security through seizing and liquidating the collateral. When market conditions were sufficiently depressed, the Noteholders were at risk of significant losses because the value of the assets that supported their notes would first be used to meet any shortfalls incurred by the Asset Providers.

The ABCP market froze during the week of August 13, 2007. The crisis was largely triggered by market sentiment, as news spread of defaults on U.S. sub-prime mortgages. Investors in Canadian ABCP lost confidence because of a perceived lack of transparency in the market. Noteholders and potential new investors feared that the assets backing the ABCP might include substantial exposure to sub-prime mortgages or other overvalued assets. Investors thus stopped buying new ABCP, and Noteholders stopped "rolling" their existing ABCP. As ABCP became due, the Conduits were unable to fund repayments through new issuances or replacement notes. The trustees of some Conduits made requests to Liquidity Providers, who took the position that the conditions for funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, coupled with the timing mismatch between the short-term ABCP and the longer-term underlying assets, payments due on the ABCP could not be made.

On August 14, 2007, in response to this crisis and in order to prevent the destruction of value that a forced liquidation of the underlying assets would cause, representatives of the largest Noteholders and six of the Asset Providers signed an agreement establishing a 60-day standstill period (the "Montréal Accord"). During this period, the 10 relevant stakeholders focused on the restructuring and set up the foundation for the Plan. The Montréal Accord provided that all outstanding ABCP would be converted into floating rate term notes maturing at the same time as the corresponding assets. It also allowed for the modification of the margin provisions under the LSS swaps to reduce the risk of margin calls. Shortly after signing the Montréal Accord, the Investors Committee led the restructuring process with the help of the Monitor and J.P. Morgan, as financial advisor.

B. The Conduits Could Not Meet Their Liabilities

The Issuer Trustees are either the original or replacement trustees of the Conduits, which issued the ABCP pursuant to trust indentures and through commercial paper placement agents such as financial institutions and broker-dealers, and were therefore liable for amounts owing on the ABCP. The Issuer Trustees had an obligation to administer the trust and maintain proper records. Each Issuer Trustee was also the legal owner of the assets held for each series in the Conduit of which it is the trustee, and was the debtor (to the extent of the assets held in the Conduit) with respect to the ABCP issued by that Conduit. Since mid-August 2007, the Issuer Trustees had insufficient liquidity to make payments on the maturing ABCP. Each remained unable to meet its liabilities to the investors represented on the Investors Committee and to the other holders of each series of ABCP as those obligations became due.

C. A Plan Is Negotiated

Notwithstanding the fact that each Issuer Trustee is a separate legal entity and each series of notes is backed only by the assets relating to that series, the ABCP market suffered from common problems and required a common solution. Accordingly, the Monitor, the Investors Committee and other key market participants, believed that one comprehensive Plan best addressed the needs of the ABCP market as a whole. The Plan provides for market-wide transparency in the assets underlying the restructured notes, and a greater opportunity for investors to realize payment of what was due to them under the ABCP. The following is a summary of the key provisions of the Plan.

1. Restructured Margin Call Triggers

The risks caused by mark-to-market triggers in the LSS swaps are, under the Plan, reduced as the Asset Providers agreed to restructure the LSS transactions concurrently with Plan implementation. Specifically, the Asset Providers agreed to change the triggers under the LSS swaps from mark-to-market triggers to more remote spread loss triggers which will reduce the likelihood of margin calls and any consequential forced liquidation of assets to fund termination payments. The spread loss triggers, under the Plan, are based on six uniform and verifiable indices of spreads and losses. The change in the triggers also increases transparency, predictability and certainty.

