

Court of Appeal File No.
Superior Court File No. CV-23-00710795-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant (Respondent)

-and-

**2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP,
1000162801 ONTARIO CORP., AMERICAN CORPORATION
and 1000199992 ONTARIO CORP.**

Respondents (Appellant)

BOOK OF AUTHORITIES OF THE RECEIVER

January 9, 2025

Paliare Roland Rosenberg Rothstein LLP

155 Wellington Street West, 35th Floor

Toronto ON M5V 3H1

Tel: 416.646.4300

Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)

Tel: 416.646-4330

jeff.larry@paliareroland.com

Kartiga Thavaraj (LSO# 75291D)

Tel: 416.646.6317

kartiga.thavaraj@paliareroland.com

Ryan Shah (LSO# 88250C)

Tel: 416.646-6356

ryan.shah@paliareroland.com

Lawyers for the Receiver, Albert Gelman Inc.

TO: Service List

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TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: 2403177 Ontario Inc. v. Bending Lake Iron Group Limited,
2016 ONCA 225

DATE: 20160322

DOCKET: M46061 (C61637)

Brown J.A. (In Chambers)

BETWEEN

2403177 Ontario Inc.

Applicant (Respondent/
Responding Party)

and

Bending Lake Iron Group Limited

Respondent (Appellant/
Responding Party)

Kenneth Kraft, for the moving party, A. Farber & Partners Inc.

Robert MacRae, for the responding party, Bending Lake Iron Group Limited

Heard: March 8, 2016

ENDORSEMENT

I. OVERVIEW

[1] This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”). A. Farber & Partners Inc. was appointed receiver of the

property of Bending Lake Iron Group Limited (the “Debtor”) pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199, transferring all the Debtor’s property to an unrelated purchaser, Legacy Hill Resources Ltd. (“Legacy Hill”). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

II. HISTORY OF THE RECEIVERSHIP

[2] The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the “Receivership Order”). The Debtor’s major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

[3] By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor’s property (the “SISP Order”). Significantly, the Debtor consented to the SISP Order.

[4] In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor’s property (the “Sale Agreement”). The Debtor opposed the motion and,

in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

[5] The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

[6] The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

[7] Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

[8] The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. ISSUE ON THE MOTION

[9] The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in

which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *B/A* provides:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

[10] The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. SECTION 193(A): DOES THE APPROVAL AND VESTING ORDER INVOLVE FUTURE RIGHTS?

A. Positions of the parties

[11] The Debtor submits the point in issue in its appeal involves future rights.

The Debtor makes the following submissions in its factum:

[T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the

Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.

...

The future rights of the “affected Aboriginal communities” will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

[12] In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about “affected Aboriginal communities” and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor’s evidence concerning “affected Aboriginal communities”

[13] Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver’s motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible “partnership/co-operative development in rescuing [the Debtor] from receivership.” He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

[14] At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his “continued efforts on behalf of [the Debtor] and

its creditors, shareholders, stakeholders and affected Aboriginal communities.” He deposed that the termination of the receivership would have a “concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities.”

[15] Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

[16] In any event, Mr. Wetelainen’s evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor]

in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.

...

The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

[17] In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

[18] A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

[19] The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the

honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

D. Analysis

[20] The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*.¹ The passage of time has not improved the clarity of the concept. In *Elias v. Hutchinson*,² McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

[21] Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts

¹ Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *In re Union Fire Insurance Co.* (1886), 13 O.A.R. 268, (C.A.) at pp. 294-295.

² (1981), 14 Alta. L.R. (2d) 268; 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (C.A.).

have attempted to cloak the term “future rights” with some practical meaning. In *Re Ravelston Corp.*,³ Doherty J.A. stated, at para. 18:

The meaning of the phrase “future rights” is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal ... Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights... [Citations omitted.]

[22] Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* “must refer to rights which could not at the present time be asserted but which will come into existence at a future time.”

[23] More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,⁴ stated, at para. 15:

“Future rights” are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

[24] The Debtor’s argument that the Approval and Vesting Order involves the future rights of “affected Aboriginal communities” is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

³ (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

⁴ 2013 ONCA 282, 115 OR (3d) 617.

[25] First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company – i.e. its creditors or shareholders.⁵ On the sale approval motion, the Debtor did not adduce evidence that any “affected Aboriginal community” had such an economic interest in the Debtor, nor did any “affected Aboriginal community” adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor’s creditors listing, “no Aboriginal groups are creditors of [the Debtor].”

[26] Second, at this stage of the process it does not lie in the Debtor’s mouth to contend that the Receiver failed to give proper notice to “affected Aboriginal communities”. The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

[27] Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor’s creditors and shareholders, not their future rights.

[28] Finally, it is clear from Mr. Wetelainen’s affidavit that the Debtor’s real complaint about the effect of the Approval and Vesting Order is one concerning the “commercial advantages or disadvantages that may accrue from the order challenged on appeal.” Mr. Wetelainen objected to the Sale Agreement because

⁵ See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *In Re Kern Agencies Ltd.* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

[29] I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

V. SECTION 193(B): WILL THE APPROVAL AND VESTING ORDER AFFECT OTHER CASES OF A SIMILAR NATURE IN THIS PROCEEDING?

A. Positions of the parties

[30] The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue the Receiver, s. 193(b) of the *BIA* applies.

[31] The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

[32] The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where “the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings.”⁶ The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person’s rights arising in multiple contexts.⁷ Regardless, s. 193(b) must concern “real disputes” likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings.⁸

[33] Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a “real-time” basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding – minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation sees one

⁶ *Wong v. Luu*, 2013 BCCA 547, at para. 21.

⁷ See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Re Norbourg Gestion d’actifs inc.*, 2006 QCCA 752, 33 C.B.R. (5th) 144 at paras. 9-11.

⁸ *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, at para. 19.

judge assigned to manage the proceeding from its inception to its end. Under a “one judge” model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

[34] I do not accept the Debtor’s submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

[35] The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver’s constitutional duty to consult “affected Aboriginal communities” either in its materials or during its submissions on the sale approval motion. The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

[36] In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation.⁹ The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below.¹⁰ It is far from clear that the Debtor would

⁹ *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (C.A.), at para. 11.

¹⁰ *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

[37] First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult “affected Aboriginal communities” about a sale at that time; it is difficult to conceive how it can do so now.

[38] Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Behn v. Moulton Contracting Ltd.*,¹¹ at para. 30:

The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights. [Citations omitted.]

[39] No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act, 1982*.

[40] Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect “other cases of a similar nature in the bankruptcy proceedings.” Here, the Approval and Vesting Order disposed of all the property of the Debtor.

¹¹ 2013 SCC 26, [2013] 2 S.C.R. 227.

Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

[41] The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

[42] For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. SECTION 193(C): DOES THE PROPERTY INVOLVED IN THE APPEAL EXCEED IN VALUE \$10,000?

A. Positions of the parties

[43] The Debtor submits that the Approval and Vesting Order will transfer property in excess of \$10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

[44] While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds \$10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall.¹²

[45] On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

[46] The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act.¹³ By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Re Dominion Foundry Co.*,¹⁴ the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*,¹⁵ as well as on the jurisprudence

¹² In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately \$12.4 million consisting of (i) secured loans from the applicant in excess of \$3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately \$405,000, and (iii) unsecured liabilities of close to \$8.5 million.

¹³ *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex* 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

¹⁴ (1965), 51 W.W.R. 679.

¹⁵ Such as *Faillis and Deacon v. United Fuel Investments Ltd*, [1962] S.C.R. 771, at p. 774.

considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to “the amount or value of the matter in controversy.”¹⁶

[47] Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.¹⁷ However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a “broad, generous and wide-reaching” interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c)¹⁸ – or by interpretations conducted within the context of the demands of “real time litigation” characteristic of contemporary insolvency and restructuring proceedings.¹⁹

[48] In my view, two contextual factors should inform any application of the subsection.

[49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek

¹⁶ *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, at para. 8; *Galaxy Sports Inc. v. Abakhan & Associates Inc.*, 2003 BCCA 322, 44 C.B.R. (4th) 218 at para. 12; *Newfoundland and Labrador Refining Corporation v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 at para. 18.

¹⁷ *Wong v. Luu*, at para. 23; *Re Norbourg Gestion d'actifs inc.*, at para. 9.

¹⁸ *Wong v. Luu*, at para. 23.

¹⁹ *Re Stelco Inc.* (2005), 8 C.B.R. (5th) 150 (Ont. C.A.), at para. 4.

leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

[50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the CCAA's appeal regime.

[51] For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded \$10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to a sales approval and

vesting order obtained by a debtor company under the CCAA would require obtaining leave to appeal under s. 13 of that Act.

[52] In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a CCAA debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank of Canada v. Soundair*.²⁰ A need for the legislative harmonization of appeal rights in insolvencies is apparent.

[53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, “real-time” insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

[54] The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate’s assets.

²⁰ (1991), 4 O.R. (3d) 1 (C.A.).

[55] In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

[56] The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)*.²¹ There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

²¹ 1997 ABCA 273, 48 C.B.R. (3d) 171.

[57] O’Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge’s order was essentially a procedural direction to the trustee in the face of Alternative’s challenge to the method by which the equipment was sold, by-passing the tender process.

[58] In the present case, the overwhelming majority of the Debtor’s grounds of appeal are process-related, involving issues concerning the Debtor’s dealings with Legacy Hill following the Receivership Order, the Receiver’s disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to “affected Aboriginal communities.” Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor’s property?

[59] The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor’s property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded \$10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that “an order appointing a receiver does not bring into play the value of the property; it simply appoints an

officer of the court to preserve and monetize those assets, subject to court approval.”

[60] In the present case, the Approval and Vesting Order marked the final step in the Receiver’s monetization of the Debtor’s assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, “the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets.” The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor’s property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

[61] Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corporation v. Fox*,²² Paperny J.A. described this aspect of s. 193(c) at para. 8:

The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

²² 2015 ABCA 44.

[62] The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

[63] However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of \$125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US\$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US\$100 million to \$300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding \$10,000 in value, giving it a right to appeal under s. 193(c).

[64] I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the

evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value \$10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than \$10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.²³

[65] In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

[66] Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had declined to the mid-US\$50 per tonne range, making a court sanctioned sales process "very challenging in the current market conditions." The market price for iron ore

²³ See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

[67] Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over \$100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

[68] Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

[69] Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than \$10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[70] I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

VII. DISPOSITION

[71] For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

[72] The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

- (i) The Debtor would file its leave materials by March 28, 2016;
- (ii) The Receiver would file any responding materials by April 4, 2016;
- (iii) The Debtor would file reply materials, if any, by April 11, 2016.

[73] I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

[74] The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

[75] The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

"David Brown J.A."

TAB 2

COURT OF APPEAL FOR ONTARIO

CITATION: AFC Mortgage Administration Inc. v. Sunrise Acquisitions (Elmvale)
Inc., 2024 ONCA 764

DATE: 20241015

DOCKET: M55415, M55416 (COA-24-CV-0967)

In the matter of section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C.
1985, C. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O.
1990, C. C.43, as amended

Zarnett J.A. (Motions Judge)

BETWEEN

AFC Mortgage Administration Inc.

Applicant

and

Sunrise Acquisitions (Elmvale) Inc., Sajjad Hussain, Mahvesh Hussain,
Muzammil Kodwavi and Safana Kodwavi

Respondents

(Appellants/Moving Parties/Responding Parties by way of cross-motion)

Jonathan Kulathungam and Catherine E. Allen, for the respondent/responding
party (M55415)/moving party by way of cross-motion (M55416), Rosen Goldberg
Inc.

Jason Albert Wadden and Shimon Sherrington, for the appellants/moving parties
(M55415)/responding parties by way of cross-motion (M55416)

Heard: October 10, 2024

ENDORSEMENT

[1] On August 15, 2024, in the context of a receivership proceeding, Conway J.
made two orders. The first, an Approval and Vesting Order (“AVO”), approved and

authorized the completion by the Receiver¹ of sales of two residential properties owned by the individual debtors.² The second, a Sale Procedure Order (“SPO”), concerned vacant development lands owned by the corporate debtor.³ The SPO approved the retention of a real estate brokerage firm, the entering into of a stalking horse agreement, and a process for marketing the lands, obtaining bids and selecting a suitable bidder to buy those lands, with any actual purchase to be subject to further court approval.

[2] This motion by the corporate and individual debtors (the “Debtors”) and cross-motion by the Receiver raise three issues: i) whether the Debtors may appeal the orders of Conway J. without leave under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”); (ii) if not, whether leave under the BIA should be granted; and (iii) whether Conway J.’s orders should be stayed pending appeal.

[3] For the reasons that follow, I conclude that the appeal requires leave under s. 193(e) of the BIA and that leave to appeal should not be granted. I therefore do not reach the third issue.

¹ Rosen Goldberg Inc.

² Sajjad Hussain, Mahvesh Hussain, Muzammil Kodwavi and Safana Kodwavi.

³ Sunrise Acquisitions (Elmvale) Inc.

The Receivership Order

[4] On February 29, 2024, Black J. granted a receivership order against the Debtors.

[5] The receivership order divided properties of the Debtors into two groups – the Sunrise Property and the Grand Vellore Property. The properties in issue for this motion (the vacant development land known as the Elmvale Land and the two residential properties known as the Cicada and Abbruzzese Properties) formed part of the Sunrise Property group.

[6] The Receiver was empowered and authorized, under the receivership order, to market any property of the Debtors, and to sell any property (with approval of the court if the consideration exceeded certain limits). Although the receivership order gave the Receiver the discretion to act first on the Sunrise Property before the Grand Vellore Property, it made no distinction, among properties within the Sunrise Property group, as to when and in what order the Receiver should proceed to market or sell them.

[7] In his February 29, 2024 reasons for granting the receivership order, Black J. noted the Debtors' request to require realizations in a specific order in the hope that they could preserve their ownership of certain properties if there were sufficient realizations on others. He rejected the request, stating: "I decline to build

in a specific protected priority for the Debtors beyond whatever ordinary right or ability they may have to redeem.”

[8] On April 5, 2024, Black J. addressed another request of the Debtors concerning the sequence of realization. He considered it to be a request for the same relief that he had already refused in his February 29 reasons, and he rejected it on the same basis.

[9] There was no appeal from the receivership order.

Conway J.’s Orders

[10] The Receiver brought a motion seeking, among other things, two orders: (i) a sale procedure order (i.e., the SPO) relating to the Elmvale Land; and (ii) an approval and vesting order (i.e., the AVO) approving sales of the Cicada and Abbruzzese Properties. On August 15, 2024, Conway J. granted both the SPO and the AVO sought by the Receiver.

[11] The SPO authorized the Receiver to pursue the sale of the Elmvale Land following a particular methodology. Part of the methodology that was approved involved the Receiver entering into a Stalking Horse Agreement. It also involved retaining a real estate brokerage firm (CBRE) to list the property and marketing efforts aimed at obtaining other bids. If a sale to another bidder was approved, a “break fee” was payable to the Stalking Horse Purchaser. Under some circumstances – for example if no higher bid was elicited – the Stalking Horse

Purchaser might be approved as the actual purchaser of the Elmvale Land. But any sale, to the Stalking Horse Purchaser or to another bidder, was subject to further court approval.

[12] Conway J. rejected the Debtors' submission that the Receiver should enter into an allegedly more favorable stalking horse agreement with a separate bidder who submitted a Letter of Intent to the Receiver after it had entered into the Stalking Horse Agreement for which the Receiver was seeking approval. She noted that it would remain open to that separate bidder to bid on the Elmvale Land even without its own stalking horse agreement in place. She deferred to the Receiver's decision to market the property by entering into the Stalking Horse Agreement with the bidder of its choice.

[13] The relevant portions of Conway J.'s reasons read as follows:

[4] With respect to the Stalking Horse Agreement, the Receiver explains the background in its First Report and the affidavit of Mr. Rosen sworn August 15, 2024. The Receiver originally considered proceeding by way of a listing and bid process. It was then approached by an interested party and entered into lengthy negotiations with that party over the terms of the stalking horse agreement. The Receiver considered the price in the Stalking Horse Agreement and whether it was too low. The Receiver's evidence is that based on discussions with CBRE and the significant uncertainty currently in the marketplace, it believes that the purchase price is reasonable. It entered into the Stalking Horse Agreement on June 5, 2024.

[5] After the Receiver entered into the Stalking Horse Agreement, the Respondents put forth a Letter of Intent dated July 24, 2024 for a higher purchase price (the “**Other Bidder**”). The Receiver responded that it had already entered into the Stalking Horse Agreement and that the Other Bidder could participate in the sale process.

[6] The Respondents submit that the Other Bidder should replace the Stalking Horse Bidder. They are critical of the way that the Receiver engaged with the Stalking Horse Bidder and say the Receiver did not act with sufficient urgency. They further argue that the Stalking Horse Agreement will send the wrong message to the market and ultimately yield a lower price for the Elmvale Property. They argue that the Stalking Horse Agreement is now stale and does not reflect the state of the market.

[7] I do not accept these arguments. The Receiver, as a court-appointed officer, has conducted its own assessment of the market and engaged and negotiated with the Stalking Horse Bidder. The Respondents do not dictate the process and the Receiver is not bound to accept their views on pricing, stalking horse bidder, or the optimal way to market the property. I am satisfied that the Receiver’s assessment that the Stalking Horse Agreement is the best way to move forward should be accepted in this case. If the Other Bidder wishes to bid on the Elmvale Properties, it is free to do so. The market will speak. In addition, the Receiver has its duties as a court officer and will have to satisfy the court that the *Soundair* principles have been met when it seeks approval of any transaction arising out of the process.

[8] The break fee in the Stalking Horse Agreement is in line with others approved by this court (2.5%). The timelines in the Sale Process Order are acceptable (and the dates have been modified by the Receiver to respond to concerns raised by other stakeholders). I approve the Sale Procedure Order.

[14] With respect to the AVO, Conway J. was satisfied that a proper sales process had taken place. She rejected the Debtors' request to defer any sale of the Cicada and Abbruzzese Properties until after a sale of the Elmvale Land because the proceeds from the latter might obviate the need for the former. She considered this "essentially the same argument that Justice Black considered and rejected in his endorsements of February 29, 2024 and April 5, 2024 when he granted the receivership order." She concluded that there was no basis for the Debtors to wrest away the control over the sale process that Black J. had granted to the Receiver.

The Proposed Appeal

[15] On or about August 23, 2024, the Debtors served a notice of appeal seeking to set aside the SPO and the AVO.

Analysis

(1) Is leave to appeal required?

[16] The parties agree that the BIA governs the appeal rights in issue. A party seeking to appeal an order under the BIA may do so without leave if the appeal comes within one of the categories in ss. 193(a) through (d) of the BIA, which read as follows:

- (a)** if the point at issue involves future rights;

- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars [...]

Any other appeal requires leave: s. 193(e).

[17] In my view, both the AVO and the SPO may be appealed only with leave.

[18] The Debtors' arguments that the AVO is appealable as of right under ss. 193(a), (b) or (c) all fail in light of the decisions in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635; *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1; and *Hillmount Capital v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228.

[19] The AVO authorizes and approves two sales and sets out the procedure for their completion. It does not affect future rights, only present rights; s. 193(a) is inapplicable: *Bending Lake*, at paras. 27-28.

[20] Section 193(b) is inapplicable because the AVO is not likely to affect other cases of a similar nature in the receivership. No other existing cases were referred to. Although the Debtors say they may raise the sequencing issue again when the

Receiver proposes other sales, a party cannot “create a ‘case’ after the impugned order was made in order to invoke s. 193(b).” The sequencing argument was rejected at the time of the making of the receivership order which was not appealed: *Bending Lake*, at paras. 32, 41.

[21] Nor does s. 193(c) apply. The property involved in an appeal from the AVO does not involve more than \$10,000, in the sense used in s. 193(c). The AVO converts one asset (land) into another (money). There is no evidence-based assertion of improvident sale, nor do the Debtors quarrel with the prices obtained, just the timing of the sales. Accordingly, the AVO does not put the value of the Debtors’ property into play or finally determine the economic interest of a claimant in the Debtors resulting in a gain or a loss. An order premised on the rejection of an argument that a sale should be postponed is not one that brings into play the value of the debtor’s property: see *Bending Lake*, at paras. 54, 59-60, 62, 64 and 69; *First National*, at para. 33; *Hillmount*, at para. 42.

[22] For similar reasons, the SPO is not an order that may be appealed without leave. The Debtors primary contention is that s. 193(c) applies to the appeal of the SPO. I disagree. Section 193(c) “does not apply to ... orders concerning the methods by which receivers or trustees realize on an estate’s assets”: *Bending Lake*, at para. 54; *Re Harmon International Industries Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1, at paras. 31-35. The SPO is that type of order.

[23] I do not accept the argument that because the SPO included approval of the Stalking Horse Agreement as a step in a more extensive sales process, it no longer was an order concerning a method of realization.

[24] This case is materially different than *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59, 493 D.L.R. (4th) 503. There, the refusal of the bankruptcy judge to hear a motion to approve an already existing unconditional Agreement of Purchase and Sale (“APS”) for a sale of property at \$31 million, coupled with the sanctioning of a sale process with a stalking horse agreement setting a floor price \$7 million lower, deprived the debtor of any right to enforce the APS and created the prospect of loss of more than \$10,000.

[25] Here, there is no pre-existing unconditional APS, nor a refusal to consider enforcing one. The Stalking Horse Agreement is not the sale, but a step in a process toward a sale. The question for the Receiver, having entered into the Stalking Horse Agreement, was whether to abandon it in favour of a subsequently received Letter of Intent from a bidder who wished to be the stalking horse purchaser. The choice of the Receiver as to which stalking horse purchaser and terms to use in connection with a sales method with further steps aimed at maximizing value is about the process of realization. The decision of Conway J. to accept the recommendation of the Receiver as to its preferred stalking horse purchaser and terms in the context of the SPO is similarly about the process for

the sale of assets, the ultimate result of which is not yet known. No gain or loss results from the choice of a stalking horse purchaser in this situation any more than would result from a choice about the listing price for a property (i.e., the situation in *Re Harmon* found not to give rise to a right to appeal).

[26] This case is also unlike *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217, which involved an order directing payment to someone who was not a creditor of the insolvent estate, of funds to be generated from a sale of one of its assets. The grounds of appeal in *Comfort Capital* did not, as they do in this case, involve issues about the process for the sale of assets: at paras. 17 and 22.

[27] Nor is this a case like *Firepower Debt GP Inc. v. TheRedPin, Inc.* (12 February 2019), M50109 (C66336) (Ont. C.A.), where the contest was over whether funds were properly part of the debtors' assets or the property of third parties. In *Firepower*, the order under appeal, which determined the funds to be part of the debtor's assets available to all of its creditors, rather than the property of third parties, was held to be appealable as of right under s. 193(c). In this case, the mere possibility that a break fee might be payable to the Stalking Horse Purchaser does not place the SPO into that category. If it did, every order approving a sales process would be appealable as of right if it contemplated, in some circumstances, payment of real estate commissions on a successful sale.

[28] The Debtors rely on the decision of the British Columbia Court of Appeal in *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation*, 2024 BCCA 318. There, a final sale was approved by the chambers judge who refused to direct the Receiver to follow up on a potentially better offer: at paras. 25-27. That order was held to be appealable as of right.

[29] I note that the approach to the interpretation of s. 193(c) in some provinces, including British Columbia, differs from that of our court as set out in *Bending Lake* (see the discussion in *QRD*, at paras. 31 to 37). But importantly for these purposes, *QRD* involved a different situation.

[30] Unlike in *QRD*, here no final sale has been approved and the question is not, as it was in *QRD*, whether the *Soundair*⁴ principles justified the chambers judge's approval of the sale (see paras. 62-64). Here, the question is not about an approved sale, but about a process that has not yet resulted in one. The Stalking Horse Agreement has been approved as part of an approved sales process which contemplates significant other steps to solicit bids, including retention of a listing agent, preparation and mailing of marketing materials, advertising, and the creation of a Data Room. The sales process contemplates receipt of Phase I and then Phase II bids, an auction if required, selection of a successful bid, and

⁴*Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

importantly, court approval before any sale takes place. As Conway J. noted, it permits the separate bidder, among others, to bid so that the “market” determines the sale price, and requires the Receiver to demonstrate “that the *Soundair* principles have been met when it seeks approval of any transaction arising out of the process.”

[31] For these reasons, I conclude that leave to appeal is required.

(2) Should leave to appeal be granted?

[32] The principles guiding the consideration of a request for leave to appeal under s. 193(e) of the BIA were summarized in *Business Development Bank of Canada v. Pine Tree Resorts, Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. The court is to consider whether the proposed appeal:

a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;

b) is *prima facie* meritorious, and

c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] In my view, these factors require the denial of leave to appeal. I address the merits factor first, because the submissions primarily focussed on it.

[34] I am not persuaded that the proposed appeal is *prima facie* meritorious.

[35] I see no arguable error in the decision of Conway J. to grant the AVO and reject the request to postpone sale of the Cicada and Abbruzzese Properties. I agree with her that this was the same request made to, and rejected by, Black J. Moreover, the timing of sales so as to maximize recovery is quintessentially a matter for the Receiver's business judgment – the receivership order clothed the Receiver with the ability to determine timing. Whether to approve that exercise of judgment was within the discretion of Conway J. Discretionary decisions of judges supervising insolvency proceedings are entitled to a high degree of deference: *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, 87 C.B.R. (6th) 243, at para. 20. No error in principle has been shown that would justify interfering with the exercise of her discretion.

[36] Similarly, with respect to the SPO, I see no arguable error that would displace deference to Conway J.'s decision to defer to the Receiver's recommendation as to how to maximize value, including through the use of a particular stalking horse agreement in the broader context of a particular sales process and methodology.

[37] As was pointed out in *QRD*, sometimes stalking horse arrangements are beneficial in insolvency contexts and sometimes they are not. Helpfully, they set a baseline and structure for other bidders to consider in deciding whether to bid. But because that baseline price can affect future bids, safeguards are appropriate,

such as setting the stalking horse price in accordance with professional advice about value and approving it only as part of a process designed to solicit other bids by market exposure over a suitable period of time: at paras. 54-61.

[38] Contrary to the submission of the Debtors, I do not consider it arguable that Conway J. lost sight of any of these considerations. She referred to the Stalking Horse Agreement having been entered into based on discussion with CBRE (the approved listing agent). And the SPO makes it clear that it forms part of an extensive marketing process designed to solicit other bids so that “the market will speak” and determine the sale price. Indeed, the Debtors do not quarrel with any aspect of the sales process or the use of a stalking horse bid as part of it. Their complaint is about the choice of stalking horse bidder and the price of the bid. These are clearly matters of judgment, not principle, and in any event involve speculation as to their ultimate impact on the value realized.

[39] As to the other factors relevant to granting leave, this is a fact-specific case that does not raise issues of general importance. Granting leave would also risk unduly hindering the insolvency proceeding, which is by its nature time sensitive, as it might delay pending sales and the sales process.

Conclusion

[40] The motion of the Debtors for directions that they have an appeal as of right, or that they be granted leave to appeal if required, is dismissed. The cross-motion of the Receiver is dismissed as moot.

