COURT FILE NUMBERS	25-3086318 25-3086304 25-3086302	Clerk's stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD. and GREEN ROCK CANNABIS (EC 1) LIMITED	
APPLICANTS	420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD. and GREEN ROCK CANNABIS (EC 1) LIMITED	
DOCUMENT	**BOOK OF AUTHORITIES TO THE BRIEF OF THE APPLICANTS**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** Barristers & Solicitors 4300 Bankers Hall West 888-3rd Street SW Calgary, AB T2P 5C5 **Karen Fellowes, K.C. / Natasha Doelman** Tel: (403) 724-9469 / (403) 781-9196 Fax: (403) 266-9034 Email: kfellowes@stikeman.com / ndoelman@stikeman.com File No.: 155857.1002	

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2.	*Gray Aqua Group of Companies, Re*, 2015 NBQB 107
3.	*Mustang GP Ltd, Re*, 2015 ONSC 6562
4.	*Electro Sonic Inc, Re* 2014 ONSC 942
5.	Model CCAA Initial Order
6.	*In the matter of the notice of intention to make a proposal of Nilex Inc and Nilex USA Inc* Order of Little J. dated November 8, 2022
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8.	*In the matter of the notice of intention to make a proposal of BR Capital LP et al*, Order (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension) of Dario J. dated October 14, 2022
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CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to May 28, 2024

Last amended on April 27, 2023

À jour au 28 mai 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d’agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l’un ou l’autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s’applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d’un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l’article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s’il est convaincu que, selon le cas :

a) la personne insolvable n’agit pas — ou n’a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l’expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l’expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l’ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s’appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d’intention doit, entre le dépôt de l’avis d’intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l’égard duquel a été déposé un avis d’intention aux termes de l’article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d’une charge ou sûreté — d’un montant qu’il estime indiqué — en faveur de la personne nommée dans l’ordonnance qui accepte de prêter au débiteur la somme qu’il approuve compte tenu de l’état — visé à l’alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l’évolution de l’encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu’une obligation postérieure au prononcé de l’ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s’il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l’exploitation de l’entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l’ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

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

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n’a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d’une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor’s business and financial affairs are to be managed during the proceedings;

(c) whether the debtor’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor’s property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee’s report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Facteurs à prendre en considération

(5) Pour décider s’il rend l’ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l’égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d’une proposition viable à l’égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l’un ou l’autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

2005, ch. 47, art. 36; 2007, ch. 36, art. 18.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

In case of a prior meeting

(2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

Chair of first meeting

(3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

R.S., 1985, c. B-3, s. 51; 1992, c. 1, s. 20, c. 27, s. 20; 1999, c. 31, s. 19(F); 2005, c. 47, s. 123(E).

Convocation d'une assemblée des créanciers

51 (1) Le syndic convoque immédiatement une assemblée des créanciers — qui doit avoir lieu dans les vingt et un jours suivant le dépôt de la proposition auprès du séquestre officiel aux termes du paragraphe 62(1) — en adressant, de la manière prescrite, à chaque créancier connu et au séquestre officiel, au moins dix jours avant l'assemblée, les documents suivants :

a) un avis des date, heure et lieu de l'assemblée;

b) un état succinct des avoirs et obligations;

c) une liste des créanciers que vise la proposition, avec des réclamations se chiffrant à deux cent cinquante dollars ou plus, et des montants de leurs réclamations, connus ou indiqués aux livres du débiteur;

d) une copie de la proposition;

e) si elles n'ont pas déjà été envoyées, les formules prescrites — en blanc — devant servir à l'établissement d'une procuration, d'une preuve de réclamation ou, dans le cas d'un créancier garanti à qui la proposition a été faite, d'une preuve de réclamation garantie;

f) une formule prescrite de votation.

En cas d'une assemblée antérieure

(2) Lorsqu'il est tenu une assemblée des créanciers à laquelle a été présenté un état ou une liste de l'actif, du passif et des créanciers du débiteur, avant que le syndic soit ainsi requis de convoquer une assemblée aux termes du présent article pour étudier la proposition, et que, à la date à laquelle le débiteur requiert la convocation de cette assemblée, l'état de l'actif du débiteur reste sensiblement le même qu'à l'époque de l'assemblée précédente, le syndic n'est pas tenu d'observer les alinéas (1)b) et c).

Président de la première assemblée

(3) Le séquestre officiel, ou la personne qu'il désigne, préside l'assemblée des créanciers visée au paragraphe (1) et décide des questions posées ou des contestations soulevées à l'assemblée; tout créancier peut appeler d'une telle décision devant le tribunal.

L.R. (1985), ch. B-3, art. 51; 1992, ch. 1, art. 20, ch. 27, art. 20; 1999, ch. 31, art. 19(F); 2005, ch. 47, art. 123(A).

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- **(a)** in the Province of Ontario, the Superior Court of Justice;
- **(b)** [Repealed, 2001, c. 4, s. 33]
- **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- **(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- **(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;
- **(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- **(g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- **(h)** in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

- **a)** dans la province d'Ontario, la Cour supérieure de justice;
- **b)** [Abrogé, 2001, ch. 4, art. 33]
- **c)** dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;
- **d)** dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;
- **e)** dans la province de l'Île-du-Prince-Édouard, la Cour suprême;
- **f)** dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;
- **g)** dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;
- **h)** au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Compétence de la Cour supérieure de la province de Québec

(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

R.S., 1985, c. B-3, s. 183; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 3; 1998, c. 30, s. 14; 1999, c. 3, s. 15; 2001, c. 4, s. 33; 2002, c. 7, s. 83; 2015, c. 3, s. 9.