2. The Master Asset Vehicles

While the change in the triggers reduced the risk for Noteholders, it increases the risk of the Asset Providers. The Asset Providers required further collateral, beyond the existing assets in the Conduits, to be available through margin funding facilities. In order to address this need for additional security, the Plan transfers all of the assets of the ABCP series backed by synthetic assets into two MAVs ("MAV1" and "MAV2"). The pooling of assets into those two MAVs provides for cross-collateralization making collateral calls less likely. The collateral also includes non-levered synthetic assets. Under the Plan, all of the assets of the ABCP series backed solely by traditional assets were transferred to a third MAV ("MAV3"). In MAV1, additional margin funding is provided by the Noteholders participating in that vehicle themselves, through "self-funding." This involves the assumption of additional risk by these Noteholders. Some may be required to post collateral and there may be some impact on their capital. MAV2 is supported by a third-party margin funding facility, in effect a standby line of credit. The Asset Providers as well as several Canadian banks agreed to provide a large portion of the funding needed for this margin funding facility at a favorable interest rate.

The Noteholders participating in MAV1 or MAV2 have transferred ABCP (other than the ABCP for which the underlying assets are traditional assets) to the applicable MAV in exchange for a combination of Class A-1 Notes, Class A-2 Notes, Class B Notes, Class C Notes, and ineligible asset tracking notes (collectively referred to as the "Plan Notes"). The different categories of Plan Notes were designed to permit the highest possible credit ratings in the Class A-1 Notes. All Noteholders had the option of participating in MAV1, provided that they met certain financial criteria or posted collateral, as required by the Asset Providers. Investors in MAV1 agreed to self-fund for their entire holdings. An investor could also participate as a margin funding lender in MAV2 for part of its holdings, again subject to certain criteria.

Noteholders have exchanged or have been deemed to have exchanged the affected ABCP owned by them for Plan Notes. The Plan Notes were distributed to Noteholders through the existing securities structure.

3. Matching Assets and Liabilities

Under the Plan, all ABCP was replaced by Plan Notes that have maturities and interest rates appropriately tied to the underlying assets.

4. Classification of Creditors

The Plan had a single class of creditors for voting purposes, being all investors in ABCP, and treated all ABCP holders equitably by accounting for the differing risks and corresponding interests across all of the ABCP.

5. Claims Procedure

The Plan approved by the Noteholders and the Ontario Court provided for the exchange of all ABCP for Plan Notes, and for all Noteholders to receive their Plan Notes through the established mechanisms in Canada for distribution of securities to beneficial holders of record. No proof of claim was required to be filed, but investors were required to confirm the amount of their particular holdings by submitting a voter confirmation form (in the event they had previously disclosed their holdings to the Monitor) or a voter identification form to the Monitor, and to vote in person or by proxy at the meeting.

6. A Global Release

The Plan and the Sanction Order provide each participant in the Canadian ABCP market, including the Asset Providers, the Sponsors, the Issuer Trustees, the Conduits, and the Investors Committee (collectively, the "Released Parties"), with a release that protects them from liability and actions on account of any and all past, present and future claims, rights, interests, actions, rights of indemnity, liabilities, demands, duties, injuries, damages, expenses, fees or causes of action of whatsoever kind or nature in any way related to the third-party ABCP market in Canada. The jurisdiction of the Ontario Court to grant the release and injunction provisions was the central issue decided by the Ontario Court and, on the appeal, by the Ontario Court of Appeal. The Canadian Supreme Court denied review. The Ontario Court and the Ontario Court of Appeal decided that under the CCAA, the Ontario Court had jurisdiction and properly exercised its power and discretion in approving the non-debtor release and injunction provisions in the Plan and Sanction Order.

The Verified Petition explains that the comprehensive releases were included because the Asset Providers, whose participation was viewed as vital to the restructuring, made them a condition for their participation. They required comprehensive releases in return for their agreement to: (i) enter into the new LSS swaps whose terms are more favorable to the investors; (ii) provide margin funding facility support at rates significantly below the cost another third party would charge for such funding in the marketplace; and (iii) disclose information concerning the synthetic assets to create transparency, facilitate the restructuring and assist investors in assessing the Plan. The entire restructuring was premised on these key concessions that served to shift the risk from the investors to the Asset Providers to protect more fully the investors from the negative effects of volatile credit markets.