[41] In accordance with the agreement of the parties, costs of these motions will be addressed as part of the proceedings in the Superior Court.

“B. Zarnett J.A.”

TAB 3

COURT OF APPEAL FOR ONTARIO

DATE: 20210319
DOCKET: M52081 (C68797)

Coroza J.A. (Motion Judge)

In the Matter of the Bankruptcy of Guo Li Chun

James Gage, Christopher Hubbard, Trevor Courtis and Akiva Stern, for the moving parties

John N. Birch and Ben Goodis, for the responding party, Guo Li Chun

Ashley John Taylor, Lee Nicholson and Ben Muller, for the responding party, KSV Restructuring

Heard: January 29, 2021 by video conference

REASONS FOR DECISION

I. Overview

[1] The moving parties in this motion are a syndicate of six banks (the “Lenders”). The responding party is the appellant, Guo Li Chun. On October 29, 2020, Conway J. found that the appellant owed the Lenders over \$300 million and has assets of \$7 million in Ontario, and she granted a bankruptcy order against her under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”).

Conway J. also appointed a trustee over the appellant's estate. On November 12, 2020 the appellant filed a notice of appeal. Pursuant to s. 195 of the BIA, upon the commencement of an appeal, the bankruptcy order is automatically stayed pending appeal. The pertinent text of s. 195 reads:

195 ... all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[2] The Lenders seek a partial lift of the stay that would reinstate the powers of the trustee to the extent necessary to permit the trustee to identify and preserve the appellant's assets pending appeal. They assert that the appellant is frustrating the bankruptcy process and will dissipate her assets.

[3] I would grant the Lenders' application. Maintaining the status quo prejudices the Lenders because the trustee has been prohibited in carrying out its duties to identify and preserve the appellant's assets as a result of the filing of an appeal that appears to have little merit. It is in the interests of justice to lift the stay in respect of ss. 158(b), (c), (d), (f), (g), (o) and 163(1) and 164(1) of the BIA.

II. Background Facts

[4] For the purposes of this decision, it is only necessary to provide a brief review of the facts.

[5] The Lenders entered into an agreement dated September 10, 2019 to provide over \$500 million USD in loan financing to Haode Investment Inc. (“Haode”).

[6] The appellant and her husband guaranteed the obligations of Haode. Haode is beneficially owned by the appellant, her husband and their family. The security for the loan included the pledge of shares of a coffee franchise, which are also beneficially owned by the appellant, her husband and their family.

[7] On April 2, 2020, the value of the coffee franchise shares, including those pledged as security for the loans, plummeted. Haode failed to repay the loans, and a guarantee demand was sent to the appellant and her husband demanding immediate repayment. The Lenders then commenced an application before Conway J. for a bankruptcy order.

[8] Conway J. found that the evidence was sufficient to establish the factual foundation for the bankruptcy order (i.e. that the loan was advanced to Haode; a demand for repayment was made; the guarantee demand was sent to the appellant; and she has not paid under the guarantee). Conway J. rejected the appellant’s objections to the Lenders’ affidavit evidence. She found that the affiants had sufficient knowledge since they were properly connected with the commercial funding transaction in question. Conway J. did not accept that evidence had to be adduced from the very person involved in wire transferring funds to Haode or

emailing Haode and the appellant. While s. 43(3) of the BIA requires personal knowledge of the material facts supporting the application for a bankruptcy order, that requirement has been interpreted broadly.

[9] Conway J. also found the guarantee was binding – since the appellant is a beneficiary of the ultimate shareholder of Haode, she indirectly received a benefit from the loan advanced to Haode. Conway J. found the test for a bankruptcy order was met because the Lenders established they are creditors of the appellant, and she is a debtor as an insolvent person – her assets are \$7 million and her liabilities under the guarantee are over \$300 million.

[10] Conway J. also declined to exercise her residual discretion to refuse to grant the bankruptcy order, as the appellant did not provide any compelling reason for doing so. Conway J. granted the bankruptcy order and appointed a trustee over the appellant's estate.

III. Discussion

[11] This motion raises one issue. Should this court partially lift the automatic stay under s. 195 of the BIA to ensure the appellant's assets are identified and protected pending the appeal?

[12] In considering whether the automatic stay should be cancelled, the court will principally consider two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties: *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78

C.B.R. (6th) 165, at para. 11; *First National Financial GP Corp. v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 40; *Yewdale v. Campbell, Saunders Ltd.* (1995), 9 B.C.L.R. (3d) 252 (C.A.), at para. 15.

(i) Merits of the Appeal

[13] The appellant submits that Conway J. relied upon inadmissible hearsay evidence to find that the elements of a bankruptcy had been established. The appellant also argues that Conway J. erred by treating the Lenders as a single creditor, and by not considering certain relevant factors in deciding not to exercise her residual discretion to refuse to grant the bankruptcy order.

[14] I agree with the Lenders that the grounds of appeal advanced by the appellant are extremely tenuous. In my opinion, Conway J. reviewed the test for proving allegations in a bankruptcy proceeding, noted that the “personal knowledge” requirement for affidavits by corporate representatives is to be interpreted broadly, and made careful factual findings on the basis of those affidavits. Further, she noted that some of the facts supporting the bankruptcy order were not contentious and were confirmed by the appellant’s own materials.

[15] An appeal generally lacks merit where it consists largely of complaints about factual findings or seeks to re-litigate them. Since the panel hearing the appeal will have to approach Conway J.’s decision with deference in mind, the appellant’s

efforts to overturn the decision will be an uphill climb. I will use three examples that fortify my conclusion.

[16] First, the argument that Conway J. erred by concluding the Lenders advanced funds to Haode is puzzling. There is no evidence to the contrary. As Conway J. found, it was conceded by the appellant on the bankruptcy application.

[17] Second, the argument that Conway J. erroneously concluded that the Lenders sent certain notices to the appellant that she was in default appears to be devoid of merit. The Lenders provided evidence that those notices were sent. It was open to Conway J. to rely on an affidavit sworn by the appellant in related proceedings in the British Virgin Islands. In any event, it is unclear that Conway J. actually did rely on the affidavit and the appellant's objection to its admissibility is being raised for the first time on appeal.

[18] Finally, I do not think that the appellant's argument that six banks (i.e. the Lenders) are converted into a single creditor because there is one loan agreement has any merit. As confirmed by Conway J., each lender signed as an individual, and each had a commitment to fund a specific portion of the loan.

[19] Overall, I find that the grounds of appeal advanced by the appellant are extremely weak.

(ii) Prejudice

[20] The appellant submits that if the stay is partially lifted, it will cause her prejudice in terms of inconvenience and impact on her privacy rights. She will have to cooperate with the trustee, make wide disclosure, and submit to intrusive examinations.

[21] The appellant argues that maintaining the stay will not prejudice the Lenders because there is no evidence that her assets have been dissipated or are at risk. To the contrary, before the stay came into effect, the trustee appointed over her estate took steps to safeguard her assets in Canada by registering the bankruptcy order against title to her properties and notifying the appellant's Canadian banks of the bankruptcy order. Furthermore, any suggestion that the Lenders are prejudiced by the stay is undermined by their delay in bringing this motion to partially lift the stay. The stay took effect on November 4, 2020 but the Lenders waited until December 20, 2020 to bring this motion.

[22] In my view, the issue of prejudice favours the Lenders.

[23] On the issue of delay, I accept the Lenders' explanation that they wanted to review the appellant's factum before bringing the motion. Since the merits of the appeal are an important consideration, that was a reasonable move on their part.

[24] I agree with the appellant that the trustee has taken significant steps to identify and preserve assets in Canada and there is no direct evidence that the

appellant will dissipate any of her assets. However, as I see it, the Lenders' claim is also grounded in the appellant frustrating the process of bankruptcy by stonewalling attempts to identify and properly protect her assets in Canada and other jurisdictions. For example, the appellant has not provided any disclosure or information to the trustee regarding any assets, whether within or outside of Canada, held indirectly through corporations or trusts, nor does she deny that such assets exist. The prejudice to the Lenders is the risk that if the trustee is not permitted to continue its investigation of the appellant's assets, there will be a loss of relevant financial information. I note that the appeal is not scheduled to be heard until September of 2021. I agree with the Lenders that the trustee should not be delayed, for several months, in its efforts to look into and preserve any assets which may become the subject of the order.

[25] In contrast, I see very little prejudice to the appellant. It is true that a partial lifting of the stay would require her to immediately make disclosure and potentially submit to investigations about her personal affairs but that is as a result of the bankruptcy order. As a result of the order, the BIA provides powers to the trustee which are not possessed by ordinary, unsecured creditors of the bankrupt, especially when it comes to compelling answers or the production of documents.

[26] I conclude that the status quo of leaving the stay in place is prejudicial to the Lenders and this factor pulls towards partially lifting the stay.

[27] In conclusion, the appellant's grounds of appeal are extremely tenuous and there is prejudice to the Lenders if the stay were to remain in place. A partial lifting of the stay to permit the trustee to properly identify and protect the appellant's assets pending appeal is in the interests of justice.

(iii) Form of Order

[28] The Lenders provided a detailed draft order to this court. The appellant objects to the terms of the proposed order and argues that they include a worldwide *Mareva* injunction in respect of assets she owns or jointly owns with others.

[29] The appellant does not live in this jurisdiction. She has assets in Canada and elsewhere. While I am not persuaded by the appellant's argument that the order is a disguised *Mareva* injunction, I acknowledge some of the wording of the Lenders' proposed order is inconsistent with the provisions of the BIA. For example, the proposed order would require the appellant to submit to examination under oath at the request of the trustee, whereas s. 158(c) of the BIA provides that the examination of the bankrupt is to be called and managed by the official receiver. The proposed order would also require the appellant to provide to the trustee descriptions of all property sold, transferred, disposed of or gifted in the five years prior to June 12, 2020, whereas s. 158(f) excepts certain dispositions of property from the disclosure requirement and s. 158(g) sets out a different disclosure period for property disposed of "at undervalue".

[30] I would simply order that the automatic stay under s. 195 of the BIA should be cancelled to the extent of permitting the trustee to carry out its duties under ss. 158(b), (c), (d), (f), (g), (o) and 163(1) and 164(1) of the BIA. The appellant shall have 15 days to comply with this order.

[31] I highlight for the parties that the specific manner in which the trustee acts pursuant to the powers given under the BIA is within the trustee's discretion. To the extent the powers are exercised in a manner with which the appellant does not agree, directions can be sought from a court pursuant s. 34(1) of the BIA as needed.

IV. Disposition

[32] The Lenders' application is granted. Pending the hearing of the appeal, the stay of proceedings imposed by s. 195 of the BIA is lifted in respect of ss. 158(b), (c), (d), (f), (g), (o) 163(1) and 164(1) of the BIA.

[33] If the parties cannot agree to costs of the motion they may make written submissions. The submissions of the Lenders shall be made within ten days of these reasons. The submission of the appellant shall be made ten days thereafter. The submissions shall not exceed two pages each.

“S. Coroza J.A.”

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Cosa Nova Fashions Ltd. v. The Midas Investment Corporation, 2021
ONCA 581
DATE: 20210823
DOCKET: M52741 (C69767)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Cosa Nova Fashions Ltd., B & M Handelman, Investments Limited, Comfort
Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme
Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handelman,
Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust
Company and Canada Investment Corporation

Applicants

and

The Midas Investment Corporation

Respondent

Catherine Francis, for the moving party, Rosen Goldberg Inc.

Kevin Sherkin, for the responding party, John Kavanagh

David P. Preger, for the applicants

Michael G. McQuade, for the respondent

Robert A. Klotz and Timothy Danson, for Auto World Imports

Heard: August 20, 2021 by video conference

REASONS FOR DECISION

A. OVERVIEW

[1] Rosen Goldberg Inc. (the “Receiver”) brings this urgent motion. John Kavanagh, a non-party in the proceeding, is the responding party on the motion. Both made written and oral submissions on the motion.

[2] In addition, the parties to the proceeding – the applicant mortgagees and the respondent Midas Investment Corporation (“Midas”) – made oral submissions on the motion. Auto World Imports, the tenant of the “Eastern Avenue property”, which is described below, also made oral submissions before me.

[3] This urgent motion arises from two orders made by Koehnen J. (the “Motion Judge”) related to the sale of two properties.

[4] The applicants hold a mortgage over the “Eastern Avenue property” and the “Yonge Street property”.¹ The mortgage has been in default since October 1, 2013, shortly after it was registered on March 4, 2013. This resulted in the court-appointed Receiver becoming involved in the sale of the properties.

[5] The Motion Judge granted two approval and vesting orders: (i) the August 5, 2021 order (reasons dated August 9, 2021) for the Eastern Avenue property; and (ii) the August 12, 2021 order (reasons dated August 13, 2021, revised on

¹ While there were initially two mortgages, one for each property, the second mortgage was used to pay out the first mortgage, thereby consolidating the two into a single, large mortgage registered on March 4, 2013: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at paras. 1-2.

August 15, 2021) for the Yonge Street property. The sale of the Yonge Street property is scheduled to close on Monday, August 23, 2021. The sale of the Eastern Avenue property is scheduled to close on Thursday, September 2, 2021.

[6] Mr. Kavanagh has filed two notices of appeal, intending to appeal both approval and vesting orders. The Receiver, concerned that these attempted appeals could derail the imminent closing of the Yonge Street property and the shortly forthcoming closing of the Eastern Avenue property, brought an urgent motion seeking declaratory relief, which I heard on Friday, August 20, 2021. While the Receiver has raised a number of issues, in light of how I am deciding this matter, the only issues I need to address are: (i) whether Mr. Kavanagh has a right to appeal the approval and vesting orders under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“*BIA*”); and, if not, (ii) whether he should be granted leave to appeal those orders under s. 193(e) of the *BIA*.

[7] The answer to both of these questions is no.

B. BACKGROUND

[8] Midas was the owner of both the Yonge Street and the Eastern Avenue properties. It appears that Mr. Kavanagh worked for Midas as an in-house accountant: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at para. 13. He was involved in arranging the mortgages on the Yonge Street and Eastern Avenue

properties. In the materials he filed on this motion, Mr. Kavanagh describes himself as a “shareholder and guarantor” of Midas and its properties.

[9] Midas defaulted on the mortgages. Eventually, Midas and Midas’ President, Thomas Farrell, started an action, alleging that the mortgages taken out on the two properties were unauthorized and the result of fraudulent activity by Mr. Kavanagh. After over seven years of litigation, which saw Midas and Mr. Farrell seeking judgment against Mr. Kavanagh, the Motion Judge (who was also the trial judge on the action) determined that the mortgage was valid and dismissed the action: *Farrell*, at para. 124. Midas and Mr. Farrell unsuccessfully sought a stay of the decision: *Farrell v. Kavanagh*, 2021 ONCA 213.

[10] Following the completion of the trial in *Farrell*, the applicants made a demand on Midas for payment of the sum of \$11,045,858.94 and, when the demand was not met, applied for the appointment of a receiver. By order dated April 6, 2021, the Receiver was appointed over the assets, undertakings, and properties of Midas, including the Yonge Street and Eastern Avenue properties, which are the subject of this motion.

[11] By order dated May 31, 2021, the marketing and sale process for the properties was approved, and Auto World Imports, the tenant at the Eastern Avenue property, was directed to produce documents showing how much rent they

had prepaid on the property.² Subsequently, the Receiver came to learn that: (i) the tenant had paid \$2 million in advance rent, half of which was paid while the decision in *Farrell* was under reserve; and (ii) Midas had agreed to sell the Eastern Avenue Property to a company affiliated with the tenant.

[12] Given these newly discovered facts, the Receiver entered into negotiations with the tenant at the Eastern Avenue property and they ultimately entered into an agreement of purchase and sale. Equally, the Receiver entered into a separate agreement of purchase and sale for the Yonge Street property.

[13] After the agreements had been reached in relation to both properties, the Receiver sought and obtained approval and vesting orders. Notably, the combined proceeds to be realized from the sale of the properties will be sufficient to pay out all encumbrances against the properties, although the Receiver acknowledges that it is possible that there could be a shortfall in respect of accrued interest depending on when distributions are authorized.

[14] Mr. Kavanagh has now filed two notices of appeal, one for each of the approval and vesting orders. He maintains that he has a right to appeal the orders under s. 193(c) of the *BIA*.

² It had come to light that the tenant had prepaid some rent, but that a confidentiality order precluded disclosure of any details of the arrangement that had been made.

[15] In the event he is wrong about that, Mr. Kavanagh has also filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property, pursuant to s. 193(e) of the *BIA*. Counsel for Mr. Kavanagh informs the court that he also filed a motion seeking leave to appeal the August 12, 2021 approval and vesting order relating to the sale of the Yonge Street property, pursuant to s. 193(e) of the *BIA*. If that motion has been filed, it has not yet been located in the court's records. In any event, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the missing leave motion has been properly filed.

C. ANALYSIS

[16] Section 195 of the *BIA* says that "all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of" (emphasis added). The provision goes on to say that a single judge of this court may do any number of things, including cancel the stay for any reason deemed proper.

[17] As I understand it, what has triggered this last-minute motion for declaratory relief is that the Receiver is concerned about the potential operation of s. 195 of the *BIA*. That concern rests on the fact that Mr. Kavanagh has filed two notices of appeal and a leave motion, all arising from the approval and vesting orders made pursuant to the *BIA*. The Receiver wants to foreclose any possible suggestion that the approval and vesting orders – which are required to close the sales of the

Yonge Street property on Monday, August 23, 2021 and the Eastern Avenue property on Thursday, September 2, 2021 – will be the subject of automatic stays pursuant to s. 195 of the *BIA*. If the automatic stays apply, then the Receiver asks that they be cancelled.

[18] The Receiver's concerns are well placed given that Mr. Kavanagh has responded to this motion, suggesting that he has a right to appeal under s. 193(c) of the *BIA* and, therefore, s. 195 operates to automatically stay the approval and vesting orders. He says the stay should not be cancelled. He also argues that, if he is wrong about the right to appeal, then I should grant him leave to appeal and impose stays on that basis.

[19] I have concerns about whether Mr. Kavanagh even has standing to appeal the approval and vesting orders. The Receiver submits that he has no standing as a non-party with no personal stake in the proceeding. In the end, though, as will become clear in these reasons, it is unnecessary for me to settle on the question of standing. For the purposes of these reasons, I proceed on the assumption, but without deciding, that Mr. Kavanagh has standing to challenge the approval and vesting orders.

(1) Is There an Automatic Right of Appeal Under s. 193(c) of the *BIA*?

[20] Mr. Kavanagh's first position is that he has an automatic right of appeal under s. 193(c) of the *BIA*, which reads as follows:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

[21] The Receiver argues that, in this case, there is no such right of appeal. I agree.

[22] This court has been clear that, given the “broad nature of the stay imposed by s. 195 of the *BIA*”, the right to appeal under s. 193(c) must be narrowly construed: *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 15, citing *Enroute Imports Inc., Re.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. As noted by Brown J.A., the narrow construction of s. 193(c) accords with the “needs of modern, ‘real-time’ insolvency litigation”: *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 53. Therefore, Brown J.A. affirmed that s. 193(c) does not provide for an appeal as of right to matters involving: “(i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss”: *Bending Lake*, at para. 53.

[23] The operation of any one of these principles is fatal to an applicant’s automatic right of appeal pursuant to s. 193(c) of the *BIA*: see, for example,

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611, 49 C.B.R. (6th) 173. The first and third principles are operative in this case.

(a) Is the Order Procedural in Nature?

[24] Section 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, “including orders concerning the methods by which receivers or trustees realize an estate’s assets”: *Bending Lake*, at para. 54. At least in relation to the appeal from the order relating to the Eastern Avenue property, that is precisely what Mr. Kavanagh is seeking to appeal as of right: the method used by the Receiver to arrive at the agreement of purchase and sale of the Eastern Avenue property.

[25] Mr. Kavanagh’s chief complaint is that the Receiver, as he puts it, “sought and obtained the Sale Process order and then abandoned that process and negotiated directly with one party based on new facts.” What he is referring to is the fact that, after receiving the May 31, 2021 court order setting out a marketing and sale process that the Receiver would follow for the Eastern Avenue property, the Receiver did not follow that process, but rather negotiated the sale with the current tenant at that property.

[26] As the Motion Judge detailed in his reasons, the Receiver acted reasonably in the circumstances. The Receiver had very good reason to negotiate with the tenant before embarking upon the marketing and sale process that had been

approved in the May 31, 2021 order. That reason rested on the fact that it was only after the May 31, 2021 order was issued that the Receiver came to learn that the tenant at the Eastern Avenue property had prepaid \$2 million in rent to Midas and Mr. Farrell, representing rents paid until May 31, 2027, and had actually entered into an agreement of purchase and sale for the property. In light of that state of affairs, the Receiver recognized the obvious: unlike an ordinary buyer, the tenant would be highly motivated to protect its financial outlay, and allowing the tenant to do so would avoid potentially lengthy and costly litigation.

[27] While the Receiver did not seek an order varying the marketing and sale process set out in the May 31, 2021 order on the basis of the new information that had come to light, I am not satisfied that the Motion Judge erred in concluding that the Receiver acted appropriately in the circumstances. Importantly, there is no evidence that the manner in which the Receiver proceeded resulted in any loss.

[28] While Mr. Kavanagh is not pleased with the Receiver's decision to negotiate with the tenant, in my view, his complaint in relation to the Eastern Avenue property is entirely procedural in nature. At its core, his complaint is that the Receiver should have followed a different process for selling the Eastern Avenue property. Section 193(c) does not permit an appeal as of right for this type of procedural complaint.

(b) Does the Order Result in a Loss?

[29] In any event, there is another reason that s. 193(c) does not afford Mr. Kavanagh an appeal as of right in relation to either approval and vesting order.

[30] Section 193(c) grants a right of appeal where “the property involved in the appeal exceeds in value ten thousand dollars”. Determining the “value” of the “property involved” is subject to significant constraints because any other approach would lead to an automatic right of appeal in virtually all *BIA* matters: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17.

[31] As Brown J.A. explained in *Bending Lake*, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. The court does not look to the total value of the property involved in the dispute, but to the value of the actual loss (or gain) resulting from the impugned order: *Bending Lake*, at paras. 61-64. The loss (or gain) must be squarely rooted in the evidentiary record. As Brown J.A. stated in *Bending Lake*, at paras. 64 and 69:

The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value \$10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than \$10,000 because the Receiver could have obtained a higher sales price for the Debtor’s property. Bald assertion is not sufficient, otherwise a mere bald

allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.

...

... I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[32] Similarly, I am not persuaded that there is anything in the factual record here that supports Mr. Kavanagh's suggestion that he has suffered or will suffer a loss greater than \$10,000. The factual record does not even suggest that he has suffered or will suffer any loss at all. Recall that he describes himself, for the purposes of this motion, as the guarantor of the subject mortgage. It is worth emphasizing a point made earlier: it is anticipated that the mortgage will be paid out as a result of the sales of the properties, should those sales move efficiently. Therefore, as a guarantor, Mr. Kavanagh should not lose on the approved sales.

[33] Mr. Kavanagh also points to what he describes as appraisals that have been done by a reputable broker, which value the properties at more than the ultimate purchase price. He further shares his view that this appraisal is at "the low end" of what could be obtained for the properties through a bidding process. As noted by the Motion Judge, the "report" makes clear that it is not an appraisal. The report also does not reference the critical fact that rent had already been prepaid on the property until May 31, 2027, meaning that even if the property could be sold to

someone else, it would not earn rental income for a very long time. As a commercial investment property, this would undoubtedly affect the value received through a bidding process. Moreover, having reviewed the report, it appears that the author of the report was told that the landlord had indicated that the tenant was willing to vacate the property and reoccupy only after the property had been redeveloped. Therefore, few of the underlying premises upon which the report rested accord with reality.

[34] At the very most, as a guarantor, someone in Mr. Kavanagh's position may have a statutory right to redeem the mortgage. Counsel for Mr. Kavanagh stated in oral argument that this is Mr. Kavanagh's primary concern. Mr. Kavanagh asserts he has that right, but has not clearly identified from which statute that right would arise. Others on the motion say he does not have that right in the current circumstances. Others were unsure, identifying various statutes from which that right might arise. In any event, Mr. Kavanagh has not clearly asserted the basis for his purported right of redemption, has not attempted to redeem the mortgage over the past eight years during which it has been in default, and has not proffered any evidence of the value of his loss.

[35] Therefore, I have arrived at the conclusion that there is no evidence in the record to support the suggestion that the value of the property involved in Mr. Kavanagh's appeals exceeds \$10,000. Accordingly, I conclude that Mr. Kavanagh does not have a right to appeal either approval and vesting order under s.193(c)

of the *BIA*. This means that there is no automatic stay of the approval and vesting orders pursuant to s. 195 of the *BIA*.

(2) Should Leave to Appeal be Granted Pursuant to s. 193(e) of the *BIA*?

[36] If he does not have a right to appeal under s. 193(c) of the *BIA*, Mr. Kavanagh asks that leave to appeal be granted pursuant to s. 193(e) of the *BIA*. He has filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property. Pursuant to s. 193(e), I have jurisdiction to determine this issue as a single judge of this court.

[37] Granting leave to appeal is a discretionary decision. In exercising that discretion, the court must take into account whether the issue: “(1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of bankruptcy/insolvency proceedings”: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 12, referring to *Pine Tree Resorts*, at para. 29; *McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

[38] Applying this test, I would dismiss the motion for leave to appeal.

[39] I see no issue of importance to bankruptcy and insolvency practice. This case is really about mortgages that fell into arrears a very long time ago and obstacles put in the way of the ability of the applicant mortgagees to recover on

their losses. While it is true that the Receiver did not comply with the process as spelled out in the original order of May 31, 2021, the Motion Judge's reasons aptly explain why the Receiver's actions made perfect sense in the unusual circumstances of this case.

[40] In the end, the proposed appeal really come down to Mr. Kavanagh's complaint that the Motion Judge should not have approved the Receiver's decision to deal directly with the tenant at Eastern Avenue. In my view, the Motion Judge's reasons are clear, concise, and directly responsive to the issue at hand. There is no issue of general importance involved.

[41] Nor is the issue one that is *prima facie* meritorious. While Mr. Kavanagh perhaps wishes that the Motion Judge's order were different, it was an order that was available to him to make.

[42] Finally, to grant leave to appeal would undoubtedly hinder the progress of the proceeding by interfering with the sale of the Eastern Avenue property.

[43] For these reasons, I dismiss the leave motion in relation to the Eastern Avenue property.

[44] As indicated above, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the leave motion in relation to the Yonge Street property has been filed. However, in my view the proposed appeal raises no issues of importance to the practice, it is not *prima facie* meritorious, and

it would hinder the progress of the proceeding by interfering with the sale of the Yonge Street property.

[45] Given that I have refused to grant leave to appeal under s. 193(e) of the *BIA*, and given that s. 193(c) does not apply, s. 195 is inapplicable and no stay of either of the approval and vesting orders is imposed.