In addition, the Asset Providers required assurances that no claims would remain after Plan implementation that could lead to claims against them for contribution and indemnity. The Monitor argues that indemnity or contribution claims would undermine the finality and certainty that the releases are intended to give. Therefore, the Asset Providers required a release of all parties who might be sued by the investors, because such parties might then claim against the Asset Providers.

The Plan specifies that the releases (a) do not stay, release, discharge, bar, enjoin or otherwise interfere with any powers or remedies of, or proceedings or investigations by, any regulatory or self-regulatory body having jurisdiction (pursuant to any applicable statute, regulation, rule or, in the case of the Investment Industry Regulatory Organization of Canada, contract) over any party that would otherwise be released concerning such party's involvement in the creation, issue, sale or rating of any Affected ABCP, provided that (b) the releases would be effective to release and enjoin the making of any order or award to compensate or make restitution to an aggrieved person or company or to pay general or punitive damages to any other person or company. In addition, the Plan provided an exception from the releases with respect to particularized claims ("Excepted Claims") against a specific party by a Noteholder that suffered damages as a direct result of purchasing specific ABCP in reliance on express fraudulent misrepresentations by that party, provided the Noteholder served and filed an initial pleading in a proceeding to pursue the Excepted Claim by a specified date that was approximately ten weeks after the date of the Sanction Order. The Monitor states that no pleadings for Excepted Claims were served or filed within the specified time period.

7. An Injunction against Proceedings against Non-Debtors

In addition to the global release, the Plan and the Sanction Order also provide for an injunction against proceedings against the Released Parties. The Monitor argues that the comprehensive restructuring of the ABCP market involved a variety of parties whose interests are so intertwined with the Issuer Trustees that it would have been impossible to grant an injunction affecting the Issuer Trustees without extending that injunction to certain non-debtors including the Investors Committee, the Asset Providers, and the Liquidity Providers. The injunction provided under the Plan was subject to the same exceptions for regulatory proceedings and Excepted Claims described above with respect to the global releases.

D. Request for Assistance in Carrying Out Canadian Orders

The Canadian Orders specifically include provisions requesting aid, recognition and assistance by U.S. courts in carrying out the terms of the orders. *See* Sanction Order ¶ 31; Implementation Order ¶ 50.

E. Canadian Courts Determine that the Ontario Court Had Jurisdiction to Enter the Non-Debtor Release and Injunction Provisions

A review of the written decisions by the Ontario Court (*see* Supplemental Declaration of Ken Coleman in Support of Petitions for Recognition of Foreign Proceedings and Related Relief, dated November 20, 2009, Exhibit C (ECF # 17)), and the Ontario Court of Appeal (*see id.*, Exhibit B; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 4811), show that the jurisdiction of the Ontario Court to issue the third-party non-debtor release and injunction provisions was the principle disputed legal issue in the Canadian Proceedings. Both courts issued lengthy, reasoned written decisions upholding the jurisdiction of the Ontario Court under the CCAA to approve the non-debtor release and injunction provisions. More than 30 parties appealed the Ontario Court decision approving those provisions. The Ontario Court of Appeal framed the issues as follows:

> [Appellants] raise an important point regarding the permissible scope of a restructuring under the *Companies'*

> *Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ('CCAA'): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Id., Exhibit B, at 7 ¶ 3.

In its lengthy decision, the Court of Appeal decided "the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring." *Id.*, Exhibit B at 13 ¶ 43. The Court of Appeal held that the Ontario Court had jurisdiction over the parties and the matter before it and correctly decided that the non-debtor release and injunction were properly included in the Plan. *Id.*, Exhibit B at 27 ¶ 105 ("For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.") The Court of Appeal also concluded that "[w]hether a plan of compromise or arrangement is fair and reasonable is a mixed question of fact and law, and one on which the application judge exercises a large measure of discretion." *Id.*, Exhibit B at 27 ¶ 107. The Court of Appeal concluded that the application judge made findings supported by the record that the Plan here is fair and reasonable. As already mentioned, the Canadian Supreme Court denied review from the decision of the Ontario Court of Appeal.