D. CONCLUSION

[46] The Receiver's motion is granted. Mr. Kavanagh's notices of appeal in respect of the August 5, 2021 approval and vesting order and the August 12, 2021 approval and vesting order are quashed. His motion for leave to appeal in respect of the August 5, 2021 approval and vesting order is denied. Proceeding on the assumption that the motion for leave to appeal in respect of the August 12, 2021 approval and vesting order has been filed, it is also dismissed.

[47] I note that there was a time-limited sealing order imposed by the Motion Judge so as to protect the pending sales. Therefore, the Receiver is directed to communicate with the Registrar of this court to identify whether there are any documents that have been filed in this matter that fall within the parameters of the Motion Judge's sealing order or that should otherwise be sealed for a short time pending the completion of the sales.

[48] Costs submissions of no more than three pages may be provided by the moving party and those supporting the moving party no later than August 25, 2021. Mr. Kavanagh may respond with no more than three pages by August 27, 2021.

“Fairburn A.C.J.O.”

TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: First National Financial GP Corporation v. Golden Dragon HO 10
Inc., 2019 ONCA 873

DATE: 20191105

DOCKET: M50969 (C67612)

Fairburn J.A. (Motion Judge)

BETWEEN

First National Financial GP Corporation

Applicant (Respondent)

and

Golden Dragon HO 10 Inc. and Golden Dragon HO 11 Inc.

Respondents (Appellants/Responding Parties)

David Preger and David Seifer, for the moving party, the receiver Deloitte
Restructuring

Ian Matthews, for the Ministry of Municipal Affairs & Housing

Chad Kopach, for First National Financial GP Corporation

Karen Perron, for Royal United Investments

Martin Diegel, for the responding parties

Heard: November 4, 2019

REASONS FOR DECISION

A. OVERVIEW

[1] This motion for declaratory relief was heard yesterday. I granted that relief
with written reasons to follow. These are my reasons.

[2] On September 22, 2017, Deloitte Restructuring Inc. was appointed as an interim receiver under s. 47 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. The order related to a two-building apartment complex at 345 and 347 Barber Street, Ottawa. Of the 110 units in the buildings, 30 units are used for affordable housing pursuant to agreements with the City of Ottawa and the Ontario Ministry of Municipal Affairs and Housing.

[3] Those properties are the subject of five mortgages extended by three mortgagees: (1) First National Financial GP Corporation (three mortgages); (2) Liahona Mortgage Investment Corp; and (3) the City of Ottawa and Ministry of Municipal Affairs and Housing. The total value of the mortgages exceeds \$15,000,000.

[4] The receiver's powers were expanded on May 21, 2019. At that time, the motion judge issued a receiver and manager order which included an approved marketing and sale process for the properties. The receiver was authorized pursuant to that order to enter into a listing agreement for the properties. That process was followed and, ultimately, an agreement of purchase and sale ("APS") was entered into on August 27, 2019. The purchase was conditional on only one matter. That condition was waived on September 26, 2019.

[5] The APS requires that an approval and vesting order be granted within 21 days of the purchaser's waiver and that the transaction close within 10 days

following the issuance of that order. It further provides that the receiver may postpone the closing date for up to 60 days after the original closing date.

[6] The appellants, who are the debtors in this case, opposed the issuance of the approval and vesting order on the basis that the purchase price under the APS does not represent fair market value. In support of that claim, the debtors pointed to another “higher” offer. However, they admit that the “higher” offer was late, having been delivered to the receiver on September 19, 2019. Indeed, the “late offer” was provided after:

- (i) the call for offers had closed on July 30, 2019,
- (ii) the qualified offers had been identified and the offerors had been invited to resubmit their offers with improved terms by August 7, 2019,
- (iii) the qualified offerors had complied with the August 7, 2019 deadline,
- (iv) the best offer had been identified, and
- (v) the APS had been signed by the purchaser and receiver on August 27, 2019.

[7] After the purchaser waived the sole condition upon which the APS rested and delivered written directions to the receiver, directing that title to the properties be placed in the names of certain designees upon closing, the late offer was replaced by an “amended late offer”. The amended late offer was

delivered to the receiver on October 4, 2019, which was the day after the original return date for the receiver's motion for the approval and vesting order.

[8] The receiver did not consider either of the late offers to be credible ones. I will later explain why I agree with that position.

[9] The motion judge granted the approval and vesting order on the same day that the motion was heard, October 11, 2019, with written reasons following just over a week later.

[10] The debtors have filed a notice of appeal seeking to set aside the approval and vesting order. They signaled their intention to do so on October 17, 2019, right after the receiver informed them that the closing date was being moved to October 18, 2019. The closing date was moved to accommodate a religious holiday that conflicted with the original closing date.

[11] A new closing date was then chosen to accommodate having this motion heard. I was informed during oral submissions that the new closing date is November 6, 2019. Accordingly, there is urgency around deciding this matter.

[12] The receiver seeks directions to ensure that the closing proceeds on schedule. The receiver seeks the following relief:

- (i) a declaration that the appeal from the approval and vesting order dated October 11, 2019 is governed by the *BIA*;

- (ii) a declaration that the appellants do not have an automatic right of appeal under ss. 193(a) to (d) of the *BIA* (meaning that they must seek leave to appeal pursuant to s. 193(e) of the *BIA*); and
- (iii) a declaration that the approval and vesting order is not automatically stayed pursuant to s. 195 of the *BIA* and, if it is stayed pursuant to that provision, an order cancelling the stay.

B. ANALYSIS

(1) Is the appeal governed by the *BIA*?

[13] The appellants agree that the appeal is governed by the *BIA*. In light of that concession, there is no need to address this issue.

(2) Do the appellants have a right to appeal under ss. 193(a) to (d) of the *BIA* or must they seek leave to appeal under s. 193(e) of the *BIA*?

[14] The appellants contend that their right to appeal lies under s. 193(c) of the *BIA*. Accordingly, I will only address the arguments advanced in respect of that provision. Section 193(c) reads:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars.

[15] In the event of an appeal as of right under s. 193(c) of the *BIA*, a stay of the order appealed from is automatically triggered by virtue of s. 195 of the *BIA*. Therefore, in light of the “broad nature of the stay imposed by s. 195 of the *BIA*”,

the right to appeal under s. 193(c) (as opposed to seeking leave to appeal under s. 193(e)) has been narrowly construed: *Enroute Imports Inc., Re.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. Accordingly, s. 193(c) has been granted a restrictive interpretation, one that accords with the “needs of modern, ‘real-time’ insolvency litigation”: *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 347 O.A.C. 226, at para. 53.

[16] In keeping with that narrow interpretation, the total value of the property that forms the subject of the impugned order does not inform whether “the property involved in the appeal exceeds in value ten thousand dollars.” As Blair J.A. held in *Business Development Bank of Canada v. Pine Tree Resorts, Inc., et al.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17, to allow an appeal as of right under s. 193(c) of the *BIA* every time property value exceeds \$10,000 would be to permit an appeal as of right in almost every case.

[17] To bring some meaningful limit to the parameters of s. 193(c), the court must instead focus upon the value of the “loss” that results from the impugned order: *Bending Lake*, at para. 64. The evidentiary record must be considered to determine the question of “loss”. As Brown J.A. held in *Bending Lake*, at para. 69:

Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than \$10,000 because the Receiver could have obtained a higher

price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[18] When determining the amount of loss in a situation like this case, the court looks beyond the simple question of whether a higher price for the subject property could be obtained. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, a case that is very similar to this one, Tulloch J.A. emphasized the fact-specific nature of the inquiry into potential loss and the need to determine loss by way of a “substantive assessment of competing offers” and not a “mere comparison of formal prices”: *Downing Street*, at para. 28.

[19] The appellants argue that there is a clear loss in excess of \$10,000 arising from the approval and vesting order in this case. The appellants say that the purchase price under the APS is \$3.5 million below the late offer and \$2 million below the amended late offer. They say that this proves that the purchase price, as encapsulated under the APS, and as approved by the impugned order, does not reflect fair market value.

[20] They go on to disavow any suggestion that they are simply comparing prices. Instead, they claim that the differential between the current purchase amount and the late offers should give the court pause about the actual value of

the subject properties. The appellants argue that the late and amended late offers should be considered against the backdrop of the vacancy rate for the building, which lies at about 8 to 10 percent and which they argue is well above market average. They also submit that the value of the buildings should be considered in relation to the value of the units on a per unit basis. That comparison is said to yield a fair market value well exceeding the current purchase price. The appellants also claim that there was insufficient marketing done on the property and that it was not properly exposed to the market, including the failure to list it on MLS.

[21] In all of these circumstances, the appellants say that the court should be satisfied that the loss exceeds \$10,000 and that they come within s. 193(c) of the *BIA*.

[22] I disagree.

[23] I start with the late and amended late offers. I agree with the receiver that neither of those offers were credible and cannot be used to set the benchmark for the fair market value of the subject properties. I say this for a number of reasons:

- (i) I note that the purchaser under the late offer is the director of a company that registered a collateral third mortgage over one of the properties five days after the original appointment order was made.

That collateral third mortgage was later discharged and deleted by the court.

- (ii) The terms of the late offer are not credible, including that:
- (a) The deposit of \$50,000 was entirely out of proportion to the purchase price offered;
 - (b) the offer was conditional on the purchaser obtaining a mortgage to finance the purchase;
 - (c) the closing date was into December; and
 - (d) the purchaser wanted the vendor to obtain estoppel certificates from all tenants within the complex.

[24] Both the proposed purchaser and the terms of the late offer render it highly suspicious, full of risk, uncertain, and difficult for the vendor to comply with (particularly the insistence upon estoppel certificates). The offer was entirely dependent on financing and there is no evidence that the financing was even realistic. This is to be contrasted with the solid APS as approved by the court, one that rested on a single condition that was waived early in the process. I agree with the receiver that, unlike the actual APS, the late offer was not a serious or credible offer.

[25] In my view, the revised late offer was no better. The purchase price went down by \$1.5 million, and the deposit rose by \$50,000 to \$100,000 in total. That deposit was still out of proportion to the actual purchase price being offered. The closing date was moved up by a couple of weeks, but the offer had become entirely conditional upon the purchaser convincing First National to allow the

purchaser to assume the First National mortgages over the property. First National is not prepared to entertain that request. Accordingly, and importantly, even if the late amended offer had been a *bona fide* offer (which I do not accept), it would not have survived the test of time.

[26] In my view, the late offers were not credible and should not be used as a benchmark for “loss” under s. 193(c).

[27] Moreover, I do not agree with the appellants’ suggestion that the motion judge erred by failing to take into account the “per unit” price to calculate the value of the property and determine whether fair market value had been achieved. The motion judge specifically rejected the appellants’ evidence on that point. He was entitled to do so and his conclusion attracts deference by this court.

[28] Nor did the motion judge accept the appellants’ criticism of the receiver’s failure to have the property marketed on MLS. Indeed, there was evidence before the motion judge, which he accepted, that marketing a property of that value through MLS is not a suitable means to attract buyers. In fact, the appellants are known to have marketed similar large-scale properties in the past and foregone any use of MLS as a marketing tool. Again, deference applies to the motion judge’s factual determination on this point.

[29] As for the vacancy rate, I do not accept the appellants' submission that it impacts the amount of loss. The appellants say that the motion judge erred by not considering the vacancy rate, for which they say the receiver is responsible, in determining the fair market value. The appellants argue that, had the vacancy rate been at the market standard, the building would have attracted a higher purchase price.

[30] I do not accept this submission. Although a higher occupancy rate may have attracted a higher price, the fact is that the occupancy rate for the buildings was vastly improved under the receivership, going from about 60% occupancy when the receiver originally took over, to about 90% or more. Even if that occupancy rate was still below the average occupancy rate for that area in Ottawa, the receiver had made great strides in achieving an increase in the occupancy rate which no doubt assisted in increasing the market value for the buildings. There is no evidence to support the suggestion that the receiver could have achieved an even higher occupancy rate.

[31] The fact is that the properties were appraised. While the purchase price as reflected in the APS is below the appraised value, this court has been provided with information explaining the gap. That information was filed in this court on the consent of the parties. Included in that information is reference to the purchaser's estimated capital expenditure upon closure, which will well exceed the differential between the purchase price and the average appraised value of the properties.

In these circumstances, it is unsurprising that the motion judge granted the approval and vesting order.

[32] While the appellants also maintain that the real estate market was gaining in strength after the appraisals were done, and they do not, therefore, reflect the true market value of the buildings, I see nothing in the record to support that submission.

[33] In my view, the granting of the approval and vesting order did not result in a loss of more than \$10,000 because there is no credible evidence to support the position that the receiver could have obtained a higher sales price for the debtors' property. Nor is there credible evidence that, when looked at on a more substantive and general level, the receiver could have obtained a better offer.

[34] Accordingly, the appeal is not governed by s. 193(c) of the *BIA* and the appellants must seek leave to appeal under s. 193(e) of the *BIA*.

[35] Although the appellants ask that leave to appeal be granted as a form of relief in their factum in response to this motion, they have not sought leave to appeal to this court under s. 193(e). No such application has been filed and no material in support of that application has been given. There is simply a notice of appeal.

[36] In light of the absence of a leave to appeal application, I am not inclined to determine the issue of leave.

[37] For the reasons that follow, though, even if the appellants had a right to appeal or were granted leave to appeal, triggering a s. 195 *BIA* stay of the approval and vesting order, I would cancel that stay. Accordingly, and in the alternative, I will address the issue of a stay.

(3) Does section 195 of the *BIA* apply and, if so, should the stay be cancelled?

[38] Among other things, s. 195 of the *BIA* allows for an automatic stay where there is an appeal from an approval and vesting order unless the stay is cancelled for a reason deemed proper. Section 195 of the *BIA* reads:

Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper. [Emphasis added.]

[39] Even if there was a properly constituted appeal before this court, I would cancel the stay so that the transaction can be completed by tomorrow.

[40] In doing so, I emphasize two points: (a) the appeal is lacking in merit; and (b) the relative prejudice to the parties arising from a stay of the approval and vesting order.

[41] In my view, the grounds do not raise a serious issue to be appealed. The notice of appeal refers to only very general grounds, which are largely complaints

about findings of fact and appear to be based upon a desire to factually relitigate the matter that was already determined by the motion judge. Accordingly, even if the appeal was properly constituted, I am not satisfied that there is any substance to the appeal.

[42] The fact that the appeal is lacking in merit combines with the prejudice that would arise and costs that would be accumulated if a stay under s. 195 (assuming s. 195 is invoked) were allowed to continue. The appellants (debtors) have no money. They are broke. Importantly, therefore, any costs arising from the continued operation of the buildings, and any risk associated with those buildings, comes out of the pockets of the creditors. The monthly costs are exorbitant. For example:

- (i) \$60,000 monthly interest is accruing under the mortgages registered on title;
- (ii) \$22,000 per month insurance costs are accruing;
- (iii) utility costs are rising with the winter coming; and
- (iv) the receiver's costs continue to accumulate.

[43] Moreover, I agree with the receiver that if this transaction is lost, there will be "a serious chilling effect on the market" and a "risk that another buyer would not assume the affordable housing agreement with the City of Ottawa and the Province. That agreement is critical to many people residing in that affordable housing.

[44] In my view, the integrity of the sale process, combined with the costs currently being incurred, and the risks associated with this transaction not being completed, pitted against what I determine to be a very weak appeal, all favour the lifting of any stay that may be operative under s. 195 of the *BIA*.

C. CONCLUSION

[45] I conclude that this appeal is not brought under s. 193(c) of the *BIA* and, therefore, leave to appeal must be sought. Leave to appeal has not been properly sought. Even if the appeal is properly constituted under s. 193(c) or leave should be granted under s. 193(e), pursuant to the powers under s. 195 of the *BIA*, I would cancel any stay of the approval and vesting order.

“Fairburn J.A.”

TAB 6

CITATION: GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173

COURT FILE NO.: CV-12-9856-00CL

DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: GE Canada Real Estate Financing Business Property Company, Applicant

AND:

1262354 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Pillon and Y. Katirai, for the Receiver

L. Rogers, for the applicant, GE Canada Real Estate Financing Business Property Company

C. Reed, for the Respondent and for Keith Munt, the principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for the proposed purchaser, 5230 Harvester Holdings Corp.

HEARD: February 18, 2014

REASONS FOR DECISION

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

[1] PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

[2] The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by

the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

[3] After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

[4] The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for \$10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of \$9.95 million. In January, 2013, the listing price was reduced to \$8.2 million.

[5] In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

[6] Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

[7] Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to \$6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

[8] One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property

under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to \$6.8 million.

[9] On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

[10] As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

[11] The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at \$6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

[12] In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

[13] By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately \$593,000 of the \$600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

[14] The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

[15] In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

[16] The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

[17] The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, “clean” - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations – and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

[18] The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver’s materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

[19] At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver’s request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

[20] The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the “Receiver’s Confidentiality Agreement”). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

[21] By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

[22] On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

[23] On January 23 Debtor's counsel wrote to the Receiver:

My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

[24] The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

[25] The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

[26] Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

[27] On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

[28] At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver – i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been

the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

[29] The Receiver's Confidentiality Agreement contained a recital which read:

The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

[30] Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

[31] By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

[32] In *Sierra Club of Canada v. Canada (Minister of Finance)*¹ the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects.² As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer – receiver, monitor or trustee – filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

[33] The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.³

[34] To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

[35] From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

¹ 2002 SCC 41

² *Ibid.*, para. 53.

³ 8857574 *Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Gen. Div.).

[36] Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

- (i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank of Canada v. Soundair Corp.*,⁴ specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;
- (ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership – a proper request. The Debtor was prepared to agree to that term;
- (iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

[37] In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

⁴ (1991), 4 O.R. (3d) 1 (C.A.)

V. Receiver's request for approval of the sale: The *Soundair* analysis

[38] The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

[39] The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

[40] Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

- (i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;
- (ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;
- (iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

[41] Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

[42] As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

[43] As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,⁵ motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

[44] First, one had to take into account the economic reality of this receivership – i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

[45] Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to \$356,301.40, and its counsel had incurred fees approximating \$188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

[46] Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

[47] Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

[48] Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.⁶ In this receivership the Receiver had served this motion over a week in advance of

⁵ 2011 ONSC 346, para. 7.

⁶ *Hryniak v. Mauldin*, 2014 SCC 7, para. 31.

the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

[49] Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

[50] Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of a receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

[51] For those reasons, I refused the Debtor's second adjournment request.

[52] Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

[53] Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

[54] For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

D. M. Brown J.

Date: February 24, 2014

TAB 7

COURT OF APPEAL FOR ONTARIO

CITATION: Grillone (Re), 2023 ONCA 844

DATE: 20231218

DOCKET: M54714 (COA-23-CV-1202)

Brown J.A. (Motions Judge)

In the Matter of the Bankruptcy of Sergio Grillone

Bankruptcy Application under the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended

Kenneth D. Kraft, Meredith Bacal and Mark A. Freake, for the moving party/respondent, Bluecore Capital Inc.

Sergio Grillone, for the responding party/appellant, acting in person

Heard: December 13, 2023 by video conference

ENDORSEMENT

I. OVERVIEW

[1] Bluecore Capital Inc. (“Bluecore”), the respondent on this appeal, moves for an order lifting the stay of the bankruptcy order dated October 12, 2023 issued by Kimmel J. against the appellant, Sergio Grillone, (the “Bankruptcy Order”) following a five-day trial and a subsequent one-day motion for a mistrial. The Bankruptcy Order adjudged Mr. Grillone a bankrupt and appointed A. Farber & Partners Inc. as trustee of his estate.¹

¹ The motion judge noted at para. 238 of her reasons that the Trustee may have undergone a name change.

[2] Mr. Grillone is an experienced litigation lawyer who no longer operates a legal practice. He currently is under administrative suspension by the Law Society of Ontario. Mr. Grillone represented himself at trial.

[3] In December 2018, Bluecore entered into a loan agreement with Mr. Grillone and his law firm, a sole proprietorship called the Grillone Law Firm. The purpose of the loan was to provide litigation/disbursement funding to Mr. Grillone's law practice. Mr. Grillone also signed a personal guarantee for the repayment of up to \$1 million of the amounts owing under the loan agreement. As of the date of the bankruptcy application, Bluecore claimed to be owed the principal loan amount of approximately \$1.332 million, plus accrued interest and fees.

[4] In granting the application for a bankruptcy order against Mr. Grillone, the trial judge made several key factual findings:

[115] The applicant has proven [the] Loan Agreement was executed by both Mr. Grillone and Bluecore as the "Borrower". Its terms are clear and unambiguous.

...

[116] At trial, Bluecore's bookkeeper, Mrs. Susan Lau, testified as to the outstanding Indebtedness at the time of the application and at the time of the trial.

...

[117] The applicant has been held to the strict standard of proving the outstanding debt that was owing to it by Mr. Grillone both as of the date of the application and as of the date of trial. The amount claimed to be owing when the bankruptcy application was commenced was not

precisely calculated in the First Robson Affidavit but has now been, with regard to the undisputed terms of the Loan Agreement and the undisputed amounts advanced, amounts paid and interest payable. Bluecore has proven on a balance of probabilities that the debt owing to it under the Loan Agreement by Mr. Grillone both at the date of the bankruptcy application and the date of the trial was far more than \$1,000.

...

[123] The alleged Act of Bankruptcy that Bluecore elected to proceed to trial on (described at the outset of these reasons) is that Mr. Grillone had, within the six months preceding the date of the filing of this application on September 29, 2021, “ceased to meet his liabilities as they have come due in failing to pay the above-noted sum [of \$1,332,462.58] to the Applicant.”

[124] Facially, these facts have been proven by Bluecore on a balance of probabilities based on the evidence of Mr. Robson, who was responsible for collecting the Bluecore Loan once it went into default, and of the bookkeeper from Bluecore’s accounting firm who has tracked the amounts distributed to the Grillone Law Firm and the amounts repaid in respect of those advances and who has calculated the interest accruing based on the contractual rates of interest provided for in the Loan Agreement. This testimony establishes on a balance of probabilities the amount owing under the Loan Agreement to be more than the specific sum claimed (so, by definition, he also failed to pay the lesser amount claimed).

...

[164] Bluecore is a secured creditor and has not stated it is willing to give up its security for the benefit of the creditors in the event the bankruptcy order is made. Accordingly, the court must be satisfied that it has provided a satisfactory estimate of the value of its security.

...

[193] Mr. Robson has provided his best estimate of the value of the Bluecore Security, ranging from zero to \$100,000. I find that to be sufficient to satisfy s. 43(2) of the BIA.

[5] The trial judge also concluded that Bluecore had demonstrated the existence of “special circumstances” that supported granting its single-creditor bankruptcy application: Reasons, at paras. 138-62.

[6] Mr. Grillone appealed the Bankruptcy Order by notice of appeal dated October 16, 2023. He separately sought leave to appeal the trial judge’s decision to dismiss his motion for a mistrial, which I describe later in these reasons. This court has directed that the motion for leave will be heard by the panel hearing Mr. Grillone’s appeal.

[7] Mr. Grillone continues to represent himself on this appeal.

[8] On November 1, 2023, Bluecore served a notice of motion to lift the automatic stay of the Bankruptcy Order pursuant to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) or, alternatively, an order requiring Mr. Grillone to post security for costs of the appeal. In its factum filed on November 29, 2023, Bluecore clarified that it sought security for costs in the amount of \$20,000.

[9] Although the parties agreed on December 13, 2023 as the hearing date for Bluecore’s motion as well as on a timetable for the delivery of motion materials,

procedural skirmishing subsequently ensued between the parties. Those events culminated in a letter dated December 5, 2023 from Mr. Grillone to the court's Executive Legal Officer (the "December 5 Letter") requesting the appointment of a single judge to case manage the appeal and advising that he planned to seek an adjournment of the December 13 hearing.

[10] By letter dated December 8, 2023, the parties were advised that the Associate Chief Justice "directed that the appointment of an appeal management judge is not required."

[11] At the hearing before me on December 13, Mr. Grillone sought to adjourn Bluecore's motion for a month to enable him to file further responding materials. I denied his request and heard the motion. In the result, I grant an order lifting the stay of the Bankruptcy Order. As well, I order Mr. Grillone to post \$30,000 as security for costs. My reasons for doing so are set out below.

II. ADJOURNMENT REQUEST

[12] My refusal to grant Mr. Grillone an adjournment of Bluecore's motion was informed, in part, by the procedural history to date of his appeal as well as the litigation strategy he has adopted on this appeal.

Appeal procedural history

[13] Mr. Grillone served Bluecore with his notice of appeal on October 17, 2023. The *Rules of Civil Procedure* require an appellant to serve with his notice of appeal

an appellant's certificate respecting evidence: r. 61.05(1). Mr. Grillone did not do so. Indeed, the court's records disclose that as of the date of the hearing of Bluecore's motion, Mr. Grillone still had not done so.

[14] The *Rules* also require an appellant, within 30 days after filing a notice of appeal, to file proof that he has ordered a transcript of all oral evidence that the parties have not agreed to omit: r. 61.05(5). Mr. Grillone has not done so.

[15] While in his December 5 Letter Mr. Grillone wrote that "[t]he perfection of the appeal will follow the normal course", the court's records show that Mr. Grillone has not taken any steps to perfect his appeal in accordance with the *Rules* since filing his notice of appeal. That raises serious doubts as to whether Mr. Grillone's appeal constitutes a serious request to review the reasons of the trial judge or merely a device to stall the enforcement of the Bankruptcy Order.

Litigation strategy on the appeal

[16] Bluecore served Mr. Grillone with its notice of motion to lift the stay on November 1, 2023. The email correspondence between the parties, which was filed in evidence on this motion, reveals that by November 2 they had agreed to a December 13 hearing date for Bluecore's motion, as well as to a timetable for the filing of motion materials and cross-examination thereon. As Mr. Grillone wrote in his November 3, 2023 email: "I am fine with the timetable as is."

[17] The timetable required Mr. Grillone to file responding materials by November 13, 2023. He did not file any materials by that date.

[18] He did conduct a full-day cross-examination of Mr. Nick Robson, a Bluecore representative, on November 23, 2023 on Mr. Robson's affidavit in support of Bluecore's lift stay motion. The timetable contemplated such a cross-examination. I have read the transcript, which runs to some 306 pages in length. Perhaps five pages of questioning dealt with issues relevant to Bluecore's lift stay request; the rest amounted to a re-hash of past litigation and is of no relevance to this motion. A lack of focus on the material issues and a willingness to waste time characterized Mr. Grillone's approach to the cross-examination.

[19] Instead of filing responding materials in accordance with the timetable, in his communications with opposing counsel and this court since November 2, 2023, Mr. Grillone has indicated that he wants to take a series of steps prior to the hearing of the motion and his appeal, including:

- (a) The removal of Dentons as counsel for Bluecore (December 5 Letter);
- (b) A motion against three of the Bluecore's lawyers for a "show cause" hearing for their alleged breach of an order or direction made by the trial judge, a matter previously raised before the trial judge (November 2 email to opposing counsel);

- (c) Requiring Bluecore's lawyers to demonstrate that they "have not suborned the perjury of Nick Robson" (December 11, 2023 affidavit);
- (d) Requiring Bluecore's lawyers to provide an explanation as to why they disobeyed the trial judge's direction regarding how the loan agreement was to be treated as an exhibit and what happened to "Exhibit A" to Mr. Robson's initial verification affidavit. As put by Mr. Grillone in his December 11 affidavit:

Before the motion to lift the stay can go forward a determination must be made regarding [Bluecore's lawyers'] possible contempt of Justice Kimmel's trial order and a determination of the [Bluecore's lawyers'] possible subordination of perjury.