III. DISCUSSION

The Monitor argues that the third-party non-debtor release and injunction provisions included in the Plan and Sanction Order should be enforced in the United

States because, if this were a plenary case under chapter 11, such provisions would pass muster under the rigorous standards for release and injunction provisions established by the Second Circuit in *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005); and *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008) ("*Manville*"), *rev'd on other grounds sub nom. Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009). Additionally, the Monitor argues that whether or not a bankruptcy court within the Second Circuit could issue non-debtor release and injunction provisions in a plenary case under chapter 11, the provisions included in the Canadian Orders should be enforced in the United States pursuant to law applicable to enforcement of foreign judgments, the principles of international comity, and the public policy embodied in chapter 15 of the Bankruptcy Code.

The Second Circuit imposes significant limitations on bankruptcy courts ordering non-debtor releases and injunctions in confirmed chapter 11 plans. In *Metromedia*, the court concluded that a third-party non-debtor release "is proper only in rare cases." 416 F.3d at 141. The court emphasized that:

> [A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

Id. at 142. The court held that "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan . . . ." *Id.* at 143.

The Monitor argues that the rigorous standard established in *Metromedia* would be satisfied in this case, and that the standard applied by the Ontario Court and the Ontario Court of Appeal was equally rigorous. That may well be so, but the subsequent decision in *Manville* raises a question whether meeting the *Metromedia* standard is enough. *Metromedia* did not address the jurisdictional issue considered by the Second Circuit panel in *Manville*.[2] But Second Circuit law on approval of a non-debtor release is now uncertain after the Supreme Court's reversal in *Manville*.

In *Manville*, the Second Circuit panel concluded that a bankruptcy court only has jurisdiction to issue a non-debtor release where the released claims "directly affect the *res* of the bankruptcy estate." 517 F.3d at 66. In reaching its conclusion, the panel relied heavily on the Fifth Circuit's decision in *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), which rejected use of a non-debtor release as exceeding the bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 1334:

> Those cases in which courts have upheld "related to" jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy.

Zale, 62 F.3d at 753.

The Supreme Court reversed the *Manville* panel decision on the grounds that the court had impermissibly permitted a collateral attack on a final judgment of the

[2] In *Metromedia*, the court stated that "[a]ppellants' sole argument—and the only argument that we consider—is that these nondebtor releases were unauthorized by the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, at least on the findings made by the bankruptcy court." 416 F.3d at 141.

bankruptcy court issued many years before. 129 S. Ct. at 2206. The Supreme Court's disposition was to "reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion." *Id.* at 2207. It is unclear whether the circuit panel's decision remains binding law in this Circuit on other issues decided by the panel—specifically on the jurisdictional limits on a bankruptcy court's power to approve a third-party non-debtor release and injunction. Even if the circuit panel decision is not binding, it may nevertheless be persuasive with respect to the jurisdictional issue.

Although the Monitor argues that the *Manville* standard has been satisfied here, it is far from clear that the third-party non-debtor release and injunction provisions here would be consistent with the jurisdictional limits *Manville* imposes on a bankruptcy court. No claims have so far been asserted against Asset Providers in the U.S., but it is not clear that any direct claims of investors against Asset Providers seeking to establish liability based solely on the Asset Providers' conduct could properly be released in a plenary chapter 11 case under the *Manville* standard.[3] But, whatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court "related to" jurisdiction under 28 U.S.C. § 1334, and the prudential limits courts have applied in chapter 11 cases under the Bankruptcy Code. This Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by the Canadian courts. The correct inquiry, therefore, is whether

[3] For example, during argument on December 23, 2009, the Court asked whether the non-debtor release would bar claims against a U.S.-based Asset Provider that, in its capacity as a fund manager or advisor, negligently or recklessly purchased or recommended the purchase of ABCP to its clients. The Monitor's counsel responded that the release would bar such claims. Such claims would not appear to affect the *res* of the bankruptcy estate.

the foreign orders should be enforced in the United States in this chapter 15 case. As explained below, principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.