- (e) A motion to answer more than 50 refusals Mr. Grillone contends were made on his November 23 cross-examination of Mr. Robson (November 28 email to opposing counsel; December 11 affidavit);
- (f) The opportunity to file further responding evidence on this motion to deal with answers given by Mr. Robson on his cross-examination. Preparation of such evidence would require Mr. Grillone to access documents concerning litigation with which he has been involved since 2012. He contends that this research process would require him to review each case and provide a proper explanation for it (December 5 Letter); and
- (g) Requiring the other creditors who testified at the trial to disclose "the foundation" of their support of the application so that their evidence is

“properly before the court” as “they should give evidence at the motion to lift the stay” (December 5 Letter).

[20] In his December 5 Letter, Mr. Grillone took the position that “before any further steps can be taken” in his appeal, the issues described as items (a) and (b) above ought to be determined.

[21] Notwithstanding his failure to file responding materials in accordance with the agreed upon timetable, shortly before the motion hearing date Mr. Grillone filed two responding affidavits: the above-noted December 11 affidavit and a supplementary affidavit sworn on December 12. On the morning of the hearing, he filed an “aide memoire”, which hyperlinked certain documents.

Analysis of adjournment request

[22] In her reasons, the trial judge described the litigation strategy Mr. Grillone employed in the court below:

[15] Mr. Grillone is an experienced litigation lawyer. While he claims not to have had experience in bankruptcy and insolvency matters, he has utilized his skill set as a litigation lawyer to research and become familiar with this area of the law and has made use of his skill set and the tools available to him to raise a multitude of objections to this bankruptcy application, both procedural and substantive. Mr. Grillone’s resources included the use of the court’s process to raise objections, bring motions, launch attacks personally and professionally against Bluecore and its counsel, and challenge the many creditors who have pursued him through the court. Mr. Grillone has put forth a valiant effort to avoid the bankruptcy order, and he has demanded that Bluecore

be required to strictly comply with the requirements of the BIA.

...

[38] By the spring of 2022, it was apparent that this was going to be a hotly contested bankruptcy application and a trial of the contested issues was directed. Between November 2021 and January 2023 there were eighteen endorsements made by the court on case conferences, interlocutory motions, and scheduling (and re-scheduling) conferences.

[39] As was noted in my February 9, 2023 pre-trial endorsement following a trial management conference: “There is a long procedural history to this matter. Mr. Grillone has sought many (more than seven) adjournments and stays of the bankruptcy hearing over the past year.”

[40] Approximately two weeks after the trial concluded, Mr. Grillone requested an urgent case conference and asked the court to schedule a fresh evidence motion, which was initially scheduled to be heard on May 18, 2023 with a timetable for the delivery of material for that motion put in place. On May 15, 2023, that motion had to be adjourned because Mr. Grillone delivered his motion record late, had still not delivered his factum, and instead had purported to serve a summons to witness on opposing counsel, which the court declared to be a nullity. The next available court date was not until July 11, 2023 and the fresh evidence motion was adjourned until then.

[41] Mr. Grillone requested a further urgent scheduling appointment that was convened on June 14, 2023, at which he advised that he wanted to schedule a motion for a mis-trial and that he was withdrawing his fresh evidence motion. It was agreed (subject to Bluecore’s reservation of its rights regarding the costs of the withdrawn fresh evidence motion) that the July 11, 2023 hearing date would be re-purposed for the mis-trial motion. The mis-trial motion was argued that day.

[42] In the meantime, the court's decision in the bankruptcy trial was held in abeyance pending the motion for a mis-trial. The court indicated in its June 14, 2023 endorsement that the timing and sequencing of the two decisions (motion for mis-trial and, depending on the outcome of that, the trial decision) would be determined by the outcome of the July 11, 2023 motion. These reasons include the court's decision on the mis-trial motion, which is the first of the issues the court must decide, and the trial.

[23] It is apparent from Mr. Grillone's communications about this appeal with opposing counsel and this court, as well as from his failure to take the steps the *Rules* require to perfect his appeal, that he wishes to replicate at the appeal level his litigation strategy below of multiple case management conferences and motions. Such an appeal litigation strategy is misconceived and improper.

[24] An appeal is a completely different litigation creature than a first instance adjudication on the merits. An appeal is not a process designed to create an evidentiary record, save in the small number of cases that involve fresh evidence that meets the stringent requirements of the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Instead, an appeal takes the record created below, subjects it to panel review in accordance with the applicable standards of review, and may result in appellate intervention where a reversible error is identified in the decision below.

[25] Since an appeal essentially involves taking the record created below and packaging it for appellate consideration in the form prescribed in considerable detail by the *Rules* and the practice directions of this court, resort to motions in

most civil appeals is unnecessary and wasteful. Most civil appeals involve only a handful of issues, so disputes about timelines and “packaging” of the record can and should be worked out by the parties through a process of reasonable discussion. Indeed, the rise in civil pre-hearing motions in this court over the past decade has been a most unfortunate development; there is no need for resort to this court to resolve most pre-hearing disagreements. And while appeal management conferences can play a useful role in complex, multi-party appeals, this is not such an appeal.

[26] In my view, Mr. Grillone’s request for an adjournment is not a proper one. By November 2, he had agreed to a timetable that would culminate in a hearing of the lift stay motion on December 13 and under which he agreed to file responding motion materials by November 13. He did not do so. That was his choice.

[27] He then cross-examined Mr. Robson on November 23. The combined effect of rr. 39.02(1) and (2) is that once a party to a motion cross-examines on an opposing affidavit, he cannot deliver further affidavits unless granted leave to do so. I saw no reason to grant leave. In his affidavit, Mr. Robson identified numerous pieces of litigation that named Mr. Grillone. Information about those lawsuits no doubt lies within the possession of Mr. Grillone. He elected not to file a responding affidavit that addressed the issue before cross-examining Mr. Robson. To grant leave to file a responding affidavit on that issue at this point of time, thereby

necessitating an adjournment of the hearing, would make a mockery of the timetable the parties agreed to back on November 2, 2023.

[28] In any event, Mr. Grillone has filed two affidavits and an “aide memoire”, or mini-factum, without regard to the schedule the parties had agreed upon and without seeking leave of the court. His response was before the court. There was no need to adjourn the matter to enable Mr. Grillone to file yet more material.

[29] I concluded that the record showed that Mr. Grillone sought to resort to motions and case management to set aside a motion timetable he previously had agreed to and to initiate a process to complicate what is really a simple appeal. That is not a proper use of judicial time in an appellate court.

[30] Any prejudice that Mr. Grillone might suffer from not placing responding materials before the court on this motion is purely self-inflicted. He is an experienced litigator in Ontario courts. He knows the rules and the consequences of not complying with them.

[31] Finally, Mr. Robson deposed that Mr. Grillone has failed to satisfy two cost orders made by this court in favour of Bluecore: the \$5,000 cost order of Roberts J.A. dated February 21, 2023; and the further \$5,000 cost award made by a panel on June 19, 2023. Mr. Grillone submitted that he had some understanding with other counsel for Bluecore regarding those costs orders. Yet, Mr. Grillone did not file any evidence to support that assertion, and counsel for Bluecore on this

motion stated he was not aware of any such arrangement. Accordingly, I am left with Mr. Robson's evidence that the cost orders remain unsatisfied. I accept Mr. Robson's evidence. It is not open to Mr. Grillone, on the one hand, to fail to satisfy cost orders made by this court yet, on the other hand, seek an indulgence from this court in the form of an adjournment of a motion brought by a party in whose favour those cost orders were made.

[32] In those circumstances, I was not prepared to grant Mr. Grillone an adjournment of the Bluecore motion, and I proceeded to hear argument on Bluecore's motion.

[33] I should note that the day following the hearing Mr. Grillone emailed court staff to advise that he understood the Trustee had not been served with the motion materials. The court file also shows that Mr. Grillone did not serve the Trustee with his materials. Mr. Grillone contends that the Trustee should have been present at the hearing, and the Trustee's absence might impact my decision on the merits of the motion. Since that time the court has not received any communication from the Trustee. Nor can I see what assistance the Trustee could have provided on the motion given that its appointment had been stayed by Mr. Grillone's notice of appeal.²

² I have read Mr. Grillone's letter to the court dated December 18, 2023. In it Mr. Grillone questioned whether the Trustee appointed by the Superior Court of Justice should continue to act. If that truly is an issue, it is one that the Superior Court of Justice should decide, not this court on this motion.

III. REQUEST TO LIFT THE *BIA* S. 195 STAY

The applicable considerations for lifting the automatic stay

[34] Bluecore moves to lift the stay of the Bankruptcy Order under *BIA* s. 195, the relevant parts of which provide as follows:

[A]ll proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay ... if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.
[Emphasis added.]

[35] An applicant that seeks to cancel a *BIA* s. 195 stay bears the burden of establishing compelling reasons to support a cancellation: *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121, 391 A.R. 202, at para. 5. The *BIA* s. 195 jurisprudence identifies several factors courts should consider when dealing with a request to lift an automatic stay:

- The appellant's litigation conduct, including whether the appellant is diligently prosecuting the appeal;
- The merits of the appeal;
- The relative prejudice to the parties of cancelling the stay. This typically involves applying a variation of the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 applied on stay applications, specifically whether: (i) there is a serious issue to be appealed;

(ii) the applicants would suffer irreparable harm if the stay is not lifted; and
(iii) the applicants would suffer greater harm than the respondents if the stay is not lifted;

- However, while all or part of the tripartite test may be relevant, the discretion granted by *BIA* s. 195 is broader. Accordingly, a contextual approach is appropriate that considers all the facts of the case, not merely those that engage the tripartite test, and the interests of justice generally.

See: *After Eight*, at paras. 5-6; *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 44; *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165, at para. 11; and *Toronto Dominion Bank v. Amex Bank of Canada*, 1996 ABCA 128, 181 A.R. 279, at paras. 10-11.

[36] I shall consider the evidence filed on this motion in light of those factors.

Lack of diligent prosecution

[37] I am not satisfied that Mr. Grillone is prosecuting his appeal diligently. As I noted earlier in these reasons, although the trial judge released her reasons two months ago, on October 12, 2023, Mr. Grillone has not taken the requisite initial steps to perfect by filing a certificate of evidence or proof that he has ordered the relevant transcripts.

[38] Instead, his correspondence to the court and his affidavit of December 11 identify collateral steps that he wants to take before he begins to perfect his appeal.

His lengthy list of preliminary collateral steps leads me to conclude that Mr. Grillone has no present intention of pursuing his appeal diligently. Although an experienced litigation lawyer, Mr. Grillone does not seem willing to recognize that an appellate court engages in the “review and correction” of lower court decisions, not in a process of creating a new record that requires a new adjudication on the merits. In my assessment, Mr. Grillone wants to consume court resources and time in dealing with side-issues instead of reviewing the Bankruptcy Order below.

[39] His evident unwillingness to prosecute an appeal weighs heavily in favour of lifting the automatic stay.

[40] As well, Mr. Grillone now seeks to invoke the assistance of this court for his appeal while in default of the two earlier cost orders of this court identified above. It would be unjust to permit Mr. Grillone to prosecute an appeal under the protection of an automatic stay while failing to comply with earlier orders of this court.

The merits of the appeal

[41] Based on my review of the record, I have formed the view that Mr. Grillone seeks to advance very weak grounds of appeal. His grounds of appeal can be divided into two categories.

[42] **First category:** The first category consists of Grounds 2 through 9 and 15 to 17 of his notice of appeal. Those grounds seek, in effect, a retrial of all material

findings the trial judge made in concluding that Mr. Grillone had committed an act of bankruptcy and that Bluecore had demonstrated a bankruptcy order should issue. Where the grounds allege errors of fact, for the most part the notice of appeal offers little insight into the specific factual errors the trial judge allegedly committed. His allegations about of the misapplication of statutory provisions or the “special circumstances” test are difficult to reconcile with the detailed reasoning provided by the trial judge on those issues. To my eye, based on the record before me, those grounds constitute very weak grounds of appeal.

[43] **Second category:** However, as I understand the appellant’s materials, the heart of his appeal lies elsewhere, in a procedural issue regarding the marking of an exhibit: Grounds 10 to 14 and 18 to 20 of his notice of appeal. As Mr. Grillone put the matter in his December 5 Letter:

As its core the principle [*sic*] grounds for Appeal is based on the Respondents lawyers, Ken Kraft, Mark Freake and Daniel Loberto (the “Kraft Team”), disobeying a key evidentiary ruling made during day 5 of the trial: the trial judge ordered a specific piece of documentary evidence to be entered as Exhibit #2 in the trial record (the “Trial Order”).... Notwithstanding the Trial Order and the undertaking, the Kraft Team knowingly disobeyed the order and sent the Registrar (without advising the Appellant or Justice Kimmel) a different document.

[44] By way of background to this category of grounds of appeal, two versions of the loan agreement between Bluecore and Mr. Grillone emerged at trial: the so-called Long and Short Version Loan Agreements.

[45] From what I can discern from para. 45 of the trial judge's reasons, Bluecore's initial affidavit in support of its bankruptcy application appended a copy of the loan agreement between the parties that did not include Schedules D and E to the agreement. This was the so-called Short Version Loan Agreement. Despite omitting the two schedules, the body of the Short Version identified the existence of the schedules in its "Index of Schedules": Schedule D consisted of a "Schedule of Documents" and Schedule E identified the "Matters to be Funded".

[46] At trial, when Bluecore's counsel sought to prove the loan agreement through a representative of the company, Mr. Nick Robson, counsel used a longer version of the loan agreement that included the two schedules, the so-called Long Version Loan Agreement. As a result, at trial Mr. Robson incorrectly identified the Long Version Loan Agreement as the one attached to the initial affidavit in support of the bankruptcy application, resulting in the Long Version being marked as trial Exhibit 2.

[47] When this mistake came to light a few weeks after the trial's conclusion, Mr. Grillone moved to declare a mistrial. As the trial judge explained at para. 46 of her reasons:

All of these allegations of misconduct are based on the fundamental premise that counsel for the applicant knowingly and intentionally misled the court and Mr. Grillone (and Mr. Robson, if he is not shown to have known) by stating that the Long Version Loan Agreement that included Schedules D and E was the same as the

Short Version Loan Agreement that did not include these Schedules D and E. This alleged misconduct is said by Mr. Grillone to directly implicate the duty of good faith under s. 4.2 of the BIA.

[48] The trial judge rejected the appellant's request for a mistrial based upon how Bluecore's counsel dealt with the loan agreement at trial. She concluded that:

- The Short Version Loan Agreement was "included in error" as an exhibit to the initial affidavit; there was no spoliation of evidence;
- The error was not the product of any intention by Bluecore's counsel to mislead the court;
- Bluecore was not advantaged at trial in any way by the error. As the trial judge explained at paras. 70, 106, and 196 of her reasons:

Nor has Mr. Grillone offered even a plausible theory for why Bluecore would have been assisted by misleading the court into believing that the Long Version Loan Agreement with Schedules D and E appended was the version attached to the First Robson Affidavit. The authenticity of the Long Version Loan Agreement was not in issue and there has been no valid basis upon which there could have been an objection to the Long Version Loan Agreement being entered into evidence at trial in addition to the Short Version Loan Agreement that was appended to the First Robson Affidavit. The Long Version Loan Agreement ultimately was entered into evidence, albeit having been mis-identified as the document at Exhibit A to the First Robson Affidavit.

...

There was only one Loan Agreement. That was the Long Version Loan Agreement, which is the basis for Mr. Grillone's liability to Bluecore. He is defined, together

with his sole proprietorship, the Grillone Law Firm, to be the “Borrower” under the Loan Agreement, and he also signed the Guarantee. Tendering the complete Long Version Loan Agreement with the appended Guarantee into evidence as trial Exhibit 2, taken together with Mr. Robson’s testimony and the testimony of Bluecore’s accountant, Ms. Lau, was sufficient to prove the contractual basis for Mr. Grillone’s liability to Bluecore that is at the heart of this bankruptcy application.

...

Mr. Grillone did not testify and the affidavits filed by him do not satisfy me that he was able to pay all of his debts, nor was that established through any of his cross-examinations of his creditors who testified. His bald assertion that he was meeting his lawful debts is unsubstantiated. His suggestion that his Statement of Affairs establishes that he had assets that far exceeded his Indebtedness to Bluecore is unsupported. That conclusion is dependent upon uncollected accounts receivables and disbursements and unbilled fees and disbursements about which he provides no information aside from the amounts paid into court. [Emphasis added.]

- While the trial judge did not condone the failure of Bluecore and its counsel to follow the proper steps for rectifying the misidentification of the exhibit or their failure to follow the court’s direction to file the proper version of the loan agreement, she concluded that declaring a mistrial was not warranted in the circumstances. The trial judge was “satisfied that Mr. Grillone had a full opportunity to present his case on the merits and that it can be fairly adjudicated notwithstanding these irregularities in the marking of trial

Exhibit 2 and the failure to follow the court's Direction." She continued, at para. 99:

Not all evidentiary errors lead to mis-trial. This is not a matter of relaxing the rules of evidence or the burden of proof in the interests of expediency or efficiency, as Mr. Grillone contends. Where there has been no demonstration that the irregularity prejudiced Mr. Grillone's opposition to this application, or was pursued in furtherance of an improper or ulterior motive on the part of the applicant, this is not an appropriate case in which to exercise the court's discretion to declare a mis-trial.

- In the result, the trial judge dismissed Mr. Grillone's motion for a mistrial but refused to award Bluecore any costs of the motion.

[49] Despite the extensive arguments fashioned by Mr. Grillone on this motion about how the Long and Short Version Loan Agreements were managed at trial, I see no contention on his part that the full version of the loan agreement he executed with Bluecore does not support the trial judge's conclusion that he was indebted to Bluecore under the loan agreement, which he candidly admits signing. Put differently, there seems to be no dispute that both versions of the loan agreement – with or without the Schedules D and E – created an indebtedness on his part to Bluecore. Indeed, in the "Facts Briefly Stated" portion of his notice of appeal, Mr. Grillone does not identify any facts that might suggest the trial judge erred (let alone committed a palpable and overriding error) in finding that Mr. Grillone was indebted to Bluecore.

[50] Combined, the two categories of grounds of appeal advanced by Mr. Grillone strike me as very weak based on the record before me.

Relative prejudice

[51] There is no dispute that Mr. Grillone's estate likely contains only two types of assets: approximately \$800,000 in cash paid into court; and the potential net recoveries from several dozen lawsuits in which he is named. If the stay remains in place, Mr. Grillone would continue to manage those lawsuits, without any mechanism that would require him to report to his creditors the results of his management of those assets.

[52] I start my assessment of the relative prejudice to the parties of cancelling the automatic stay by situating Bluecore's request to lift the automatic stay in the trial judge's description of how Mr. Grillone deals with his creditors, including Bluecore.

[53] The trial judge heard evidence not only from Bluecore but also from other creditors of Mr. Grillone. As she stated at para. 150 of her reasons:

Bluecore was permitted to, and did, call as witnesses at trial some of the other creditors of Mr. Grillone. They testified about their frustrations and concerns regarding the multiplicity of claims and counterclaims and the need for a streamlined process that they are all hopeful can be achieved through a bankruptcy proceeding. There was evidence of at least three other significant creditor claims against Mr. Grillone, met in each instance by a counterclaim or counter-suit.

[54] The consequences of Mr. Grillone remaining in control of the extensive litigation in which he is embroiled, instead of appointing a trustee to act on behalf of all his creditors to maximize any potential recoveries in the lawsuits, was described by a representative of another creditor, Bridgepoint, and summarized by the trial judge at para. 155:

Mr. Pauwels [of Bridgepoint] expressed the reasoning succinctly to be (this is my paraphrasing from the notes of his testimony):

Because here we are many years later with incredible judicial resources dedicated to claims and counterclaims and multiple sets of counsel, this [bankruptcy] is the preferred procedure to deal with multiple creditors and proceedings. This situation requires the diligence and focus of professional trustee to manage and expedite all of these proceedings because we are not getting anywhere.

[55] Based on the evidence she heard, the trial judge characterized Mr. Grillone's dealings with his creditors in the following terms, at paras. 159 and 160:

[I]t is not what has been adjudged to be owing to these creditors that is the point. It is the mere existence of these other claims and counterclaims ... that is indicative of a course of litigious conduct adopted by Mr. Grillone in response to claims by his many creditors. Mr. Grillone has adopted a manner of dealing with his creditors and claims against him and the available assets to satisfy those claims that is litigious, consumes court time and costs for all involved, and creates a circumstance that in the court's view requires that the processes of the *BIA* be set in motion.

...

[Mr. Grillone] has adopted an aggressive and litigious counter-attack in an attempt to avoid his contractual liability for the Indebtedness under both the Loan Agreement and the Guarantee and is apparently adopting the same approach with other creditors. I find that these add up to create a situation of special circumstances of a category 2 *Valente* type.

[56] Based on what the record before me discloses about Mr. Grillone's litigation approach to this appeal, I have no doubt that if the automatic stay is not lifted Mr. Grillone will continue to pursue the aggressive (and wasteful) litigation approach described by the trial judge, to the prejudice of Bluecore and his other creditors. Indeed, during his November 23 cross-examination of Mr. Robson, Mr. Grillone advised, at p. 232 of the transcript, that he had recently settled one piece of litigation in which he was involved, demonstrating that he was continuing to deal with his assets following the making of the Bankruptcy Order.

[57] I see much merit in the trial judge's assessment that, in the circumstances, the appointment of a trustee was required to ensure fairness not only to creditors who have claims against Mr. Grillone, but also to enable the assessment of the reasonableness of his counterclaims against his creditors. As she put the matter in paras. 162 and 210 of her reasons:

[A bankruptcy order] under s. 43(1) of the BIA is necessary to achieve an orderly distribution of Mr. Grillone's estate to his creditors, including Bluecore, and to create a single forum in which the multiplicity of claims involving Mr. Grillone (by and against him) can be

determined while ensuring no creditor obtains an unfair advantage over the others in the interim. This is in the best interests of the creditors of Mr. Grillone.

...

Mr. Robson (and Bluecore) is proceeding on the assumption that the process for creditors establishing claims to, and the determination of priorities and the eventual distribution of, any funds paid into court to Mr. Grillone's credit (and any other identified liquid or realizable assets of Mr. Grillone) would be managed by a professional Trustee in Bankruptcy if one is appointed. So would the pursuit of any counterclaims on behalf of Mr. Grillone if determined to be in the interests of the estate and other stakeholders to do so.

[58] In his affidavit in support of the cancellation of the stay, Mr. Robson of Bluecore echoes the trial judge's assessment of the circumstances. He deposes: "Without the stay being lifted, there will be no one to control what Mr. Grillone does with these claims, all to the detriment of his creditors. The (re)imposition of the bankruptcy trustee will protect all creditors and not prejudice Mr. Grillone while his appeal is being addressed."

[59] Mr. Grillone filed two affidavits on this motion. Neither addressed the issue of the relative prejudice to the parties of cancelling the stay.

Conclusion

[60] Based on the record before me, I conclude that:

- Mr. Grillone's grounds of appeal are very weak;
- To date, he has not prosecuted his appeal with diligence;

- Mr. Grillone has failed to satisfy past costs orders of this court;
- I have no confidence that Mr. Grillone intends to pursue his appeal with diligence. His litigation conduct to date gives every indication that he will attempt to convert an uncomplicated “review and correction” appeal into a series of collateral side-fights, with a view to delaying the hearing of the appeal and prolonging the automatic stay; and
- I have no doubt that Mr. Grillone would use the protection of the automatic stay to pursue his aggressive litigation against his creditors and to deprive his creditors of the benefit of any assets he might recover. In those circumstances, I have no hesitation in concluding that the relative prejudice to the parties strongly favours cancelling the stay.

[61] Consequently, I grant Bluecore’s motion and order that the automatic stay of the Bankruptcy Order under *BIA* s. 195 be lifted.

IV. SECURITY FOR COSTS

[62] As mentioned, Mr. Grillone has failed to pay Bluecore two cost awards totaling \$10,000 made earlier this year by this court. In those circumstances, Bluecore is entitled to security for costs against Mr. Grillone pursuant to rr. 56.01(c) and 61.06(1)(b): *Health Genetic Center Corp. v. New Scientist Magazine*, 2019 ONCA 968, 59 C.P.C. (8th) 15, at para. 15. I fix the amount of security of costs at \$30,000, based on the \$10,000 in unpaid cost awards and Bluecore’s reasonable

request of \$20,000 in security for costs of the appeal, as supported by the bill of costs it submitted. Mr. Grillone must post such security within 30 days of the date of this order, failing which Bluecore may move to dismiss the appeal.

[63] Until Mr. Grillone pays into court the ordered security for costs, he cannot take any step in the appeal, except a motion for a panel review of this order under s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. To be clear, until such security is posted Mr. Grillone cannot file or attempt to file any document in this court except for a motion for a panel review of this order.

[64] If Mr. Grillone posts such security, then he must proceed to perfect his appeal within 60 days thereafter, failing which Bluecore may move to dismiss his appeal.

V. DISPOSITION

[65] By way of summary, I grant Bluecore's motion and make the following orders:

- (a) The *BIA* s. 195 stay of the Bankruptcy Order of Kimmel J. made October 12, 2023 is cancelled;
- (b) Within 30 days of the date of this order, Mr. Grillone shall pay into court security for costs of the appeal fixed in the amount of \$30,000, failing which Bluecore may move to dismiss the appeal; and

- (c) If Mr. Grillone pays such security for costs into court within 30 days of the date of this order, he must perfect his appeal within 60 days after posting of the security, failing which Bluecore may move to dismiss his appeal.

[66] The parties agree that the costs of this motion should be left for determination to the panel hearing Mr. Grillone's appeal.

“David Brown J.A.”

TAB 8

COURT OF APPEAL FOR ONTARIO

CITATION: Marshallzehr Group Inc. v. La Pue International Inc., 2025 ONCA 124

DATE: 20250219

DOCKET: M55745 & M55769 (COA-25-CV-0063)

MacPherson J.A. (Motions Judge)

In the matter of an application under subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

BETWEEN

Marshallzehr Group Inc.

Applicant

(Respondent/Responding Party/Responding Party by way of cross-motion)

and

La Pue International Inc.

Respondent

(Appellant/Responding Party/Moving Party by way of cross-motion)

Miranda Spence and Adrienne Ho, for the respondent/moving party (M55745)/responding party by way of cross-motion (M55769), KSV Restructuring Inc., in its capacity as receiver of La Pue International Inc.

Maya Poliak, for the respondent/responding party (M55745)/responding party by way of cross-motion (M55769), Marshallzehr Group Inc.

Howard F. Manis and Daniel Litsos, for the appellant/responding party (M55745)/moving party by way of cross-motion (M55769), La Pue International Inc.

Mitch Lightowler and Piper Mckerlie, for 1000835091 Ontario Inc.

Fernando Souza, for Buttcon Limited and as agent for counsel for HC Matcon Inc.

Jason Wadden, for Anthony Defrancesco

Heard: February 7, 2025

ENDORSEMENT

[1] KSV Restructuring Inc. (“KSV”), in its capacity as court appointed receiver of all the assets, undertakings and properties of La Pue International Inc., including the real property known as 5528 Ferry Street, Niagara Falls, brings a motion seeking, *inter alia*:

- (a) a declaration that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the “BIA”) governs the appeal by the debtor La Pue International Inc. from the Approval and Vesting Order of Dietrich J. of the Superior Court of Justice dated January 7, 2025 (the “AVO”);
- (b) a declaration that there is no automatic right of appeal from the AVO pursuant to subsections 193(a)-(d) of the BIA and that leave to appeal is required pursuant to subsection 193(e) of the BIA;
- (c) an Order declining to grant leave to appeal from the AVO; and
- (d) an Order sealing the confidential appendices of the fifth report of the Receiver dated January 20, 2025 (the “Fifth Report”).

[2] In response to the receiver’s motion, the debtor La Pue International Inc. brings a cross-motion relating to the same subject matter and issues.

[3] In her decision authorizing the sale by the receiver of the subject property, the motion judge concluded, at paras 29-32:

[W]hat should be considered is the information available to the Receiver at the time it made a decision to proceed with the Transaction. At that time, the Transaction represented the best offer in terms of purchase price that it had received.

...

As set out by the Ontario Court of Appeal in *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para 15, courts will generally defer to a court appointed receiver's business expertise in reviewing a sale and will not second guess their recommendation absent exceptional circumstances.

...

Accordingly, I would approve the Transaction.

[4] The debtor seeks to appeal the motion judge's decision, asserting that she erred by failing to properly consider the interests of all parties and by preferring the interests of the purchaser over the interest of the debtor and its right to redeem.

[5] Appeals under the *BIA* are dealt with in s. 193:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

[6] The debtor asserts that it has a right to appeal under s. 193(a) of the *BIA*.¹ It says that the AVO affects its future rights as well as those of 359 pre-sale purchasers that entered into pre-sale construction agreements with the debtor and the lien claimants with more than \$12,000,000 in security registered against title to the property.

[7] I do not accept this submission. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, Brown J.A. said, at paras. 21-23:

Although the category of “future rights” increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts have attempted to cloak the term “future rights” with some practical meaning. In *Re Ravelston Corp.*, Doherty J.A. stated, at para. 18:

The meaning of the phrase “future rights” is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal ... Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights ...
[Citations omitted.]

¹ In its notice of appeal, the debtor asserts that it has a right of appeal under s. 193(b) of the *BIA*; however, this submission was not pursued at the hearing of this motion. Instead, the debtor relies on ss. 193(a) and (c) of the *BIA* to submit that it has a right of appeal to this court.

Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* “must refer to rights which could not at the present time be asserted but which will come into existence at a future time.”

More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, stated, at para. 15:

“Future rights” are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

[8] In my view, the debtor cannot bring itself within the definitions set out in these authorities. Its rights that may be in issue in the bankruptcy proceedings may be in issue now, not in the future.

[9] The debtor’s second submission is that it has a right of appeal under s. 193(c) of the *BIA*. It says that if the transaction contemplated by the AVO is completed, it is certain that there will be a loss exceeding \$10,000 suffered by the company, its principal and the lien claimants. The debtor points out that in its factum the receiver acknowledges that the debtor’s indebtedness to the applicant continues to accrue interest at \$14,181.37 per day and the underlying debt already exceeds \$20,000,000.

[10] I am not persuaded by this submission. In *Bending Lake Iron Group, supra*, Brown J.A. said, at para. 53:

[C]ontextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, “real-time” insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss.

[11] In my view, the AVO in this case fits precisely into the three parameters set out by Brown J.A. in this passage, and the appeal does not meet the threshold in s. 193(c) of the *BIA*. I agree with the receiver that the AVO is procedural in nature, does not bring into play the value of the debtor’s property, and does not result in a direct loss to any interested party.

[12] The debtor’s third submission is that, if it does not have an automatic right of appeal under either or both s. 193(a) and s. 193(c) of the *BIA*, it should nevertheless be granted leave under the discretionary s. 193(e) of the *BIA*.

[13] The test for leave to appeal under s. 193(e) of the *BIA* is well established. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, Blair J.A. said, at para 29:

Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and
- (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[14] The debtor cannot establish any of these factors.

[15] The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. I agree with the receiver that the proposed appeal is rooted in the specifics of the dealings among the receiver, the debtor and the potential purchaser.

[16] The proposed appeal is not *prima facie* meritorious. The motion judge's reasons are clear, comprehensive and, in my view, obviously correct.

[17] The proposed appeal would delay and "unduly hinder" the progress of the bankruptcy proceedings. The sooner the receiver can proceed with and finalize its professional steps, the better.

[18] The receiver's motion is granted. The debtor's cross-motion is dismissed.

[19] A sealing Order is granted with respect to Confidential Appendices 1 to 6 of the receiver's Fifth Report to the Court dated January 20, 2025.

[20] The receiver is entitled to its costs of the motion and cross-motion fixed at \$25,000, inclusive of disbursements and HST.

"J.C. MacPherson J.A."

TAB 9

COURT OF APPEAL FOR ONTARIO

CITATION: Proex Logistics Inc. (Re), 2025 ONCA 832

DATE: 20251203

DOCKET: COA-25-CV-0226

Thorburn, Coroza and Gomery JJ.A.

In the Matter of the Bankruptcy of Proex Logistics Inc., Guru Logistics Inc.,
1542300 Ontario Inc. and 2221589 Ontario Inc.

Ryan Shah, for the appellant, Rana Randhawa

Lee Nicholson and Sam Dukesz, for the respondent, Paul Randhawa

Alan Merskey and Kiyan Jamal, for the Trustee, KSV Restructuring Inc.

Heard: September 17, 2025

On appeal from the order of Justice Jana Steele of the Superior Court of Justice,
dated January 3, 2025, with reasons reported at 2025 ONSC 51.

Thorburn J.A:

[1] The appellant Rana Partap Singh Randhawa (“Rana”) appeals the motion judge’s decision to deny him standing, and to allow the trustee’s motion to consolidate estates, pay the claims of the respondent Swinderpal Singh Randhawa

(“Paul”), distribute any surplus to the equity holders, and approve the trustee’s report.

[2] The appellant Rana and the respondent Paul are brothers. Together, they built RGC, a group of companies which operated a successful trucking business (“the Trucking Business”) and a real estate business.¹ They are only equal shareholders of the RGC entities.

[3] RGC was first placed into receivership and then assigned into bankruptcy. KSV Restructuring Inc. was appointed receiver and then trustee-in-bankruptcy (“the Trustee”).

[4] The Trustee found that Rana had engaged in wrongful conduct aimed at eroding the value of RGC, and brought a motion to (i) consolidate the estates of the parties’ Trucking Business; (ii) authorize the Trustee to pay Paul’s claims against the Trucking Business including an unsecured claim of \$117,693.40 and an equity claim in the amount of \$2,650,000 (the “Wrongful Conduct Claim”), both of which the Trustee had approved; (iii) make distributions of any surplus of proceeds from Proex, Guru, ASR, and 2221589 Ontario Inc. (“the Bankrupt

¹ RGC is comprised of ProEx Logistics Inc., Guru Logistics Inc., 1542300 Ontario Inc. (operated as ASR Transportation), 2221589 Ontario Inc., 2435963 Ontario Inc., Noor Randhawa Corp., Superstar Transport Ltd., R.S. International Carriers Inc., Subeet Carriers Inc., Superstar Logistics Inc., Continental Truck Services Inc., and ASR Transportation Inc. The Trucking Business specifically comprises of Proex, Guru, and ASR. 2221589 Ontario Inc. is part of RGC’s real estate business, but was assigned into bankruptcy alongside Proex, Guru, and ASR.

Entities”) to Paul and Rana as shareholders of the Bankrupt Entities; and (iv) approve the Trustee’s reports.

[5] Rana opposed the relief sought by the Trustee and sought to adjourn the motion, arguing that he needed more time to challenge the Trustee’s acceptance of Paul’s claims.

[6] The motion judge denied Rana standing to participate in the motion because of: (i) the many outstanding cost awards, all of which remained unpaid for over a year; (ii) the evidence that Rana had dissipated RGC assets; and (iii) the fact that Rana was continuing to pay legal counsel although he claimed he had no money to pay the outstanding costs orders.

[7] In careful but succinct reasons, the motion judge allowed the Trustee’s motion to consolidate the estates, make distributions of any surplus to Rana and Paul as equity holders, and approve the Trustee’s report. However, she was not prepared to authorize acceptance of the Trustee’s approved claims, as under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “BIA”), the Trustee alone decides whether to allow a claim.

[8] She held that the BIA “does not contemplate the court accepting an approval that has already been made by the trustee”. Therefore, once the Trustee accepted the Wrongful Conduct Claim, and absent any valid statutory challenge, the BIA did not provide her with any authority to accept, modify or reject the Trustee’s

authorization of any claim. As a result, the Trustee's acceptance of Paul's claims was not reviewable.

[9] Section 135(5) of the *BIA* allows the court to expunge a proof of claim on the application of a creditor or the debtor if the trustee declines to interfere in the matter. A s.135(5) challenge is available both before and after a claim is allowed: L.W. Houlden, G.B. Morawetz, and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2025-Rel. 7), 4th ed (Toronto: Thomson Reuters, 2009) at §6.283. The *BIA* also allows a claimant to appeal the Trustee's acceptance of a claim within 30 days pursuant to s. 135(4) of the *BIA*.

[10] In this case, Rana brought no challenge under s. 135(4) and did not ask the trustee to disallow the claim as required under s. 135(5). The motion judge allowed the Trustee's motion, noting that the Trustee allowed Paul's claims, all appeal rights with respect to Paul's claims had expired, and therefore any claim against the Trustee at this stage would constitute a collateral attack.

[11] Rana now claims a right to appeal the motion judge's decision to this court pursuant to ss. 193(a) or (c) of the *BIA* on the basis that his appeal concerns future rights and/or the property involved exceeds \$10,000. In the alternative, he claims that the court should grant him leave to bring a claim pursuant to s. 193(e) of the *BIA*.

[12] On the merits, he claims the motion judge erred by:

1. denying him standing on the basis that he had not paid the outstanding costs orders;
2. denying him standing as an aggrieved party pursuant to s. 37 of the *BIA*;
3. denying him standing as a creditor pursuant to s. 135 of the *BIA*; and
4. failing to consider the merits of the Wrongful Conduct Claim.

[13] For the reasons that follow, I would dismiss the appeal.

[14] Before conducting my analysis, I provide an outline of the evidence relevant to this appeal.

BACKGROUND EVIDENCE

[15] In March 2018, prior to any insolvency proceedings, Paul commenced an oppression application in respect of the debtor companies.

[16] In October 2018, the brothers signed the “Minutes of Settlement” agreeing to sell the RGC businesses and split the proceeds of sale equally. However, Rana delayed the sale of the Trucking Business.

[17] In 2020, Paul retained a private investigator and as a result of the investigation, became concerned that Rana was diverting assets from RGC to another company, owned by Rana’s son.

(1) The Receivership

[18] Paul brought a motion seeking the appointment of a receiver with a sale and investigation mandate. Rana opposed the motion.

[19] On May 19, 2021, Koehnen J. granted Paul's motion, appointing KSV as receiver over RGC's assets ("the Receiver"), and empowering KSV to carry out a sale mandate and investigation into Rana's conduct.

[20] On or about May 20, 2021, Rana transferred approximately \$168,000 of his own funds to each of his two sons. He said the funds were to pay for their studies (one at Toronto Metropolitan University and the other taking real estate courses), which sums the respondent Paul claims are exorbitant. In July 2021, Rana's wife took out a \$2.4 million mortgage on their home.

[21] On September 16, 2021, Koehnen J. granted an order establishing a claims process in the receivership for RGC's creditors. The deadline by which to file a claim with the Receiver was October 31, 2021 (the "Claims Bar Date"). The claims process order provides as follows:

2. THIS COURT ORDERS that the following terms in this Order shall have the following meanings ascribed to them:

...

(c) "Claim" or "Claims" means

(i) any right of any Person against any RGC Entity, in connection with any indebtedness, liability or obligation

of any kind of any RGC Entity whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not such right is executory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity for or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation (A) is based in whole or in part on facts existing prior to the date of the Receivership Order, (B) relates to a time period prior to the date of the Receivership Order, or (C) would have been a claim provable in bankruptcy had the RGC become bankrupt on the date of the Receivership Order (a "Pre-Receivership Claim"); or

(ii) any indebtedness, liability or obligation of any kind arising out of the restructuring, termination, or repudiation of any lease, contract, or other agreement or obligation on or after the date of the Receivership Order and whether such restructuring, termination, or repudiation took place or takes place before or after the date of this Order (a "Restructuring Claim");

...

9. THIS COURT ORDERS that any Claimant that fails to deliver or fails to have delivered on the Claimant's behalf a completed Proof of Claim to the Receiver by the Claims Bar Date:

(a) shall be and is hereby forever barred from making or enforcing any Claim and all such Claims shall be forever extinguished and released; and

(b) shall not be entitled to receive any further notice in respect of the Claims Procedure of these receivership proceedings or receive any distribution in relation to the estate or assets of any RGC Entity.

...

12. THIS COURT ORDERS that the Receiver be and is authorized and directed to administer the following process to finally determine Claimants' Claims as Proven Claims:

...

(b) if the Receiver determines to revise or disallow any Claim, the Receiver shall send a Notice of Revision or Disallowance to the respective Claimant as soon as is practicable once the Claim has been revised or disallowed;

(c) a Notice of Revision or Disallowance shall be final and conclusive and stand as evidence of the respective Claimant's Proven Claim unless the Claimant delivers to the Receiver in accordance with paragraph 24 of this order, a Notice of Dispute within the fourteen (14) day period after service of the Notice of Revision or Disallowance;

...

(f) the Receiver is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which the Claims are completed and executed and may, where satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution thereof.

[22] On September 24, 2021, the Receiver issued a report confirming that Rana and Motion Transport ("Motion"), another trucking company, delayed the sale of

the Trucking Business to divert its assets and opportunities. The Receiver found that Rana was transferring RGC's assets, resources, personnel and revenues to Motion with the aim of eroding RGC's value.

[23] The Receiver stated that Rana "actively engaged with the set-up and operation of Motion to the detriment of the efforts to sell the Trucking Business", including representing that the same competing business, Motion, was a wholly owned subsidiary of ASR.

[24] On or about October 29, 2021, before the Claims Bar Date, Paul submitted two claims: the first, an unsecured claim for \$117,693.40 for funds he lent the Trucking Business, and the second, an equity claim for \$2.65 million representing the amount he claimed he would have received had the Trucking Business been sold in a timely manner in accordance with the Minutes of Settlement in 2018 (the "Wrongful Conduct Claim").

[25] Upon receipt of the Receiver's report, Rana received notice that the Receiver accepted the basis for the Wrongful Conduct Claim in the Receivership, albeit without final quantification.

(2) The Bankruptcy

[26] On October 23, 2023, the Trustee assigned the parties' related trucking company businesses: ProEx, Guru, ASR, as well as one of the real estate businesses, 2221589 Ontario Inc., into bankruptcy.

[27] On August 23, 2024, Rana was given notice that the inspectors had approved (i) payment of Paul's unsecured claim and (ii) payment to Paul of approximately \$2.65 million as an equity claim in respect of his claim related to the sale of the Trucking Business.

[28] The Trustee then brought a motion in the Superior Court seeking authorization to consolidate the estates of the companies comprising the Trucking Business, pay Paul's approved claims, distribute any surplus of proceeds to Paul and Rana as shareholders of the Bankrupt Entities, and approve the Trustee's reports. That motion, which underlies this proposed appeal, was scheduled for November 27, 2024.

[29] On November 22, 2024, five days before the hearing of the Trustee's motion, Rana's counsel provided the Trustee with his late filed proof of claim as a creditor. The Trustee determined it was unable to accept the proof of claim based on the information provided, as he was unable to reconcile Rana's claim with ASR's records. The Trustee indicated that it would review any further materials from Rana, if provided, but reserved its right to rely on the Claims Bar Date of October 31, 2021.

[30] Although Rana missed the receivership Claims Bar Date and was advised that his late-filed proof of claim in the bankruptcy was deficient, Rana chose not to take any further steps to file a corrected proof of claim.

[31] As Rana's claim remained deficient, the Trustee never accepted Rana's claim against RGC.

[32] At the time of the Trustee's motion, approximately \$4 million was available for distribution to creditors. After payment to the creditors, RGC will have a surplus, with Paul and Rana as the only two equity owners in the business with potential claims to any surplus.

[33] Rana opposed the relief sought by the Trustee and sought an adjournment so he could later challenge the Trustee's acceptance of Paul's claims. This was the first time Rana formally objected to the Wrongful Conduct Claim.

[34] At the time of the motion, the motion judge found that Rana had outstanding cost awards payable to Paul in the amount of approximately \$1.048 million.

[35] Paul has also commenced a separate civil action against Rana and his alleged co-conspirators for fraud.

THE RIGHT TO APPEAL

[36] The first question on this appeal is whether Rana has a right of appeal or should be granted leave to appeal pursuant to any one of ss. 193 (a), (c), or (e) of the *BIA*.

[37] Subsections 193(a), (c) and (e) of the *BIA* provide that:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

...

(e) in any other case by leave of a judge of the Court of Appeal.

(1) Future Rights under s. 193 (a)

[38] Rana submits that his appeal concerns future rights within the meaning of s. 193(a) which include: (i) discovery rights; (ii) rights to claim mitigation of damages, that only crystallize following the payment of the Wrongful Conduct Claim; and (iii) rights to commence an action against the Trustee after Paul receives the distribution in question and Rana obtains leave from a court to pursue this claim.

[39] The Trustee claims that no appeal as of right exists for Rana under s.193(a), as even if he is a “creditor” or a “person... aggrieved by any act or decision of the trustee” within the meaning of s. 135(5) or s. 37 of the *BIA*, he neglected to challenge the Trustee’s decision to accept Paul’s claims when those rights crystallized. Because his future rights only exist because he failed to act when those rights crystallized, he cannot now use his future rights as a basis to assert a challenge to the Trustee’s decisions.

[40] The most recent statement of the law in respect of s.193 of the *BIA* by this court can be found in *North House Foods Ltd. (Re)*, 2025 ONCA 563, 20 C.B.R.

(7th) 1. At para. 21 of the decision, Pepall J.A. noted that this court has generally taken a narrow approach to the interpretation of appeal rights under ss. 193(a) through (d), due in part to the broad automatic stay on appeal contained in s. 195 of the *BIA*. She further held that:

Future rights under s. 193(a) mean future legal rights....
The question is whether the rights engaged in an appeal are future rights or presently existing rights that are exercisable in the future.
[Emphasis added; citations omitted.]

[41] In *North House*, the rights crystallized before the order under appeal, and s. 193(a) was therefore unavailable.

[42] The “future rights” Rana raises relate to the ongoing parallel litigation between Rana and Paul (and a speculative potential lawsuit against the Trustee). Rana has not clearly explained how the Trustee making a distribution in respect of the Wrongful Conduct Claim will affect those rights in separate legal proceedings, or why “discovery rights” are future rights in a proceeding that is currently underway.

[43] Rana interprets “future” rights to include rights a litigant may but will not necessarily obtain in future litigation. That is not a correct definition of a future right as it would mean that any claim advanced includes a future right to a judgment. Rather, a s. 193(a) future right is one that will come into existence at a future time.

[44] The British Columbia Court of Appeal addressed a similar situation in *Farm Credit Canada v. Gidda*, 2014 BCCA 501, 68 B.C.L.R. (5th) 333, at para. 17, citing

Re Catalina Exploration & Development Ltd., 1981 ABCA 31, 121 D.L.R. (3d) 95, at 100²:

A right [under s. 193(a)] in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future. For the adjective “future” to have any meaning, it cannot refer to that which presently exists. Does the claim alleged against the trustee presently exist? It is a current allegation of existing facts though they may be procedurally blocked by a need to obtain leave to assert the claim.

To give “future” the meaning that includes that which a litigant may obtain by success in litigation in the future is to say that a right of appeal exists in all cases. Any claim advanced is, in that sense, a future right to a judgment which does not yet exist. It would seem to me for para. (a) of [s.193] to have any meaning that it must refer to rights which could not at the present time be asserted but which will come into existence at a future time. [Emphasis added; citations omitted.]

[45] For these reasons, Rana has not raised any “future rights” under s. 193(a).

(2) Property that Exceeds \$10,000 under s.193(c)

[46] Rana also submits that he has a right to appeal under s. 193(c) because his appeal involves property valued in excess of \$10,000.

[47] He challenges Paul’s \$2.6 million Wrongful Conduct Claim in respect of the RGC surplus, which if allowed by the Trustee, reduces the surplus payable to Rana

² Section 193(a) of the *BIA* was then s. 163 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3.

by approximately \$1 million. Further, he claims the motion judge's order was substantive because he was deprived of his claim to the \$1 million in surplus funds payable to him absent allowance of the Wrongful Conduct Claim. As such, he claims he meets the criteria to claim a right to property in excess of \$10,000 as established by this court in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635.

[48] In *Bending Lake* at para. 53, Brown J.A. for this court, held that to qualify for an appeal as of right under s. 193(c), the order under appeal must be:

- i. more than procedural;
- ii. involve the value of the debtor's property; and
- iii. result in a loss to the appellant.

[49] All three factors must be met. The \$10,000 qualification has been interpreted narrowly; it could not have been Parliament's intention to cast a wide net, as otherwise most cases would meet that description: *North House*, at para. 28. This provision must be limited to appeals which directly involve property exceeding \$10,000 in value: *Romspen Investments Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 22, leave to appeal refused, [2018] S.C.C.A. No. 37636; *Enroute Imports Inc. (Re)*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5.

[50] A fact-specific inquiry must be conducted to determine whether there was a loss based on the evidentiary record: *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 42. The question is not simply whether a higher value for the property or interest could be obtained: *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 18.

[51] Rana has not provided evidence to support the assertion that the order results in a direct loss to Rana as opposed to a mere economic risk: see *Cameron Stephens Mortgage Capital Ltd. v. Conacher Kingston Holdings Inc.*, 2025 ONCA 732, at para. 24; *Marshallzehr Group Inc. v. La Pue International Inc.*, 2025 ONCA 124, at para. 11; *Unity Health Toronto v. 2442931 Ontario Inc.*, 2025 ONCA 93, 176 O.R. (3d) 37, at para. 25.

[52] To trigger the automatic right of appeal under s. 193(c) of the *BIA*, the appeal must relate to a clear difference in value between the order under appeal and evidence in the record that a debtor could have obtained a higher value: *Downing Street Financial Inc. v. 1000162497 Ontario Inc.*, 2024 ONCA 639, 20 C.B.R. (7th) 241, at para. 20. Further, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor: *Bending Lake*, at para. 61.

[53] Rana claims that if the order is upheld and the Wrongful Conduct Claim is paid, that reduces his surplus by \$1 million, which constitutes a loss to him. The

difficulty with this argument is that Rana's claim to that \$1 million hinges on Rana successfully challenging the Wrongful Conduct Claim; otherwise, there can be no loss. Even if Rana is successful in this appeal, his position will not change: he must still return to court and apply to have the Wrongful Conduct Claim expunged.

[54] Rana cannot argue the order deprived him of a chance to do so: the Wrongful Conduct Claim was first filed in the receivership proceedings in 2021, but Rana was silent until now. Nor did Rana seek to challenge the Wrongful Conduct Claim before the motion judge, so there is no conclusion on that point for this court to adjudicate. Rana's stake in the appeal is not a loss of \$1 million, but merely more time to advance a speculative challenge that he neglected to advance for years.

[55] Further, Rana has not discharged his evidentiary burden under s. 193(c). In the absence of a competing valuation, there is no demonstrable evidence of a loss: *North House*, at para. 30; *Hillmount*, at para. 42.

[56] The order under appeal did not determine Rana's economic interests, and success on this appeal will not grant Rana anything more than an opportunity, one which he failed to take advantage of for years prior to the motion. This is no "loss" within the meaning of s. 193(c).

(3) Whether Leave Should be Granted under s. 193(e)

[57] In the alternative, if this court finds that he does not have a right to appeal under ss. 193(a) or (c), Rana says that this court should exercise its discretion to

grant him leave to appeal pursuant to s. 193(e) of the *BIA*. He contends that this appeal raises an issue of general importance, is *prima facie* meritorious, and would not unduly hinder the progress of the bankruptcy proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

[58] In oral argument, the Trustee conceded that the appellant's leave arguments are arguable and the responding parties did not oppose this court hearing the arguments under appeal. This is a factor to be considered under the exercise of discretion to grant leave to appeal: *North House*, at para. 46.

[59] While I have concluded that Rana does not have an appeal as of right to this court under s. 193(a) or (c) of the *BIA*, and Rana did not seek leave by way of motion prior to the hearing of the appeal, the appeal should be decided on its merits. Full submissions on the merits were made in oral argument. The Trustee acknowledged that there were arguable grounds for leave which the respondent Paul did not challenge, and there are some jurisprudential issues raised in respect of the interpretation of specific provisions in the *BIA*, including the court's authority to bless a Trustee's acceptance of a claim in the absence of a valid challenge, and the impact of equity claims on s. 37 and s. 135 of the *BIA*.

[60] As such, I would grant leave pursuant to s. 193(e) of the *BIA*.

ANAYLSIS OF THE MOTION JUDGE'S DECISION

(1) Standing in light of the Outstanding Costs Orders

[61] The appellant Rana disagrees with the motion judge's decision to deny him standing to challenge the Trustee's motion on the basis that Rana had dissipated assets while not paying any of the significant outstanding costs orders for over a year.

[62] If the motion judge's decision was within the bounds of her discretion under the Rules, this court cannot interfere: *Garrett v. Oldfield*, 2016 ONCA 424 at paras. 2, 6, leave to appeal refused, [2016] S.C.C.A. No. 350; *McLean v. Wolfson*, 2021 ONCA 928, at para. 13.

[63] In November 2021, Rana was ordered to pay Paul \$525,000 in connection with arbitral proceedings, which was enforced by the court in the context of the receivership. He has subsequently been ordered to pay Paul costs in the amounts of \$5,000 in November 2022, \$25,000 in March 2023, and \$50,000 in February 2025. The motion judge also found that Rana was to pay approximately \$1 million of the costs attributable to the Receiver's investigation mandate.

[64] The motion judge noted that, while Rana has not paid these outstanding costs awards, he has paid many large sums to family members without appropriate justification.

[65] First, on May 20, 2021, Rana paid \$168,000 to each of his two sons, allegedly to help them with their "tuition" for study. Rana claimed that one son

attended Toronto Metropolitan University and the other was taking real estate courses.