A. Principles of Comity in Chapter 15 Cases Support Enforcement of the Canadian Orders

A determination whether to grant recognition of foreign proceedings and enforcement of foreign court orders is a core proceeding in a chapter 15 case. 28 U.S.C. § 157(b)(2)(P) ("Core proceedings include but are not limited to— . . . (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.") Chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009). Section 1509 of the Bankruptcy Code requires that if the court grants recognition under § 1517, it "shall grant comity or cooperation to the foreign representative." 11 U.S.C. § 1509(b)(3). Here, the Monitor asks the Court to provide "additional assistance" under § 1507, specifically an order enforcing the Canadian Orders in the United States. Section 1507 directs the court to consider comity in granting additional assistance to the foreign representative:

> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance,

> consistent with the principles of comity, will reasonably assure -
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507. The non-debtor release and injunction provisions included in the Canadian Orders treat all claimants in the Canadian Proceedings similarly. No objections have been lodged that inclusion of these provisions adversely affects any claimant's treatment against any of the debtors' property.

While recognition of the foreign proceeding turns on the objective criteria under § 1517, "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (citing §§ 1507, 1521, and 1525). "Once a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity." *Atlas Shipping*, 404 B.R. at 738; *see generally* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective,* 15 J. BANKR. L. & PRAC. 2, Art. 3, at 3–5 (Apr. 2006).

Section 1506, nevertheless, places a limitation on recognition if doing so is manifestly contrary to U.S. public policy:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

11 U.S.C. § 1506. But this public policy exception is narrowly construed. *See In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333 (S.D.N.Y. 2006). *Ephedra* involved a chapter 15 proceeding in which the foreign representative moved to recognize and enforce in the United States a claims resolution procedure ordered by an Ontario court, even though the procedure arguably deprived parties of the constitutional right to a jury trial. *Id.* at 334–35. In recognizing the order, the district court ruled that the public policy exception embodied in § 1506 should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *Id.* at 336 (citing H.R.REP. NO. 109-31(I) at 109, *reprinted in* 2005 U.S.C.C.A.N. 88, 172).

The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. *See In re Bd. of Dirs. of Multicanal S.A.*, 307 B.R. 384, 391 (Bankr. S.D.N.Y. 2004) (noting that neither case law nor section 304 (the statutory predecessor to chapter 15) require a determination that the foreign proceeding is identical to the U.S. proceeding). The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness. *See Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

While Second Circuit case law places narrow constraints on bankruptcy court approval of third-party non-debtor release and injunction provisions, the use of such provisions is not entirely precluded. The Second Circuit decision in *Metromedia*, 416 F.3d at 142, and the Ontario Court of Appeal decision in *Metcalfe*, *see* Supplemental Declaration of Ken Coleman in Support of Petitions for Recognition of Foreign Proceedings and Related Relief, dated November 20, 2009, Exhibit B (ECF # 17), at 19–20 ¶¶ 69–73, both reflect similar sensitivity to the circumstances justifying approving such provisions. To the extent that *Manville*, 517 F.3d at 65, 66, identifies an additional jurisdictional limitation, it is a function of the jurisdictional limits placed on U.S. bankruptcy courts by Congress. *Id.* at 65 (recognizing "the jurisdictional predicate necessary to enjoin third-party non-debtor claims"); *id.* at 66 (concluding that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate"). The Canadian statute, on the other hand, was interpreted in *Metcalfe* to grant jurisdiction to its courts to approve such relief in appropriate circumstances. Therefore, the Court concludes that § 1506 does not preclude giving comity to the Canadian Orders in this case.