[66] Second, on June 4, 2021, Rana transferred an Ontario property to his sons as a gift.

[67] Third, on June 7, 2021, he sold a home to two daughters of a friend for \$150,000 although it had been listed for \$480,000 two years earlier.

[68] Fourth, in July 2021, Rana's wife took out a \$2.4 million mortgage on the family home. Rana claimed not to know what she did with the funds although he resided in the home and was a guarantor of the mortgage.

[69] Rana offered no reasonable explanation for the above transactions to family members and friends, and he made no payment toward the \$1.048 million total outstanding cost awards to Paul. The motion judge also found that, based on the evidence on the record, Rana continued to pay legal counsel throughout.

[70] Based on the transfer of these funds, the motion judge correctly held that, while Rana claimed he was impecunious:

[T]here is evidence of dissipation of his assets (such as the large gifts of money to his sons and his purported lack of knowledge of the proceeds from the sale of his residential home) and he continues to retain and pay sophisticated counsel.

[71] This contravened rules 57.03 and 60.12 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[72] After comprehensively reviewing the case law, the motion judge concluded that:

The court has discretion under the Rules to prevent a litigant who has flagrantly ignored costs awards from continuing proceedings. The court may intervene to bring 'some finality to the action'. [Citations omitted.]

[73] She also noted Paul's submission that further delay would result in prejudice to Paul as "it will result in more costs that Paul will be unable to recover from Rana." She concluded that:

The facts of this case demonstrate Rana's disregard for the court's costs awards. Accordingly, in the circumstances, I am not prepared to allow this late breaking attempt for Rana to further delay the finality of these proceedings.

[74] The motion judge's decision to deny standing in these circumstances is amply supported by the case law: see e.g., *Burrell v. Peel (Regional Municipality) Police Services Board* (2007), 48 C.P.C. (6th) 349 (Ont. Master), aff'd (2008), 66 C.P.C. (6th) 223 (Ont. S.C.), at para. 63 leave to appeal to Div. Ct. refused, 2008 CarswellOnt 8050 (Div. Ct.); *Schwilgin v. Szivy*, 2015 ONCA 816, at paras. 23-25.

[75] I see no error in the motion judge's decision to deny standing and would reject this ground of appeal.

(2) The Decision Not to Interfere with the Trustee's Acceptance of Paul's Unsecured Claim and Equity Claim for Wrongful Conduct

[76] Second, the motion judge held that she had no jurisdiction under the *BIA* to authorize the Trustee's acceptance of Paul's claims.

[77] Under the *BIA*, the Trustee decides whether to allow a claim in whole or in part. The *BIA* sets out the steps that may be taken if a party disagrees with the Trustee's decision.

[78] The authority to approve claims vests solely with the Trustee subject only to (i) appeal of the Trustee's decision within 30 days under s. 135(4) of the *BIA*, or (ii) the court's ability to "expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter" under s. 135(5) of the *BIA*.

[79] There is no authority in the *BIA* to permit the court to provide advice and directions after the Trustee has decided to allow a claim absent an application challenging that decision under s. 135. In this case, no application to challenge the Trustee's determination of Paul's claims was ever brought.

[80] As such, I see no error in the motion judge's conclusion that:

The *BIA* does not contemplate the court accepting an approval that has already been made by the Trustee, nor is it clear how the court could provide advice and directions after the Trustee had already made the decision. [Emphasis in original.]

[81] The motion judge correctly held that since the Trustee had allowed Paul's unsecured claim of \$117,693.40 and equity claim of \$2,650,000 for wrongful conduct under the *BIA*, there was no basis for the court to interfere and no need for the court to provide any further authorization for the acceptance of those claims to be valid.

[82] I would therefore dismiss this ground of appeal, noting that dismissal of this ground in combination with the standing issue, above, is sufficient to dispose of the appeal.

(3) No Right under s.37 of the *BIA* to Challenge the Trustee's Acceptance of the Wrongful Conduct Claim

[83] Rana claims that he is entitled to rely on s. 37 of the *BIA* to challenge the Trustee's motion to make a distribution respecting the Wrongful Conduct Claim. He is incorrect. First, Rana is not a "person aggrieved" within the meaning of s. 37. Second, Rana cannot use s. 37 to effectively challenge the Trustee's decision on a claim when the route to do so is in s. 135.

[84] Section 37 of the *BIA* provides:

Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
[Emphasis added.]

[85] A “person aggrieved” is a person who has suffered a legal grievance, a person against whom a trustee’s decision has wrongfully deprived them of something, or wrongfully affected their title to something: Houlden, Morawetz, and Sarra, at §2.132.

[86] Rana claims that his share of the surplus will be diminished if the Trustee makes a distribution on account of the Wrongful Conduct Claim, and that this court should be guided by the broad reading of s. 37 cited in *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548, 4 C.B.R. (7th) 142, aff’d 2023 ONCA 505, 168 O.R. (3d) 153.

[87] I disagree. As noted by the court in *YG Limited Partnership*, at para. 29, the limited partners in that case were not “persons aggrieved” within the meaning of s. 37 solely because:

... their ultimate potential recovery will presumably be reduced if the claim is allowed. That is not sufficient to make them aggrieved within the meaning of section 37. To conclude otherwise would mean that every creditor would have standing pursuant to section 37 to challenge the claim of every other creditor in a bankruptcy proceeding and I reject that notion.

[88] Similarly, Rana opposes the distribution essentially because he says the Wrongful Conduct Claim should not have been accepted, as that will affect his claim to the portion of the surplus that would otherwise have been payable to him.

[89] The broad discretionary powers in s. 37 may not be used in place of s. 135 of the *BIA: Re Drummie*, 2004 NBQB 35, 272 N.B.R. (2d) 314.

[90] As outlined below, Rana failed to take any steps to challenge the Wrongful Conduct Claim under s. 135 which provides a complete code for dealing with proofs of claim. To permit him now to challenge the Trustee's decision under s. 37 as a person "aggrieved", would run contrary to the clear and specific legislative structure provided for dealing with proofs of claim under s. 135.

[91] For these reasons, I would dismiss this ground of appeal.

**(4) No Right under s.135(5) of the *BIA* to Challenge the Trustee's
Acceptance of the Wrongful Conduct Claim**

(a) Rana is not a Creditor

[92] To challenge the Wrongful Conduct Claim, Rana must invoke s. 135 of the *BIA*. However, the motion judge held that he does not meet the preconditions to do so I agree.

[93] The motion judge found that in any event:

Rana, as an 'equity owner' of the bankrupt entities, is not a creditor and has no standing to challenge the Trustee's decision to accept Paul's Claims. The fact that Rana's economic interests may be negatively affected by the manner in which the assets may be distributed as a result of the acceptance by the Trustee of Paul's Claims does not provide Rana with a right of standing.

[94] Section 135(5) of the *BIA* provides that:

The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the

debtor if the trustee declines to interfere in the matter.
[Emphasis added.]

[95] In this case, the motion judge held that as an equity owner, Rana would not have had standing to apply to the court to expunge Paul's claims under s. 135(5) of the *BIA* because he was neither a creditor nor a debtor under the statutory meaning of those terms.

[96] A "creditor" within the meaning of s. 2 of the *BIA*, is a person who has, on a balance of probabilities, established that they have a provable claim.

[97] In this proceeding, a "Claim" is (i) based on facts that in whole or in part, existed before the date of the Receivership Order, (ii) relates to a time prior to the date of the Receivership Order, or (iii) would have been provable in bankruptcy had RGC become bankrupt on the date of the Receivership Order.

[98] As discussed below, in some circumstances equity holders may be creditors in the context of bankruptcy proceedings. An equity interest alone, however, is not enough to grant Rana access to s. 135(5). In the circumstances of this case, Rana is not a creditor, because he did not file a timely and valid proof of claim in either the receivership or the bankruptcy.

(b) Rana Did Not Bring a s.135(5) Application

[99] Rana did not bring an application under section 135(5) of the *BIA*, though the motion judge found he "had every opportunity to bring a motion to challenge the allowance of Paul's Claims". Rana had many opportunities to question the

Trustee on the details of Paul's claims or formally request that the Wrongful Conduct Claim be disallowed, but on the record before us, it appears he failed to do so. He did not bring a s. 135(5) application and did not take the steps necessary for one to be validly brought. Nor, in the circumstances, could he have done so.

(c) No Claim Filed in the Receivership

[100] The appellant Rana was obligated to file a claim within the Receivership. The Claims Bar Date in the Receivership, established by court order, was October 31, 2021.

[101] The Trustee was permitted to rely upon the fact that Rana had not filed a claim in the receivership and was therefore not permitted to do so in the bankruptcy.

(d) No Timely Claim Filed in the Bankruptcy

[102] Even if Rana's claim was not barred by the Claims Bar Date in the Receivership, Rana also failed to file a proof of claim in the Bankruptcy in a timely manner.

[103] Under the *BIA*, there are generally three opportunities to file a proof of claim: (i) prior to the first meeting of creditors, to be permitted to vote; (ii) in response to a notice to prove a claim sent by the Trustee, to be provided within 30 days; and (iii) prior to a distribution, if the creditor wishes to participate in the distribution.

[104] Although Rana was aware of the meeting of creditors, he did not seek to participate. Because he did not file a claim in the Receivership, the Trustee did not send a notice of claim to Rana because he was not a creditor. Rana was, however, aware of the Trustee's intention to make a distribution that excluded him, no later than August 23, 2024.

[105] Notably, a creditor who seeks to challenge another creditor's proof of claim (and the valuation evidence it is based on) pursuant to s. 135(5) may lead their own valuation evidence: see e.g. *Mamdani (Re)*, 2021 ABQB 632, at paras. 16-18.

[106] The Trustee was unable to reconcile Rana's Claim with ASR's records and therefore concluded that it was "unable to accept the proof of claim based on the information provided". He nonetheless advised that he would consider any additional information that Rana chose to submit. Rana chose not to do so.

[107] Rana ignored the deadlines until the eve of the motion, and when he did, his claim was deficient.

(e) No Standing on Account of Equity Interest

[108] Rana argues that his status as a shareholder should somehow grant him the ability to challenge the Wrongful Conduct Claim. I do not accept this submission.

[109] In most insolvency proceedings, equity holders have no economic interest in the outcome of the proceeding and have no standing to interfere. However, in

rare circumstances, an equity owner can be a creditor. The *BIA* defines “equity claim” as:

a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).

[110] No payment can be made in respect of an equity claim until all claims other than equity claims are satisfied in full. In the vast majority of insolvencies, this will never occur. However, the *BIA* provides that where there are sufficient funds to repay all debts and liabilities of a bankrupt, an equity claim can be a “claim”, and one holding an equity claim can be a “creditor”. For example, s. 54.1 provides that “creditors having equity claims” are to be classed together for proposal voting purposes, and s. 140.1 provides that “A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.” In such cases, an equity holder can be a creditor.

[111] In this case, Paul's Wrongful Conduct Claim is an equity claim. On pages 7-8 of the Trustee's Second Report, the Trustee also classified Paul's Ownership Claim (his claim for his right, as a shareholder, to receive a proportionate distribution of the corporate debtors' assets if any remain after all debts and liabilities are satisfied) as an equity claim.

[112] Nevertheless, holding an equity interest alone is not enough for a provable equity claim or creditor status. As noted above, in most cases shareholders have no economic interest in an insolvency proceeding. Nor can equity holders "bootstrap" their way into s. 135 by contending that, if their challenge to an accepted claim is successful, they will then become creditors or their theoretical likelihood of recovery will increase³.

[113] Based on Rana's arguments before me, I see no reason to disturb the motion judge's conclusion that Rana's failure to file a timely and well-supported proof of claim means he is not a "creditor" and cannot access s. 135(5).

(f) No Error in Not Considering the Merits of the Wrongful Conduct Claim

[114] As a result of finding that Rana lacked standing under any section of the *BIA*, the motion judge did not consider the merits of the Wrongful Conduct Claim.

³ See *YG Limited Partnership and YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505, 168 O.R. (3d) 153, for a similar situation, although disposed of on different grounds.

[115] Even if he had standing, which as set out above, he does not, there is no merit to Rana's claim that Paul is better off now than he would have been had the business been sold in 2018 and that he should therefore now be allowed to bring his claim.

[116] As outlined in the Receiver's Seventh Report, the Receiver retained Grant Thornton to prepare a valuation of the Trucking Business as of October 31, 2018. This calculation was provided to Rana in early February 2022, and he did not question its accuracy. As such, on May 2, 2022, Grant Thornton issued a valuation, concluding that the Trucking Business had a value of approximately \$5.3 million as of that date.

[117] Had the business been sold in 2018, Paul would have received \$2.65 million or more for his share of the business. Absent allowance for the Wrongful Conduct Claim, he will only receive \$1 million in 2025.

[118] Moreover, the motion judge had before her no evidence challenging the value of the Wrongful Conduct Claim that would warrant a consideration of the merits. The appellant now raises, for the first time, the argument that the proceeds from RGC's liquidation in the receivership, less creditor claims, were higher than the estimated 2018 value of RGC's assets, such that the motion judge should have considered the merits of the wrongful conduct claim. This argument is unsubstantiated and accordingly has no merit.

(g) Conclusion on the s. 135 Claim

[119] For these reasons, I see no error in the motion judge's conclusion that there was no further avenue available to Rana to challenge Paul's claims and that, since the matter had been ongoing for years and the Claims Bar Date was more than three years before, it needed to be concluded.

[120] I would therefore dismiss this ground of appeal.

CONCLUSION

[121] For the above reasons, I would dismiss the appeal. I would award partial indemnity costs to the respondent Paul in the amount of \$60,000 as agreed by the parties. The Trustee seeks no costs and no costs are awarded to it.

Released: December 3, 2025 "J.A.T."

"Thorburn J.A."

I agree. "Coroza J.A."

I agree. "S. Gomery J.A."

TAB 10

COURT OF APPEAL FOR ONTARIO

CITATION: Reciprocal Opportunities Incorporated v. Sikh Lehar International
Organization, 2018 ONCA 713

DATE: 20180831

DOCKET: C65109

Hoy A.C.J.O., van Rensburg and Pardu JJ.A.

BETWEEN

Reciprocal Opportunities Incorporated

Plaintiff (Respondent)

and

Sikh Lehar International Organization, Narinderjit Singh Mattu, Rajwant Kaur
Nijjar, Manjit Singh Mangat, Kamaljit Kaur Mangat, Suchet Singh Saini, Kamaljit
Kaur Saini, Gurdev Singh Gill, Kanwaljit Kaur Gill, Inderjeet Singh Saini, Jatinder
Kaur Saini, Harjeet Singh Thabal, Jaswinder Thabal, Hardeep Singh Dhoot,
Raminder Dhoot, Daljit Singh Jammu, Parnpal Jammu, Harkanwal Singh,
Kanwaljit Singh, Ramandeep Singh Athwal, Harnish Mangat, Sikanderjit Singh
Dhaliwal, Sukhinder Dhaliwal, Gurdish Singh Mangat, Satinderjit Kaur Mangat
and Guru Nanak Property Management Ltd.

Defendants (Respondent)

Paul J. Pape, for the appellant Sukhinder Sandhu

Dennis Touesnard, for the receiver JP Graci & Associates Ltd.

Ted R. Laan, for the respondent Sikh Lehar International Organization

Jonathan Piccin, for the respondent Community Trust Company and 2283435
Ontario Inc.

Heard: July 18, 2018

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice,
dated February 28, 2018.

Hoy A.C.J.O.:

[1] The appellant, Sukhinder Sandhu, appeals the February 28, 2018 order of the motion judge, declining to approve the sale by a court-appointed receiver of the property known as 79 Bramsteele Road, Brampton, Ontario (the “Property”) to him.

[2] For the following reasons, I would allow the appeal, set aside the order of the motion judge, and direct a new hearing.

Background

[3] Sikh Lehar International Organization (“SLIO”) was established as a religious, private charitable organization to buy the Property and establish, manage and operate a Gurdwara (a Sikh temple). The Gurdwara is a tenant, but not the sole tenant, of the Property.

[4] By 2014, SLIO was insolvent.

[5] The Property has been the subject of litigation. The trustees of SLIO all wanted to sell the Property, and purported to sell it to different purchasers. Disagreements about selling the Property led to the departure of some of the trustees and litigation about the amounts owing to the departing trustees: see *Sikh Lehar International Organization v. Saini*, 2018 ONSC 2839. It also gave rise to litigation between SLIO, its two remaining trustees, Manjit Mangat and Harkanwal Singh, and the appellant, who had sought to purchase the Property:

see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680.¹

Further, Canadian Convention Centre Inc. (“CCC”), a tenant of the Property, is seeking damages for alleged breaches of its lease in the amount of \$2 million.²

[6] On September 1, 2017, at the instance of the first mortgagee of the Property,³ Reciprocal Opportunities Incorporated (“ROI”), the motion judge granted an order appointing J.P. Graci and Associates Ltd. (the “Receiver”) as receiver of all the assets, undertakings and property of SLIO. The order authorized the Receiver to sell the Property, subject to the approval of the court.

[7] The Receiver proceeded to have the Property appraised on September 15, 2017 and contacted persons who had expressed an interest in purchasing the Property.

[8] However, in an email on October 4, 2017, SLIO advised the Receiver that it had a firm commitment from a lender to take an assignment of “your mortgage” (presumably referring to the first mortgage), with the transaction to close in the next two weeks. The Receiver responded by email on October 5, 2017. It advised that the payout on the first mortgage was \$4,092,745.31, the per diem rate was \$1,114.51, and the Receiver’s fees and legal fees were \$80,000. The

¹ In that action, the trial judge found that neither party was ready, willing and able to close the transaction, as at the contemplated closing date, and ordered SLIO and its two remaining trustees to pay a total of \$2,206,729.07 to the appellant. An appeal of the decision is pending to this court.

² CCC’s action has been stayed by the receivership order in these proceedings.

³ While at the instance of the first mortgagee, ROI, the appointment ultimately proceeded with the consent of SLIO and CCC.

Receiver further advised that if the mortgage amount and outstanding expenses were paid, it would apply to the court to approve the assignment of the mortgage and to be discharged. The Receiver also stated it anticipated having the information necessary to begin marketing the Property by November 1, 2017. The Receiver copied its counsel and SLIO's real estate counsel with its response, and separately forwarded its response (together with SLIO's October 4, 2017 email) to, among others, counsel for the appellant.

[9] There is no indication in the record that SLIO – or the proposed assignee – was in funds and prepared to close within two weeks of its October 4, 2017 email to the Receiver.

[10] The Receiver retained the services of a commercial real estate broker, who listed the Property for sale and put it on MLS as of October 31, 2017. The real estate broker also opined that the current value of the Property was significantly less than the appraised value, as the appraisal obtained by the Receiver assumed that the Property's roof structures were in good working order, but in fact a significant portion of the roof required immediate replacement.

[11] By letter dated October 31, 2017 to real estate counsel for SLIO, counsel for the Receiver confirmed that "provided [SLIO] buys out the first mortgage on the property on or before November 14, 2017, then the Receiver will move for an Order having itself discharged." He advised that, as of that date, the payout of

the first mortgage was in the amount of \$4,121,722.50, with a per diem rate of \$1,114.51. He further advised that provided payment was made before November 14, 2017, the Receiver's fees and legal fees would be capped at \$80,000 plus HST.

[12] The Receiver received three offers to purchase the Property. It entered into an agreement (the "Agreement") to sell the Property to the appellant on November 2, 2017.⁴

[13] Under the Agreement, the appellant agrees to purchase the Property on an "as is where is" basis, and to complete the transaction 15 business days after the Receiver obtains an approval and vesting order. With the exception of the requirement for an approval and vesting order, the appellant's obligation to complete the purchase is essentially unconditional. The Agreement provides for a purchase price that exceeds the current value of the Property as assessed by the commercial real estate broker retained by the Receiver, and that approximates the appraised value of the Property.

[14] In an affidavit sworn December 22, 2017, Mr. Mangat, one of the remaining trustees of SLIO, deposed that the appellant was "aware of the

⁴ The Receiver received offers from: (1) the appellant; (2) 2207190 Ontario Inc.; and (3) Sukhmeet S. Sandhu. 2207190 Ontario Inc. is controlled by the appellant and is a judgment creditor in the action relating to the appellant's prior attempt to purchase the Property: see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680. In his affidavit dated December 22, 2017, Mr. Mangat deposes that Sukhmeet S. Sandhu is the appellant's son.

Receiver's intention to assign the first mortgage upon payment of the amounts owing." Mr. Mangat was not cross-examined on his affidavit.

[15] The "buy out" of the first mortgage did not proceed by November 14, 2017.

[16] In an email to the Receiver on November 23, 2017, real estate counsel for SLIO confirmed that SLIO had secured financing from a lender that was prepared to pay out all amounts owed to the Receiver in exchange for an assignment of the first mortgage. He advised that, among other items, the lender required a corporate resolution of ROI authorizing the assignment, the consent of the Receiver to the discharge of the certificate of pending litigation ("CPL") registered on title to the Property by the appellant, and the Receiver's undertaking to obtain a court order discharging the receivership upon payment of all amounts owing, in order to complete the assignment.

[17] In an email later the same day, counsel for the Receiver clarified that while the Receiver could undertake to move for an order discharging the Receiver, the court would have discretion to grant the relief. He asked that counsel for the lender confirm that the lender was in funds. He indicated that the Receiver and its counsel could confirm their fees, and the Receiver could prepare a summary of its receipts and disbursements. He stated he trusted that the information he had previously provided regarding the amount owing on the first mortgage was satisfactory. He inquired as to the closing date.

[18] In an email from counsel for the Receiver to real estate counsel for SLIO dated November 24, 2017, counsel for the Receiver seems to suggest the proposed lender would have to work out the discharge of the CPL and, if it could not, would have to decide whether or not to take the assignment without the CPL being discharged.⁵ Counsel for the Receiver cautioned that, “[i]f we cannot move forward with your proposal, I will be moving on January 5, 2018 for an order approving a sale agreement signed by the Receiver.”

[19] In an email later that day to SLIO’s litigation counsel, counsel for the Receiver indicated that, “[i]f your client can get financing and the CPL issue can be dealt with, we will deal with you as per [SLIO’s real estate counsel’s] original email to the receiver.” (This presumably refers to the November 23, 2017 email, which is the earliest email in the record from SLIO’s real estate counsel). He cautioned, “[t]hat said, we will keep moving towards the sale of the property and I intend to bring the motion on January 5, 2018 for approval if the mortgage is not assigned beforehand.”

[20] In an email on November 29, 2017 to both SLIO’s real estate and litigation counsel, counsel for the Receiver characterized their prior exchanges as “without prejudice settlement discussions.” He indicated that, as an officer of the court, the Receiver must have its actions approved by the court. He explained that the

⁵ In his affidavit sworn December 21, 2017, real estate counsel to SLIO advised that the CPL was discharged before the hearing date on the motion below.

Receiver could not assign ROI's mortgage, but SLIO has a right to redeem the mortgage.

[21] He further outlined the Receiver's position on the proposed assignment of the first mortgage:

As you also know, prior to receipt of [the November 23 proposal] the receiver signed an agreement to sell the property to a third party. A motion will be served returnable January 5, 2017 [sic] for approval of that sale.

If your client wishes to redeem the mortgage and have the receiver discharged, it can bring a motion for [sic] in my action on notice to all affected parties for an order allowing it to redeem, and, on redemption, an order that the receiver be discharged. The Receiver will consent to leave to bring the motion and will not oppose that relief if sought.

[22] In an email to counsel for the Receiver on November 30, 2017, litigation counsel for SLIO asked who ROI's representative was for the purpose of assigning the first mortgage.

[23] Counsel for the Receiver provided the identity of ROI's counsel in a responding email on the same date. ROI's counsel is with the same law firm as Receiver's counsel.

[24] By email dated December 5, 2017, counsel for the Receiver provided his fees and those of the Receiver to date to real estate counsel for SLIO.

[25] Real estate counsel for SLIO contacted counsel for ROI by email dated December 5, 2017. He advised of the documents the proposed assignee was requesting from ROI, including an accounting of all monies owed to ROI under the mortgage. He asked counsel for ROI to confirm that ROI was prepared to deliver the assignment and the other requested documents. He stated that “[t]he solicitor for the proposed assignor [sic] confirms he is in funds.”

[26] The First Report of the Receiver is dated December 6, 2017. The Receiver prepared it in support of its motion for court approval of the Agreement and sale of the Property. The Report details the sales process the Receiver undertook with respect to the Property, leading it to seek court approval of the Agreement. The Report makes no reference to SLIO’s attempts to arrange an assignment of the first mortgage held by ROI.

[27] In his affidavit of December 6, 2017, real estate counsel for SLIO deposed that SLIO was concerned that if counsel for ROI did not respond quickly to the requisitions referred to in his email of December 5, 2017, the Property would be lost to a third-party purchaser in January 2018.

[28] In his supplementary affidavit of December 21, 2017, filed in response to the Receiver’s motion for approval of the Agreement, real estate counsel for SLIO further deposed that:

- On December 8, 2017, counsel for ROI delivered a draft mortgage statement to counsel for SLIO.

- He advised counsel for ROI that counsel for the proposed lender took the position that the default interest rate charged by ROI was contrary to s. 8 of the *Interest Act*, R.S.C 1985, c. I-15 and the proposed lender would not pay it. Counsel for ROI suggested that some amount in excess of the rate charged on the principal balance of the mortgage may have been the result of extension agreements entered into by SLIO and ROI.
- On December 19, 2017, counsel for ROI delivered various documents setting out revised amounts required for the payout of the first mortgage. These amounts differed from those set out in the original Notice of Sale, dated May 17, 2017, and from other amounts provided by ROI in the interim.
- The delay in effecting the assignment of the first mortgage was entirely the responsibility of ROI because of its failure to provide appropriate calculations of the amount owing.
- The requisitions required by the proposed assignee from the Receiver or ROI had otherwise been substantially complied with.

[29] In his affidavit sworn December 22, 2017, Mr. Mangat deposed that the emails of October 5, November 23 and 24, 2017 and the letter of October 31, 2017, referred to above, led SLIO to believe that “upon payment of the proper amounts owing under the First Mortgage, the Receiver would arrange the assignment of the First Mortgage. As a result [SLIO] took steps to secure the proper financing of that assignment and incurred substantial costs in the process.” Mr. Mangat then detailed borrowings from five individuals totaling approximately \$396,268.87 incurred since the beginning of September 2017,

which he says are or “will be” debts of SLIO. He deposed that of those borrowings:

- \$207,000 was paid to the broker who had been trying to arrange financing for SLIO since September 2017, in part payment of his brokerage fee;
- \$24,518 was paid to the second mortgagee on October 14, 2017 to bring that mortgage into good standing, as required by the proposed assignee of the first mortgage;⁶
- \$ 91,617.36 was paid to the City of Brampton on November 24, 2017 on account of tax arrears, again a condition of the proposed assignee of the first mortgage; and
- \$73,133.51 was paid on or after November 21, 2017 to obtain the discharge of a CRA lien for HST arrears, again a condition of the proposed assignee of the first mortgage.

[30] Mr. Mangat further deposed that SLIO was unaware of the Agreement until the Receiver delivered its motion materials. The Receiver’s motion materials are dated December 6, 2017.

[31] Neither Mr. Mangat nor SLIO’s real estate counsel deposed that all the proposed assignee’s conditions of closing had been satisfied and that, but for the determination of the payout amount, the proposed assignee was prepared to close the assignment transaction.

⁶ Counsel for the second mortgagee (who is also counsel for the proposed assignee of the first mortgage) advised at the hearing of the appeal that, as of that date, the second mortgage was in arrears.

The January 5, 2018 attendance before the motion judge

[32] In its notice of motion dated December 6, 2017, filed in connection with the January 5, 2018 attendance before the motion judge, the Receiver sought an order approving the sale of the Property to the appellant.

[33] SLIO opposed the Receiver's motion. In response, SLIO brought its own motion seeking: (1) an order requiring ROI to assign the first mortgage, upon payment of all amounts owed to the Receiver or ROI; and (2) an order discharging the Receiver upon payment of such amounts.

[34] In its factum filed on the motion, the Receiver indicated that it was prepared to be discharged – but only on the condition that the court be satisfied that it had discharged its duties, and on approval of the activities and accounts of the Receiver and its counsel. It stated that it entered into the Agreement prior to the “conditional request to take an assignment of the first mortgage of ROI.” It noted that the effect of the discharge sought by SLIO, as a condition of the assignment of the first mortgage, was that the sale transaction would not be approved and that the Receiver would seek, as part of the discharge order, a release from any potential liability to the appellant. The Receiver noted that the appellant and CCC opposed its discharge. In the event that the court was unwilling to exercise its discretion to discharge the Receiver, it sought an order approving the sale of the Property to the appellant.

[35] The appellant appeared and filed a factum. Among other arguments, the appellant submitted that SLIO had not said how it would make future payments to its mortgagees or creditors if the assignment transaction proceeded, or even that it would. The appellant argued that the sale to him should be approved and a vesting order issued.

[36] CCC filed a responding motion record opposing the form of vesting order sought because that order purported to vest the Property in the appellant free and clear of all encumbrances, including CCC's lease.

The motion judge's reasons

[37] The motion judge declined to approve the sale of the Property to the appellant and, instead, established a process that would permit the assignment of the first mortgage: *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization et al.*, 2018 ONSC 227.

[38] In his reasons, the motion judge briefly reviewed SLIO's financial position. He noted that the first, second and third mortgages on the Property remained in default; a construction lien was registered in the amount of \$406,500; the Ministry of Revenue had a tax lien in the amount of \$108,156; the City of Brantford [sic] was in a position to put the Property up for sale for tax arrears in the amount of \$433,818.59; CCC was seeking damages in the amount of \$2 million for breach

of its lease; there was a judgment in favour of the appellant in the amount of \$2,206,729.01; and that there were numerous other debts.

[39] At para. 18, the motion judge instructed himself on the four duties which *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.) directs a court must perform when deciding whether to approve a sale of a property by a receiver:

1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. The court should consider the interests of all parties.
3. The court should consider the efficacy and integrity of the process by which the offers are obtained.
4. The court should consider whether there has been unfairness in the working out of the process.

[40] The motion judge found that the Receiver took reasonable steps to obtain the best price for the Property. The motion judge noted, at para. 22, that interest was accruing rapidly on both the first mortgage and SLIO's other debts:

The [first] mortgage has been in arrears since September 2, 2016. There are substantial other debts that have also been in arrears for lengthy periods of time. Interest on the first mortgage and other debts has been accruing and escalating at a rate that the receiver must consider when acting in a manner that is efficient and fair to all interested parties.

[41] Then, at para. 23, the motion judge stated he would not approve the sale, explaining: “[e]xcept for the conduct of the Receiver/Plaintiff relative to the Defendant SLIO, I would have approved the sale.”

[42] At para. 26, the motion judge found that central to the communications from October 5, 2017 to the end of December 2017 between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee “were inconsistent representations of what the pay-out amount would be in order to effect the proposed assignment of the first mortgage.”

[43] He found, at para. 30:

It is clear that as of the end of December, 2017, the Receiver/Plaintiff was prepared to accept payment of the outstanding balance of the first mortgage and assign the mortgage to a third party. The only thing that had not been established was the proper payout.

[44] He concluded, at para. 32:

Having regard to the final consideration of *Royal Bank of Canada v. Soundair Corp*, I find the manner in which the process was conducted resulted in an unfairness to the Defendant SLIO and the prospective assignee of the first mortgage.

[45] In his order dated February 28, 2018, the motion judge ordered that the proposed sale was not approved. He ordered ROI and the Receiver to provide a statement that they intend to rely on for purposes of the payout of the first mortgage and adjourned the matter to a further hearing before him, in order to fix

the payout and set the terms of closing the payout and assignment of the first mortgage. He specifically ordered that the Receiver was not discharged.

The parties' submissions on appeal

(a) The appellant's submissions

[46] The appellant does not challenge the motion judge's finding that the manner in which the process was conducted resulted in an unfairness to SLIO and the prospective assignee of the first mortgage. Rather, the appellant argues that the motion judge provided insufficient reasons because he did not explain why the unfairness to SLIO and the prospective assignee of the first mortgage should trump the unfairness to the appellant of not having the sale approved.

[47] Further, the appellant argues that the motion judge erred in his application of the second *Soundair* duty by failing to consider the interests of creditors and the interests of the appellant, *qua* purchaser. He submits that this court should set aside the order of the motion judge and approve the sale of the Property to him. Alternatively, he asks that the order be set aside and new hearing ordered.

[48] The appellant does not argue that that SLIO's right of redemption or assignment terminated when the Receiver entered into the Agreement.

(b) The Receiver's submissions

[49] On appeal, the Receiver supports the position of the appellant. It argues that the motion judge erred in his application of the second *Soundair* duty by

failing to consider the interests of all parties and by focusing solely on the interests of SLIO. It says that not approving the sale leaves SLIO's creditors in limbo as to when and by what means the Property will be sold to satisfy their debts.

[50] It also argues that the motion judge failed to consider the third *Soundair* factor – namely, the efficacy and integrity of the process by which offers were obtained. It argues that this factor weighs in favour of approving the sale.

[51] Finally, the Receiver argues that the fourth *Soundair* duty only requires an inquiry into the fairness of the sale process, and does not contemplate an inquiry into the fairness of other aspects of the receivership. In its submission, any unfairness resulting from the Receiver's conduct in relation to SLIO and the proposed assignment is unrelated to the sale process undertaken with respect to the Property. Its position is that unfairness in the broader receivership is relevant only to an analysis of the interests of the parties under the second *Soundair* duty.

(c) SLIO's submissions

[52] SLIO argues that the motion judge correctly identified the test in *Soundair*, identified the appellant as a creditor, and considered the creditors' interests. It states that there is sufficient equity in the Property such that the appellant's position as a creditor is not at risk.

[53] SLIO argues that it was treated unfairly because the Receiver breached its written consent to permit the redemption/assignment of the first mortgage and to obtain an order for discharge. In SLIO's submission, it is implicit in the motion judge's reasons that he found that the unfairness to SLIO was the most important factor in the circumstances and the motion judge's reasons were sufficient in this regard. SLIO notes that, in any event, insufficiency of reasons is not automatically fatal to a decision.

Analysis

(a) The motion judge erred in his performance of the second *Soundair* duty

[54] The motion judge's order was discretionary in nature. An appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations: see *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22.

[55] I agree with the appellant and the Receiver that the motion judge erred in performing the second *Soundair* duty: first, by failing to properly consider and give sufficient weight to the interests of the creditors; and second, by failing to consider the interests of the appellant, *qua* purchaser.

[56] I begin by acknowledging that while the primary interest is that of the creditors of the debtor, the interests of the creditors is not the only or overriding consideration. The interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. And in appropriate cases, the interests of the debtor must also be taken into account: see *Soundair*, at paras. 39-40.

[57] Although the motion judge noted that there were substantial debts in arrears and interest was accruing on those debts, he did not consider how declining to approve the sale, so that the assignment of the first mortgage might proceed, would affect the creditors' interests.

[58] If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. It would not permit SLIO to repay the other substantial debts which the motion judge indicated were in arrears. It is also not clear that SLIO would be in a position to service the first mortgage, if assigned to a new mortgagee.

[59] Further, according to Mr. Mangat's evidence, if the assignment proceeds SLIO will assume additional debt in respect of the brokerage fees payable for arranging the assignment, thus worsening SLIO's financial position. While Mr. Mangat deposed that certain debts had been repaid (at least in part) to satisfy the prospective assignee's conditions of closing, it is intended that SLIO will

assume debts incurred to facilitate those repayments. It also appears that the Property is deteriorating and urgently requires repair. There is no indication as to how those repairs will be funded.⁷

[60] The receivership was triggered by SLIO's insolvency. The motion judge did not engage in any analysis of the continued viability of SLIO and SLIO's ability to pay the creditors if the sale did not proceed. He did not consider whether declining to approve the sale transaction would merely delay the inevitable. Given that *Soundair* directs the primary interest to be considered is that of the creditors of the debtor, this was an error.

[61] Moreover, the motion judge did not give any consideration to the interests of the appellant, *qua* purchaser. He did not consider the potential prejudice that would result to the appellant's interests if the sale was not approved. Significantly, while the motion judge declined to approve the sale based on the conduct of the Receiver and first mortgagee vis-à-vis SLIO, he did not find that the appellant was implicated in this conduct.

[62] As a result, I conclude that the motion judge erred in his application of the second *Soundair* duty. In light of this conclusion, it is unnecessary to address the appellant's argument that the motion judge provided insufficient reasons or the

⁷ In a letter dated October 31, 2017, the commercial real estate broker retained by the Receiver notes that there are visible roof leaks and a portion of the tar-gravel roof needs to be replaced immediately. The broker estimated that half of the HVAC units and a portion of the parking lot will need to be replaced. The broker also indicated that the exterior of the building requires immediate attention.

Receiver's arguments regarding the application of the third and fourth *Soundair* factors.

(b) The appropriate remedy is to set aside the order below and direct a new hearing

[63] As I have concluded that the motion judge erred in principle, the next question is whether this court should consider whether to approve the sale transaction *de novo* or set aside the order below and order a new hearing. For several reasons, I would set aside the order below and order a new hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[64] First, the circumstances are unusual. Contrary to what is suggested by the Receiver's notice of motion filed below, and to what I had understood at the hearing of the appeal, this is not a case where the Receiver unequivocally recommended that the sale be approved. Rather, its factum below indicates that it did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. It recommended the sale only in the event that the motion judge was unwilling to insulate it from liability to the appellant. A re-hearing would permit the motion judge to obtain clarity on the Receiver's position.

[65] Second, the First Report of the Receiver does not provide an update on SLIO's financial position, indicate how the assignment option would affect creditors other than ROI, explain what it told the appellant about the proposed assignment before entering into the Agreement and what it told SLIO about the proposed sale, or describe what role it took in determining the amount outstanding under the first mortgage. A re-hearing would permit the Receiver to provide a further report and assist the motion judge in balancing the interests of the creditors, the appellant, SLIO, and the proposed assignee. If the motion judge were inclined to discharge the Receiver, an updated report would also assist the motion judge in determining the terms of its discharge.

[66] Third, it is not clear that the proposed assignee is ready, willing and able to close the assignment upon determination by the motion judge of the payout amount under the first mortgage. Among other things, the discharge of the Receiver, which the motion judge declined to grant, at least at this juncture, appears to be a condition of the proposed assignment.

[67] Mr. Mangat deposed that SLIO has borrowed money to discharge certain debts, as required by the proposed assignee of the first mortgage. But, based on the amounts owing to those creditors as set out in the motion judge's reasons, the amounts Mr. Mangat says have been repaid are less than the amounts owing to those creditors. Moreover, despite Mr. Mangat's evidence that the arrears on the second mortgage had been repaid, the motion judge's reasons indicate, and

counsel for the second mortgagee advised this court in oral argument, that the second mortgage is in arrears. SLIO's overture to the Receiver also followed on the heels of unsuccessful attempts by SLIO to refinance the first mortgage before the Receiver was appointed. A re-hearing should permit the motion judge to determine whether the assignment transaction could proceed without delay.

[68] Fourth, a number of factual determinations may need to be made in order to permit the balancing of the interests of the creditors, the appellant, SLIO and the proposed assignee, to determine whether or not the sale should be approved and, if the motion judge is inclined to order the discharge of the Receiver, the terms of its discharge.

[69] For example, as indicated above, Mr. Mangat deposed that the appellant was aware of the Receiver's intention to assign the first mortgage upon payment of the amounts owing. I understand that his allegation is based on the fact that counsel for the Receiver forwarded its October 5, 2017 email, and SLIO's email of October 4, 2017, to counsel for the appellant. However, as I have stated, the motion judge made no finding as to what the appellant knew, and when. The emails of October 4 and 5, 2017 seemed to contemplate that the assignment would close by October 18, 2017 (i.e. "in the next two weeks"). It is unclear what the appellant knew about the proposed assignment transaction thereafter. There may also be credibility issues at play, as Mr. Mangat has been previously censured for his serious failure to disclose material facts to the court on a motion

for an injunction involving the Property: *Sikh Lehar International Organization v. Suchet Saini et al.*, (28 January 2016), Brampton, CV-15-1855-00 (Ont. S.C.).

[70] Nor did the motion judge make any findings about what SLIO knew, and when. In his affidavit of December 22, 2017, Mr. Mangat deposes SLIO did not know of the Agreement until the delivery of the Receiver's motion materials on the motion to approve the sale of the Property. The Receiver's motion materials are dated December 6, 2017. However, counsel for the Receiver advised both SLIO's litigation counsel and real estate counsel by emails dated November 24, 2017 that he intended to bring a motion to approve the sale of the property returnable January 5, 2018 if the assignment did not proceed. Counsel for the Receiver repeated this caution in his email of November 29, 2017. Indeed, as early as October 5, 2017, the Receiver had told SLIO that it would likely be in a position to market the Property by November 1, 2017. It may be that Mr. Mangat incurred at least some – and perhaps most – of the costs he did, purportedly on behalf of SLIO, with “fair warning” that, in the appellant's words, the Receiver was “riding two horses.”

[71] Also, in terms of the unfairness to SLIO, the motion judge made no findings about what the Receiver knew about Mr. Mangat incurring indebtedness in connection with the assignment, purportedly on behalf of SLIO. The motion judge also did not make any finding as to whether Mr. Mangat incurred these debts contrary to the receivership order, which empowers and authorizes the

Receiver, to the exclusion of SLIO and all other persons, to manage SLIO's business and incur obligations.

[72] Similarly, while the motion judge referred to what he described as inconsistent representations about the payout amount between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee as creating the unfairness to SLIO and the prospective assignee of the first mortgage, the evidence of SLIO's real estate counsel was that the delay was "entirely the responsibility of ROI because of its failure to provide appropriate payout calculations of the amount owing" [emphasis added]. More detailed findings may be required about the cause of the delay in settling the payout amount.

[73] To be clear, I do not purport to make any of these factual findings; that is a matter for the motion judge on the new hearing, to the extent necessary to resolve the motion.

[74] Fifth and finally, the issue raised by CCC regarding the form of the vesting order contemplated by the Agreement remains to be resolved.

Disposition

[75] For these reasons, I would allow the appeal, set aside the order below, and order a re-hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[76] Subject to any further directions that the motion judge may provide, I would also direct that, for the re-hearing: (1) the Receiver provide a further report, detailing SLIO's current financial position, indicating how the sale and assignment options would affect SLIO's creditors, explaining what it told the appellant about the proposed assignment before entering into the Agreement, explaining what it told SLIO about the proposed sale, explaining what role it took in determining the amount outstanding under the first mortgage, and clarifying its position; (2) ROI provide a statement of the amounts owing under the first mortgage, indicating the extent to which interest on arrears has been calculated at a rate greater than the pre-default interest rate; and (3) SLIO provide a copy of its agreement with the proposed assignee of the first mortgage and evidence from the prospective assignee of the first mortgage, confirming what (if any) conditions to closing remain outstanding and that it is in funds and willing and able to close upon satisfaction of those conditions.

[77] I would order that the appellant be entitled to his costs of the appeal, fixed in the amount of \$19,100, inclusive of HST and disbursements.

Released: "AH" "AUG 31 2018"

"Alexandra Hoy A.C.J.O."
"I agree K.M. van Rensburg J.A."
"I agree G. Pardu J.A."

TAB 11

RJR — MacDonald Inc. *Applicant*

v.

**The Attorney General of
Canada** *Respondent*

and

The Attorney General of Quebec
Mis-en-cause

and

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

**The Attorney General of
Canada** *Respondent*

and

The Attorney General of Quebec
Mis-en-cause

and

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief***RJR — MacDonald Inc.** *Requérante*

c.

^a **Le procureur général du Canada** *Intimé*^b et**Le procureur général du Québec**
Mis en cause^c et^d **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*^e et entre**Imperial Tobacco Ltd.** *Requérante*^f c.**Le procureur général du Canada** *Intimé*^g

et

^h **Le procureur général du Québec**
Mis en cause

et

ⁱ **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*
^j

INDEXED AS: RJR — MACDONALD INC. v. CANADA
(ATTORNEY GENERAL)

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA
(PROCUREUR GÉNÉRAL)

File Nos.: 23460, 23490.

Nos du greffe: 23460, 23490.

1993: October 4; 1994: March 3.

a 1993: 4 octobre; 1994: 3 mars.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

APPLICATIONS FOR INTERLOCUTORY RELIEF

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2b) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada*.

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la pondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepois à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and Yves Lebœuf, for the respondent.

W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

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Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.

Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et Yves Lebœuf, pour l'intimé.

W. Ian C. Binnie, c.r., et Colin Baxter, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

LES JUGES SOPINKA ET CORY —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(b) of the

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementant que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4^e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1^{er} janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17f) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)b) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2b) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2b) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment*, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

étant dissident sur ce dernier point. Le juge Bros-sard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'inter-diction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 \$.

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais, «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent

decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

d II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4^e suppl.), L.C. 1988, ch. 20, art. 3:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(b) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2b) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2b) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to “make any order necessary to safeguard the rights of the parties”, the Court of Appeal made the following observation on the nature of the relief requested:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants’ contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l’intimé selon laquelle l’interdiction totale de la publicité diminuait la consommation n’était pas fiable et n’avait aucune valeur probante parce qu’elle n’établissait pas que l’interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l’intimé n’avait pas démontré que l’interdiction de la publicité portait le moins possible atteinte à la liberté d’expression. Le juge Chabot a conclu aussi que la preuve d’un lien rationnel entre la prohibition de la publicité au Canada et l’objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d’ingérence sociale incompatible avec l’essence même d’une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d’appel (relativement au sursis d’exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l’art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d’appel a fait l’observation suivante relativement à la nature du redressement demandé:

[TRADUCTION] Toutefois, ce qui est en cause en l’espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d’une part, la suspension de l’effet juridique d’une partie de la Loi et de l’obligation de s’y conformer pendant une période de 60 jours et, d’autre part, la suspension du pouvoir des autorités publiques responsables d’en assurer l’application. C’est une question sérieuse que de suspendre ou de retarder l’effet ou l’exécution d’une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l’application ou l’exécution d’une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d’empiéter dans les sphères législative et exécutive. [Souligné dans l’original.]

La cour a fait droit en partie au redressement demandé:

[TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu’il existe une possibilité que les requérantes soient poursuivies en vertu de l’art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2b) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] “body of opinion” favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the “national concern” branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(b) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act’s objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court’s jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l’atteinte minimale, du critère formulé dans l’arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l’article premier était satisfait puisqu’il se peut que l’interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d’après l’existence même d’un «corps d’opinions» favorables à l’adoption d’une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l’atteinte minimale en ce qu’elle n’interdit pas la consommation, n’interdit pas la publicité étrangère et n’écarte pas la possibilité d’obtenir de l’information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l’opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu’elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l’ordre et le bon gouvernement.

Cependant, le juge Brossard n’était pas d’avis que la violation de l’al. 2b) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu’elle n’établissait pas l’existence d’un lien, ou même l’existence d’une probabilité de lien, entre l’interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu’il est tout au moins possible que les buts visés soient atteints. Il n’a pas souscrit à l’opinion que la Loi satisfaisait au critère de l’atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu’il soit nécessaire d’imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d’accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoiqu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97....

(a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale n° 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)a) de cette disposition prévoit que des règles peuvent être adoptées pour:

97....

a) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
 - (i) There is a serious constitutional issue to be determined.
 - (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.
2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.
3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.
4. Les critères applicables à une suspension d'instance sont satisfaits:
 - (i) Il existe une question constitutionnelle sérieuse à juger.
 - (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra*. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. Les injonctions interlocutoires, la suspension d'instance et la Charte

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

[TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

[TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

[TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

^a Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

[TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

^e Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

^h Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2a) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et pourrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Québec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

[TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. Le préjudice irréparable

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

[TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that “there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.”

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a ‘special factor’ which must be considered in assessing where the balance of convenience lies and which must be “given the weight it should carry.” This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the “polycentric” nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, “An Inconvenient Balance: The Injunction as a Charter Remedy”, in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic “public” in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d’autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d’un cas déterminé.»

L’arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l’intérêt public est un «élément particulier» à considérer dans l’appréciation de la prépondérance des inconvénients, et qui doit recevoir «l’importance qu’il mérite» (à la p. 149). C’est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l’Ontario dans l’affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

[TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d’une loi ou de l’autorité d’un organisme chargé de l’application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l’organisme a comme mandat de protéger, et en faire l’appréciation par rapport à l’intérêt des plaideurs privés.

1. L’intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l’appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C’est le caractère «polycentrique» de la *Charte* qui exige un examen de l’intérêt public dans l’appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n’a pas le monopole de l’intérêt public. Comme le fait ressortir Cassels, à la p. 303:

[TRADUCTION] Bien qu’il soit fort important de tenir compte de l’intérêt public dans l’appréciation de la prépondérance des inconvénients, l’intérêt public dans les cas relevant de la *Charte* n’est pas sans équivoque ou asymétrique comme le laisse entendre l’arrêt *Metropolitan Stores*. Le procureur général n’est pas le représentant exclusif d’un public «monolithique» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

[TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la pondération des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convaincre le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a un sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. Sommaire

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

constitutional issues.” This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. Le préjudice irréparable

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. La prépondérance des inconvénients

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement d'avantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, n° 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

vention of the widespread and serious medical problems directly attributable to smoking.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

a La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

e *Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.*

TAB 12

Court of Queen's Bench of Alberta

Citation: Romspen Investment Corporation v. Hargate Properties Inc., 2012 ABQB 412

Date: 20120625
Docket: 1103 17749
Registry: Edmonton

Romspen Investment Corporation

Plaintiff

- and -

**Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd.,
1333183 Alberta Ltd., Bellavera Green Condominium Corp. and
Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic,
Kevyn Sheldon Frederick or Kevin Frederick and
Chateau Lacombe Capital Partners Ltd.**

Defendants

Reasons for Judgment of the Honourable Mr. Justice Donald Lee

I. Background

[1] This is an application by the Receiver, D. Manning & Associates Inc. for a sealing order with respect to the Receiver's report dated June 4, 2012; as well as for directions with respect to the disbursement of certain funds recovered by the Receiver from the accounts of Chateau Lacombe Capital Partners Ltd. ["CLCPL"]. There is also an application by the primary creditor for a one day redemption order in a related foreclosure application.

[2] The Receiver's report dated June 4, 2012 provides details with respect to the ongoing sale process of the Chateau Lacombe Hotel in downtown Edmonton, including the realtors marketing reports and appraisal of the hotel. The Receiver submits that the protection of the commercial interest herein forms a proper basis for the issuance of a sealing order as there is an ongoing sales process. In the absence of the sealing order with respect to the appraisal and

marketing reports, it is submitted that there is a serious risk that the integrity of the sales process will be adversely affected and that all parties involved in this matter will suffer financially.

[3] The primary creditor in this matter, Romspen Investment Corporation (“Romspen”), supports the Receiver’s application for a sealing order. Romspen is owed approximately 35 million dollars presently, and submits that the sealing order is required to protect the confidentiality of the sales process. The second mortgagee, Allied Hospitality Services Inc., [“Allied”] also supports the sealing order application.

[4] Opposing the sealing order, however, are counsel for Dr. Singh who has claimed a first mortgage on properties known as the “Church lands.” The priority of Dr. Singh’s claim as first mortgagee on the Church lands is in dispute as Romspen received an apparent postponement in it’s favor from Dr. Singh when it financed the hotel purchase in 2010. These lands consist of 20 acres on Ellerslie Road located in a rapidly developing residential suburban area of Edmonton which the principal of CLCPL, Kevin Frederick, had purchased from the Victory Christian Church in August 2008, for 18 million dollars.

[5] Counsel for the Victory Christian Church also opposes the sealing order request, arguing that concept of “Marshalling” could be applicable with respect to the Church lands given that the Church has now received an assignment of the 12 million dollar vendor take-back mortgage given by Kevin Frederick in it’s favor at the time of the 2008 purchase by his numbered company. The Victory Christian Church advises that at the present time as a result of the current developments in the case, the 20 acres of prime Edmonton real estate sold for 18 million dollars has resulted in no realisable funds to the Church. The Church is now also the subject of a potential removal proceeding from the lands that it uses for its worship services because of Romspen’s present foreclosure application.

[6] Counsel for Dr. Singh, a retired dentist, and the Church submit that they must have access to the marketing and appraisal reports that the Receiver, Romspen, and Allied Properties already have with respect to the Chateau Lacombe Hotel site. Counsel for Dr. Singh and the Church submit that it is only through their receipt of these marketing reports and appraisal that they will be able to determine that the best price is being obtained for the Chateau Lacombe Hotel site.

[7] The present appraisal comes in at a price well below that which is owed to the creditors, so all counsel supporting the granting of the sealing order argue that no useful purpose would be served in disclosing this information any further. They further submit that it is inevitable, and in fact, they wish the Court to direct as part of another application presently before me that a redemption order for the Church property be issued setting the redemption period at one day.

[8] Counsel for Dr. Singh, the first mortgagee on the Church lands, points out that the City of Edmonton’s current valuation of the Chateau Lacombe Hotel for municipal tax purposes is approximately 32 million dollars, and at the time the hotel was purchased in 2010 it was 38 million dollars. Based on three appraisals done in 2010, the Chateau Lacombe Hotel property

was worth between 57 to 70 million dollars. The property was purchased in October 2010 for 47.8 million dollars by Mr. Frederick's company, Hargate Properties Inc. ["Hargate"], with Romspen advancing 32 million dollars, a take-back second mortgage by Allied of 11+ million dollars, and Kevin Frederick's 6 million dollar contribution. The 6 million dollars appears to have come from Dr. Singh's first mortgage loan secured on the Church lands. The Church's 12 million dollar vendor take-back mortgage on its lands from Mr. Frederick has been defaulted on and it has been assigned back to the Church, although curiously, the purchase price for the Church lands was listed at Land Titles as 10 million dollars. The Marshalling concept as I understand it involves certain other Leduc properties owned by Kevin Frederick that are also under foreclosure currently.