B. The Canadian Orders Are Entitled to Recognition as a Matter of Comity

U.S. courts apply general comity principles in determining whether to recognize and enforce a foreign judgment. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895); *Odd-Bjorn Huse v. Huse-Sporem, A.S. (In re Birting Fisheries, Inc.)*, 300 B.R. 489, 502 (9th Cir. BAP 2003); *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 615 (S.D.N.Y. 1991). In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202–03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings. *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada—a sister common law jurisdiction with procedures akin to our own—are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); *Tradewell, Inc. v. American Sensors Elecs., Inc.*, No. 96 Civ. 2474(DAB), 1997 WL 423075, at *1 n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979) ("The fact that the foreign country involved is Canada is significant. It is well-settled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United

States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted).

As explained above, the issue of the jurisdiction of the Ontario Court to enter the Plan and Sanction Order, and in particular the third-party non-debtor release and injunction provisions, was contested and fully litigated in the Canadian Courts. The Ontario Court concluded that it had jurisdiction to enter the relief; the Ontario Court of Appeal confirmed the jurisdictional grounding of the Plan and Sanction Order; and the Supreme Court of Canada denied review. In these circumstances, principles for recognition of foreign judgments strongly support the exercise of this Court's discretion to give *res judicata* effect to the Canadian Orders.

1. *U.S. Courts May Give Res Judicata Effect to Foreign Judgments on the Basis of Comity*

U.S. courts may give *res judicata* effect to foreign judgments on the basis of comity.[4] *Diorinou v. Mezitis*, 237 F.3d 133, 139, 143 (2d Cir. 2001); *see also Paramedics Electromedicina Comercial, Ltda v. GE Medical Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004); *In re Parmalat Sec. Litig.*, 493 F. Supp. 2d 723, 737 n.74 (S.D.N.Y. 2007); *In re Telecom Argentina S.A.*, No. 06 Civ. 2352, 2006 WL 3378687, at *5 (S.D.N.Y. Nov. 20, 2006) ("*res judicata* applies to bar [creditors] from raising . . . objections for the first time in the Bankruptcy Court").

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4 Foreign judgments are treated differently from the decisions of other State courts. In the case of foreign judgments, *res judicata* is discretionary. However, under domestic law, the principle of *res judicata* will prevent collateral attack on a judgment of another State based on an issue that has been litigated in the rendering court, including issues concerning the jurisdiction of the rendering court. *See, e.g., Durfee Et Ux v. Duke*, 375 U.S. 106, 111 (1963) ("while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment . . . a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment").

2. The Decisions of the Canadian Courts Finding Jurisdiction Should Be Recognized

In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See* *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant.* The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion . . . a renewed challenge to jurisdiction of the rendering court is generally precluded"). The justifications for giving *res judicata* effect to the Canadian Courts' carefully reasoned determination that the Ontario Court had jurisdiction, and for giving effect to the Plan and Implementation Order, under principles of international comity, are particularly strong in this case.

IV. CONCLUSION

The Canadian Proceedings were the result of near-cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis. The far-reaching Plan was adopted with near-unanimous creditor support, approved by the Ontario Court, and then affirmed on appeal by the Ontario Court of Appeal in the face of a jurisdictional challenge to the inclusion of third-party non-debtor release and injunction provisions. There is no basis for this Court to second-guess the decisions of the Canadian courts. Principles of comity in chapter 15 cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11. Therefore, the Court will enter an order recognizing this case as a foreign main proceeding and enforcing the Canadian Orders.

Dated: January 5, 2010
New York, New York

/s/Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES

(Motion Returnable February 1, 2010)

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Fred Myers LSUC#: 26301A
Joseph Pasquariello LSUC#: 37389C
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the THE BANK OF NEW YORK MELLON in its capacity as Administrative Agent for the Second Lien Lenders