[9] The argument then of counsel for Dr. Singh and for the Church is that the Chateau Lacombe Hotel property could or should have a value far greater than intimated by the Receiver presently, and if there are proper marketing efforts, all creditors and primarily Romspen would benefit. However, in order to ascertain the validity of the present appraisal and marketing efforts, counsel for Dr. Singh and for the Church need access to the most current reports, which to date has been refused by the Receiver

II. Conclusion

[10] All parties agree that the relevant case law is found in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J 42; [2002] 2 S.C.R 522 at paragraph 53 which reads 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
- (b) the salutary effect of the confidentiality order, including the effect 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.

[11] The commercial interest as stated in *Sierra Club* is presumed in the present case, but as the Supreme Court of Canada also stated at paragraph 57 "reasonably alternative measures" requires the judge to consider whether reasonable alternatives to the confidentiality order are available as well as to restrict the order as much as reasonably possible while preserving the commercial interest in question. Counsel for the Receiver is not prepared to release the marketing and appraisals even to counsel for Dr. Singh and for the church on any basis.

[12] I conclude that the Receiver has already released the marketing reports and the appraisal to counsel for Romspen, the primary creditor, and to counsel for the second mortgagee, Allied, with no adverse consequences, to the sales process as they are entitled to receive that information on a confidential basis. I conclude that counsel for Dr. Singh and for the Church should also be allowed to see those reports on the same confidential basis, and I am satisfied that there will be no adverse consequences as a result notwithstanding the objections of counsel for the Receiver, Romspen and Allied Properties. It is in everyone's financial interest amongst this group including Dr. Singh and the Church to see that the Chateau Lacombe Hotel property is sold for the most monies. The release of the requested sales process and appraisal reports is no reflection that there is anything deficient in the present sales efforts which appear to have been conducted quite efficiently. It is only a recognition of the legitimate financial interest in this process of Dr. Singh and the Church.

[13] The application to Seal is granted with the exception that the documents sealed, and future related documents, will be released to counsel for Dr. Singh and for the Church confidentially, in addition to them being released to Romspen and Allied. Pending the receipt of these reports and appraisal, including the results of the current final June 22 bidding round, the application for a one day redemption period on the Church lands pursuant to the foreclosure application presently before me, will be adjourned to July 5, 2012, at which point it will be considered.

III. The CLCPL Application

[14] With respect to counsel for BDO Canada's issues regarding the Receiver's request to distribute all of the remaining funds in that company, I understand BDO's objection to be that the Canada Revenue Agency ["CRA"] has a secured priority claims under the Wage Earning Protection Program ("WEPP"), and with respect to certain unremitted employee source deductions.

[15] Hargate Properties Inc. purchased the hotel from the previous owner, Chateau Lacombe Limited Partnership in October 2010, financing the purchase in part by a 32 million dollar loan from Romspen. The assets purchased by Hargate formed a substantial part of the security taken by Romspen for the loan. Additional security came from the allegedly improper/fraudulent postponement of the first mortgage on the Church lands that Dr. Singh had advanced to a numbered company controlled by Kevin Frederick. Concurrent with Hargate's acquisition of the assets of the Chateau Lacombe Hotel, unbeknownst to Romspen even at the time I granted the original receivership order to Romspen, in apparent contradiction in the terms of Romspen's security documentation, CLCPL began operating the Chateau Lacombe Hotel.

[16] There were no formal agreements between Hargate and CLCPL with respect to the buyers use of Hargate's assets. CLCPL did not render any payments to Hargate for the use of the assets. CLCPL did not appear to have had any assets of its own, yet it received and retained all the revenues generated through the operation of the hotel (with the exception of some of the

Page: 5

revenues generated under a lease between Hargate and ImPark in relationship to the hotel's parkade.) Kevin Frederick was the principal and operating mind of both Hargate and CLCPL at all material times, and it is alleged that Mr. Frederick converted at least some of the revenues generated by the hotel to his own use.

[17] I have considered the concerns of the bankruptcy trustee of CLCPL BDO Canada Ltd. and I am satisfied that the CRA has properly been notified with respect to any priorities it may have in this matter. From the funds held by the Receiver of \$632,110.26, there will be a \$120,000 hold-back with respect to any potential WEPP claim made by the employees of CLCPL, although non-union employees were terminated by the Receiver upon his appointment. The Receiver has paid all outstanding wages since the date of their appointment, and has continued to pay vacation pay as it becomes due, payable to non-union and union employees. The hold back will also cover any costs of the Receiver-Manager prior to discharge. The Receiver shall pay \$5,985.57 to the CRA in satisfaction of its secured claim for unremitted source deductions.

[18] Additionally, the CRA shall provide the Receiver with notice of any opposition to the payout described above within 14 days of service of these directions.

[19] If the CRA does not provide notice to the Receiver within 14 days of service of these directions, then it shall be deemed forever barred from making or enforcing any claim, interest or right of any nature or kind whatsoever, whether arising by statute, at law or in equity (a "Claim") to the Funds, as well as any Claim(s) arising out of or relating to the Funds or the source of the Funds, and all such Claim(s) shall be forever extinguished, barred and released.

Heard on the 14th day of June, 2012.

Dated at the City of Edmonton, Alberta this 22nd day of June, 2012.

Donald Lee
J.C.Q.B.A.

Appearances:

Schuyler V. Wensel, Q.C.
Witten LLP
for the Plaintiff

Lindsay Miller
Field LLP
for the Second Mortgagee, Allied Hospitalities Services Inc.

Scott Stevens
Owen Bird Law Corporation
for the Receiver, D. Manning & Associates Inc.

Russel A. Rimer
Duncan & Craig LLP
for BDO Canada Ltd.

Atul Omkar
Reynolds Mirth Richards & Farmer LLP
for Dr. Singh

Lyle Brookes
Fraser Milner Casgrain LLP
for the Victory Christian Centre Inc.

TAB 13

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. 1434399 Ontario Inc., 2025 ONCA 878

DATE: 20251215

DOCKET: M56482 (COA-25-CV-1307)

Huscroft J.A. (Motion Judge)

BETWEEN

Royal Bank of Canada

Applicant (Respondent)

and

1434399 Ontario Inc.

Respondent (Appellant/Responding Party)

E. Patrick Shea, K.C. and Carol Liu, for the moving party, msi Spergel Inc.

Victoria Adams, for the respondent Royal Bank

Alastair McNish and Chit Leung, for the responding party, 1434399 Ontario Inc.

Heard: December 12, 2025

REASONS FOR DECISION

[1] The receiver brings this motion seeking an order declaring that the responding party, 1434399 Ontario Inc. (“143”), has no right of appeal under ss. 193(a) or (c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “BIA”) from three orders of Sheard J., dated May 27, 2025: an approval and vesting order, an ancillary order, and a discharge order. The receiver seeks a further order

denying leave to appeal and requests alternative orders in the event the appeal is permitted to proceed.

[2] The motion is granted for the reasons that follow.

BACKGROUND

[3] 143, the subject of the receivership, owns, and formerly operated, a gym. John Fulton is the sole director, officer, and principal of 143.

[4] The receiver was appointed on September 28, 2023, following an unopposed application by the Royal Bank of Canada (“RBC”), a secured creditor of 143. RBC’s debt is secured by a mortgage on the principal asset of 143 – the real property on which the gym operated. Mr. Fulton is guarantor of the RBC debt. The receiver received only two offers for the property following substantial price reductions. The receiver accepted the best offer and, on May 20, 2025, sought the court’s approval of the sale. 143 brought a cross-motion to redeem its debt to RBC of approximately \$1.7 million and discharge the receiver.

[5] The matter was adjourned, peremptory to May 27, at 143’s request. On May 27, at 10:30 a.m., counsel for 143 and Mr. Fulton, Stephen Barbier, sent a without prejudice email to the receiver indicating that Mr. Fulton was working to secure additional financing and that he was willing to offer \$1.4 million “if that would get us to a consent discharge.” At 10:41 a.m., Mr. Barbier sent another without prejudice email to the receiver. He stated: “I confirm that Fulton is offering a firm

\$1,400,000 for a consent discharge. I don't see how RBC can do better than that on its own motion and enforcement. Please advise."

[6] At the motion, 143 filed affidavits from Gerald Guilbeault, described as a "long-time friend" of Mr. Fulton, and Lawson J. Fulton, Mr. Fulton's son, indicating that they were prepared to lend 143 a total of \$1.4 million "to salvage its ownership of the [...] property".

[7] 143 submitted that it was attempting to, and should be permitted to, redeem the mortgage. The motion judge responded:

THE COURT: Your client -- okay. You have to stop saying things that aren't accurate. Your client is not in a position to redeem. [...] He cannot redeem, can he? He doesn't have the money to redeem. You've said that to me at least twice if not three times.

S. BARBIER: Well, I would say -- make a distinction that he's offering a substantial redemption and there's cases where, you know --

THE COURT: But he hasn't offered it.

S. BARBIER: -- the ---

THE COURT: He hasn't offered it. He said, "Oh, I think I've got a friend of a friend of mine, my son, he's going to appear -- look here's his bank account.". That's not the same. If your client had been in a position to redeem, I assume he would have done so, and if your client had been in a position to provide a buyer that was prepared to pay more than whoever it is who has been bragging about what he paid for, your client would have done so. What he's doing now is, I'm afraid, is he is doing all he

can and you for him, and I commend you for your efforts,
but it is too little, too late.

[8] The motion judge then granted the receiver's motion approving sale of the property and dismissed 143's motion to discharge the receiver. In her reasons, the motion judge noted that 143 had 20 months to secure new money to redeem but was unable to do so. She characterized 143's proposal as "something less than binding commitments to provide funds in a total amount that was much less than the amount [it] needed to redeem." It was "too late and too little". 143 had no funds in hand and there was "no real basis on which to accept [its] optimism that it would soon, or ever, be in a position to redeem. In reality, she said, 143 had not presented an offer at all, yet it argued that the receiver should accept its proposal because it would generate more than if the sale were approved. Acceptance of its proposal, the motion judge said, would "seriously undermine the integrity of the court-approved sale process that has been in place since September 2023."

[9] 143 appealed prior to the release of motion judge's reasons. Following the release of the reasons, on June 12, counsel for the receiver sent an email to appeal counsel for 143 and Mr. Fulton, Alastair McNish, asking whether 143 was still planning to appeal. He responded that it was. Counsel for the receiver then asked several questions: "Do you have funds in your trust account? What is the amount? When would the redemption funds be paid to the Receiver? When would your client seek the discharge of the Receiver?" Mr. McNish asked whether these

questions were an indication that the receiver was prepared to consider a resolution. A phone call followed, and presumably the terms of any such resolution were discussed. Counsel for the receiver followed up on June 26, 2025, stating “please advise today as to 1) are you in funds and 2) the amount of the funding. I asked for this information last week and have yet to hear from you.” There is no record of any further communications.

There is no right of appeal under s. 193(a)

[10] Section 193(a) of the *BIA* establishes a right of appeal “if the point at issue involves future rights”.

[11] 143 argues that its appeal involves future rights because Mr. Fulton, as guarantor of the mortgage, will be subject to greater liability when RBC seeks to enforce its claim against him personally.

[12] I do not accept this argument. It is well established that “future rights” mean future *legal* rights. As explained in *North House Foods Ltd. (Re)*, 2025 ONCA 563, 20 C.B.R. (7th) 1, at para. 25:

Future rights under s. 193(a) mean future legal rights. The phrase has been interpreted to mean “rights which could not at the present time be asserted but which will come into existence at a future time”. The question is whether the rights engaged in an appeal are future rights or presently existing rights that are exercisable in the future. Future rights do not include procedural rights or commercial advantages or disadvantages that may

accrue from the order challenged on appeal. [citations omitted.]

[13] There is no question that, as guarantor of 143's debt, Mr. Fulton's commercial interests are affected by the approval and vesting order. That order determines the extent of his liability on the guarantee, but that is his present liability, not a future right: see *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at paras. 27-28.

[14] 143 did not press the future rights argument at the hearing of the motion, focusing instead on s. 193(c).

There is no right of appeal under s. 193(c)

[15] Section 193(c) provides a right of appeal "if the property involved in the appeal exceeds in value ten thousand dollars".

[16] 143 focuses on the \$10,000 threshold, arguing that it is clearly surpassed by the value of the property in this case and the loss it says it will incur if the sale is completed.

[17] However, it is well established that the right of appeal under s. 193(c) must be construed narrowly to avoid undermining the stay imposed by s. 195: see e.g., *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581, 95 C.B.R. (6th) 240, at para. 22, citing *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 15; *Bending Lake*, at para. 53. In *Bending Lake*, Brown J.A. held that s. 193(c) does

not provide for an appeal as of right from: “(i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss.”

[18] At the hearing of the motion, 143 argued that “loss” was established because two people were willing to lend 143 \$1.4 million and were seeking mortgages as security for their loans. From this, 143 argued that it could be inferred that the value of the property was \$1.4 million. Although the price obtained by the receiver is subject to a sealing order, for the purposes of this motion, the receiver agreed that the price could be assumed to be \$1 million. Thus, 143 argued that it had suffered a “loss” of \$400,000 – the difference between the value of the property and the approved sale price.

[19] I do not accept this argument. The inference I am invited to draw as to the value of the property is simply not available. Affidavit evidence as to what a friend and a family member were willing to lend says nothing about the objective value of the property. Moreover, the affidavits are an unenforceable statement of intention. They state that someone is willing to make a loan, but no such loan was made at the relevant time. 143 characterized its attempt to redeem the mortgage as “essentially” an offer but acknowledged that it was not articulated as an offer to purchase the property for \$1.4 million, and that there was a difference between affidavits promising money and money held in a trust account, available to complete a purchase. All that was available on May 27 was the affidavits.

[20] Essentially, 143 attempted to redeem its debt to RBC, albeit for significantly less than the amount of the debt. This was no offer to purchase, and even if it could be so characterized, it was contingent on raising monies that it did not have. 143 had only non-binding promises of money. The receiver was under no obligation to act on these promises, and its decision not to do so occasioned no loss, let alone the loss of \$400,000 that 143 contends.

Leave to appeal is denied

[21] The receiver opposes the grant of leave on the basis that 143 did not request leave in its notice of appeal, as required by r. 31(2) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 1 (the “*BIA Rules*”). This court has stated that leave should generally be refused where it is not sought in the notice of appeal: *North House Foods*, at para. 43. However, in rare circumstances, based on the combined operation of r. 3 of the *BIA Rules* and r. 61.08(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, an order may be granted to amend a notice of appeal to seek leave *nunc pro tunc*: *North House Foods*, at paras. 44-46.

[22] I do not think this is the rare case in which such an order should be made. But I add that I would not have granted leave even if it had properly been sought. Applying the test from *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, this appeal concerns a fact-based matter rather than a matter of general importance to the law. 143 was unsuccessful in its attempt to redeem the mortgage for less than the amount owing.

It had ample time to make an offer if it wished to do so – some 20 months – and it failed to do so. Finally, this matter has been subject to considerable delay – it proved difficult to sell the property and for a variety of reasons the court’s processes did not work efficiently. There is no basis to delay things further by granting leave to appeal.

DISPOSITION

[23] The motion is granted.

[24] The receiver is entitled to costs in the agreed amount of \$5,000. RBC did not make submissions and did not seek costs.

“Grant Huscroft J.A.”

TAB 14

Royal Bank of Canada v. Soundair Corp., Canadian Pension
Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp.
(C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137

Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least \$65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately \$9,500,000. Those creditors will have a deficiency expected to be in excess of \$50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust v. Rosenberg*, supra, at p. 112 O.R., p. 551 D.L.R.:

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In *Crown Trust v. Rosenberg*, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for \$6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of \$3,000,000. The OEL offer provided for a payment of \$2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg*, supra, and *Re Selkirk* (1986, Saunders J.), supra. However, as Saunders J. pointed out in *Re Beauty Counsellors*, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986, Saunders J.), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987, McRae J.), supra, and *Cameron*, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* (1986), *supra*, where Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 O.R., p. 548 D.L.R.:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive \$3,375,000 of the \$6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only \$1,000,000 and the Royal Bank would receive \$5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In *British Columbia Development Corp. v. Spun Cast Industries Inc.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately \$50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately \$3,000,000 to \$4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being \$4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between \$10,000,000 and \$12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of \$3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately \$3,000,000 to \$4,000,000.

In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 C.B.R.:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 15

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Ten 4 System Ltd., 2023 ONCA 839

DATE: 20231215

DOCKET: COA-23-OM-0304

Brown J.A. (Motions Judge)

BETWEEN

Royal Bank of Canada

Applicant
(Responding Party/Respondent)

and

Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc.

Respondents
(Moving Parties/Appellants)

Manjit Singh, for the moving parties/appellants

Roger Jaipargas and Douglas O. Smith, for the responding party/respondent

Heard: in writing

On appeal from the order of Justice Peter Osborne of the Superior Court of Justice,
dated October 18, 2023.

ENDORSEMENT

I. OVERVIEW

[1] Ten 4 System Ltd., 1000043321 Ontario Inc., and 1000122550 Ontario Inc.
(the “Debtors”) move, pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, for an order granting them leave to appeal the order of

Osborne J. dated October 18, 2023 (the “Appointment Order”), which appointed msi Spergel inc. as receiver of the Debtors’ assets, undertakings, and properties. The Appointment Order was made pursuant to *BIA* s. 243(1) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”).

[2] Several key facts were not in dispute before the application judge:

- the Debtors owed their creditor, the respondent Royal Bank of Canada, approximately CAD\$14.7 million and USD\$453,000;
- They were in default of their obligations to RBC; and
- RBC holds valid security, including three general security agreements that give RBC the contractual right to appoint a receiver.

[3] Very late in the life of the appointment application process, the Debtors filed a commitment letter they submitted would solve their financial problems with RBC. The application judge explained, in considerable detail, why he was not satisfied that the highly conditional commitment letter would answer the problems in a timely way. After taking into account a variety of relevant factors and circumstances, the application judge concluded it was just and convenient to appoint a receiver, as requested by RBC.

II. ANALYSIS

[4] The exercise of granting leave to appeal under *BIA* s. 193(e) is discretionary and must be exercised in a flexible and contextual way. The prevailing

considerations for a court to take into account are summarized in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. I shall consider each.

A. Merits of the proposed appeal

[5] I start by considering the merits of the Debtors' proposed appeal. In their notice of motion for leave to appeal, the Debtors identify four grounds on which they intend to appeal.

First ground of appeal

[6] As their first ground of appeal, the Debtors contend the application judge denied them a fair hearing. Their notice of motion states:

The learned Applications Judge erred in law by incorrectly relying upon [RBC's] characterization of evidence it had compiled in a so-called "confidential brief" that was neither served upon or made available to the Defendants or their counsel, nor filed with the Superior Court of Justice or put before the learned Applications Judge.

[7] Assessing the merits of this ground of appeal requires some understanding of the background facts, including what the Debtors refer to as the "confidential brief".

[8] RBC's application for a receiver was supported by the affidavit of Tro DerBedrossian, Director of RBC's Special Loans and Advisory Services ("SLAS"). In para. 24 of his affidavit, Mr. DerBedrossian deposed that the Debtors'

accounts were transferred to SLAS on August 17, 2023 “due to unusual account activity resulting in the full utilization of the operating line and an account excess of CA\$2,489,450.90 and US\$452,915.45.”

[9] In para. 8 of his reply affidavit, Mr. DerBedrossian repeated that there had been unusual activity involving the Debtors’ accounts and went on to provide considerable details of that unusual activity in paras. 9 through 14 of his reply affidavit. At paras. 24 and 25 of his endorsement, the application judge reproduced some of the details about the unusual activity described in Mr. DerBedrossian’s reply affidavit.

[10] After providing details of the unusual account activity, in para. 14 of his reply affidavit Mr. DerBedrossian went on to depose:

A confidential brief (“Confidential Brief”) evidencing the unusual account activity of the Debtors has been prepared and will be made available to the Court, if the Court requests same at the hearing of this application. In the event that the Court requests that the Applicant produce the Confidential Brief, I understand that counsel for the Bank will request that the Court grant a sealing Order in respect of same, until further Order of the Court.

[11] There is no dispute that the application judge did not request disclosure of the confidential brief referred to by Mr. DerBedrossian nor did he review it. His reasons make no mention of a confidential brief. However, paras. 24 and 25 of his reasons do refer to the unusual activity described by Mr. DerBedrossian in his

affidavits. As well, para. 22 summarizes the position advanced by RBC on the appointment motion as follows:

RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

[12] The Debtors contend three errors arise from that factual background:

- First, RBC's failure to disclose the confidential brief "irretrievably tainted the hearing from the outset". I have difficulty seeing how. RBC disclosed the existence of the brief and indicated it would be disclosed if subject to a sealing order. However, there is no suggestion in the record that the Debtors ever asked the application judge to obtain disclosure of the brief;
- Second, the Debtors contend their right to a fair hearing "was further exacerbated by [RBC's] self-serving characterization of the documents in the so-called secret confidential brief as suggestive of 'unusual activity' in the [Debtors'] bank accounts". If a party views language in a document filed in court as "scandalous, frivolous or vexatious", it can request the court to strike out the offending language: *Rules of Civil Procedure*, r. 25.11(b). The record does not disclose any such request from the Debtors; and

- Third, the Debtors argue the application judge erred by repeating in his reasons some of the language used in the DerBedrossian affidavits and adding to the deponent's word "unusual" his own word "suspicious" in describing the account activity. A judge is entitled to summarize a party's submissions using the language employed by the party, which the application judge did at para. 22 of his reasons. I read his use of the word "suspicious" as simply a synonym for "unusual".

[13] In any event, the unusual activity RBC observed in the Debtors' accounts was not one of the facts upon which the application judge rested his decision to appoint a receiver: Reasons, at paras. 35 to 40. Consequently, the Debtors' first ground of appeal is not *prima facie* meritorious.

Second ground of appeal

[14] Second, the Debtors assert the application judge erred in law by incorrectly applying CJA s. 101 notwithstanding the fact that the relief sought in the application was for a final and not an interlocutory order.

[15] I confess I have difficulty following the Debtors' argument: an initial order appointing a receiver, such as the form of order used in this case, does not finally determine any rights. Instead, it appoints a receiver to preserve a debtor's assets for distribution to its creditors following a review of their respective rights and determination of a proper allocation. In any event, RBC applied under *BIA* s. 243(1)

as well as CJA s. 101; the final/interlocutory distinction does not play the same role under the *BIA* as it does for civil litigation under the *CJA*. The application judge clearly had the authority to make the order that he did.

[16] The Debtors' second ground of appeal is not *prima facie* meritorious.

Third and fourth grounds of appeal

[17] The Debtors' third and fourth grounds of appeal are related. The Debtors contend the application judge made a palpable and overriding error of mixed fact and law by concluding that it was just and convenient to appoint a receiver notwithstanding the fact that reasonable alternatives were available in the circumstances and that the Debtors' assets exceeded the value of their liabilities.

[18] Although the Debtors obviously disagree with the weight the application judge assigned to different factors in his analysis, his reasons do not disclose that he applied incorrect or inapplicable legal principles. And while the evidence may have shown that the Debtors' assets exceeded their liabilities, there was no dispute about the amount of their indebtedness to RBC or their default under the loans.

[19] These are very weak grounds of appeal on which to seek to set aside a discretionary order. In my view, they stand a very low possibility of success.

B. Issue of general importance to insolvency practice or the administration of justice

[20] Since the record does not disclose any merit in the first two grounds of appeal, they cannot raise issues of general importance. The third and fourth grounds of appeal are rooted in the application of established principles to the specific facts of the case before the application judge; they do not give rise to issues of general importance.

C. Effect of granting leave on the specific insolvency proceeding

[21] I accept RBC's submission that granting leave to appeal would unduly hinder the progress of the administration of the receivership. The consequent automatic stay under *BIA* s. 195 would halt the receivership. Given the level of indebtedness of the Debtors to RBC, their default, and the absence of firm replacement financing, the interests of justice would not be served by granting leave.

D. Conclusion

[22] Considering the criteria as a whole, I would not grant leave to appeal. The grounds of appeal either lack any merit or are very weak; they do not raise any issue of general importance; and permitting the Debtors to appeal, thereby staying the receivership, in the absence of firm replacement financing would pose a serious risk to the rights of creditors in the circumstances.

III. DISPOSITION

[23] The Debtors' motion for leave to appeal is dismissed.

[24] As the successful party, RBC is entitled to its costs of this motion. Under the terms of the security, the Debtors are liable for "all costs, charges and expenses reasonably incurred by RBC ... in preparing or enforcing ..." the security. RBC seeks its costs of this motion on a full recovery basis. RBC filed a bill of costs stating that its actual legal costs for the motion amounted to \$35,225.00. I am not satisfied that the full amount of those costs constitutes "reasonably incurred" costs. This was a simple motion, yet RBC's bill of costs records time spent by two partners, an articling student, and a law clerk. In my view, costs "reasonably incurred" should be set at \$25,000, inclusive of disbursements and applicable taxes, and I order the appellants to pay RBC such costs within 30 days of the date of this order.

"David Brown J.A."

TAB 16

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

v.

Sierra Club of Canada *Respondent*

and

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

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

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

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

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

c.

Sierra Club du Canada *Intimé*

et

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

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

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

Jurisprudence

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

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

Statutes and Regulations Cited

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

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

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

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

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

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

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

Lois et règlements cités

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

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

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

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

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

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

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

IV. Judgments Below

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

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

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

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

III. Dispositions législatives

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

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

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

IV. Les décisions antérieures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

(2) Le juge Robertson (dissident)

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

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

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

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

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

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

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

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

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

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

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

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

V. Issues

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

V. Questions en litige

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

VI. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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.]

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A publication ban should only be ordered when:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

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

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

(2) Les droits et les intérêts des parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

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

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

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

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

(1) Nécessité

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

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

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

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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).

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

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.

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

(2) L'étape de la proportionnalité

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

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

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

(a) *Salutary Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Deleterious Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

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

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

VII. Conclusion

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

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

Appeal allowed with costs.

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

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

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

Pourvoi accueilli avec dépens.

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

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

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

**CAMERON STEPHENS MORTGAGE
CAPITAL LTD.**

Applicant (Respondent)

2011836 ONTARIO CORP., et al.

and Respondents (Appellant)

Court of Appeal File No.

**Super Court File No. CV-23-
00710795-00CL**

COURT OF APPEAL FOR ONTARIO

BOOK OF AUTHORITIES OF THE RECEIVER

Paliare Roland Rosenberg Rothstein LLP

155 Wellington Street West, 35th Floor

Toronto ON M5V 3H1

Tel: 416.646.4300

Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)

Tel: 416.646-4330

jeff.larry@paliareroland.com

Kartiga Thavaraj (LSO# 75291D)

Tel: 416.646.6317

kartiga.thavaraj@paliareroland.com

Ryan Shah (LSO# 88250C)

Tel: 416.646-6356

ryan.shah@paliareroland.com

Lawyers for the Receiver, Albert Gelman Inc.