Appointment of officers

184 Each of the following persons, namely,

(a) the Chief Justice of the court,

(b) in Quebec, the Chief Justice or the Associate Chief Justice in the district to which the Chief Justice or Associate Chief Justice was appointed,

(c) in Yukon, the Commissioner of Yukon,

(d) in the Northwest Territories, the Commissioner of the Northwest Territories, and

(e) in Nunavut, the Commissioner of Nunavut,

shall appoint and assign such registrars, clerks and other officers in bankruptcy as deemed necessary for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act and may specify or limit the territorial jurisdiction of any such officer.

R.S., 1985, c. B-3, s. 184; 1993, c. 28, s. 78; 2002, c. 7, s. 84.

Assignment of judges to bankruptcy work by Chief Justice

185 (1) The Chief Justice of the court, and in the Province of Quebec the Chief Justice or the Associate

Cours d’appel — provinces de common law

(2) Sous réserve du paragraphe (2.1), les cours d’appel du Canada, dans les limites de leur compétence respective, sont, en droit et en equity, conformément à leur procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investies de la compétence d’entendre et de juger les appels interjetés des tribunaux exerçant juridiction de première instance en vertu de la présente loi.

Cour d’appel de la province de Québec

(2.1) Dans la province de Québec, la Cour d’appel, dans les limites de sa compétence, est, conformément à sa procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investie de la compétence d’entendre et de juger les appels interjetés de la Cour supérieure.

Cour suprême du Canada

(3) La Cour suprême du Canada a compétence pour entendre et décider, suivant sa procédure ordinaire, tout appel ainsi autorisé et pour adjuger les frais.

L.R. (1985), ch. B-3, art. 183; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 3; 1998, ch. 30, art. 14; 1999, ch. 3, art. 15; 2001, ch. 4, art. 33; 2002, ch. 7, art. 83; 2015, ch. 3, art. 9.

Nomination de registraires, etc.

184 Chacune des personnes énumérées ci-dessous procède aux nominations et affectations de registraires, commis et autres fonctionnaires en matière de faillite qu’elle juge utiles pour l’expédition des questions au sujet desquelles la présente loi accorde compétence ou pouvoir, et peut spécifier ou restreindre la compétence territoriale de ces registraires, commis ou autres fonctionnaires :

a) le juge en chef du tribunal;

b) dans la province de Québec, le juge en chef ou le juge en chef adjoint du district pour lequel il a été nommé;

c) au Yukon, le commissaire du Yukon;

d) dans les Territoires du Nord-Ouest, le commissaire des Territoires du Nord-Ouest;

e) dans le territoire du Nunavut, le commissaire du Nunavut.

L.R. (1985), ch. B-3, art. 184; 1993, ch. 28, art. 78; 2002, ch. 7, art. 84.

Désignation, par le juge en chef, de juges pour siéger en faillite

185 (1) Le juge en chef du tribunal, ou, dans la province de Québec, le juge en chef ou le juge en chef adjoint dans

Re : 2015 NBQB 107

COURT NO: NB 19425
ESTATE NUMBER: 51-1780540

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the bankruptcy of Gray Aqua Group of Companies

HEARD:	January 7, 2014
DECISION:	May 25, 2015
APPEARANCES:	John D. Stringer, Q. C. and Ben R. Durnford for Ernst & Young Inc. - Trustee Joshua J. B. McElman, for Business Development Bank of Canada Ian Purvis, Q.C. for Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd. Celine Leicher for Europharma Inc.

DECISION

Background

1. On August 21, 2013 various Notices of Intention to Make a Proposal ("NOI") were filed by Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd., (collectively the "Group").

2. As a result of the filing of the NOIs, Ernst & Young ("Proposal Trustee) was appointed as the Proposal Trustee ("Proposal Trustee"). On September 24, 2013 the Proposal Trustee presented a Motion for an Order Respecting Service and Accessibility Protocol which was granted. This Order allowed, *inter alia*, for service on all creditors and affected parties to the NOIs filed by the Group via telecommunications.

3. On or about January 7, 2014 solicitors for the Proposal Trustee applied to the Court for an Order allowing the filing of a Consolidated Proposal to the respective and individuals creditors of the Group, pursuant to sections 34, 66, 183 and 192 of the *Bankruptcy and Insolvency Act* (Canada).

4. Evidence contained in various reports from the Proposal Trustee, in particular the sixth report of the Proposal Trustee and the sixth affidavit of Tim Gray, which documents submit evidence supporting the Group's suitability for the filing of a Consolidated Motion.

5. In particular, the Group companies are vertically and financially integrated with a singular management and accounting structure. Moreover, solicitors for the Proposal Trustee submit uncontested evidence that Group companies operated at all times as an integrated enterprise with centralized management, sales and accounting based in Northampton, New Brunswick.

6. The Group also shares several common senior creditors, which include Callidus Capital Corporation ("Callidus") who acquired debt and security from HSBC Canada ("HSBC") on a number of the Group companies and Business Development Bank of Canada ("BDC").

7. It is submitted that the shared and respective creditors of the Group, if an Order allowing a Consolidated Proposal would not be deprived of any rights and would not suffer any measurable prejudice.

8. The largest individual respective group of creditors who require accommodation deriving from a Group company would be the unsecured creditors of Gray Aqua Processing Limited ("GAPL") who are proposed as a distinct class of creditors under a Consolidated Proposal.

<u>Analysis</u>

9. Historically, Courts have been reluctant to grant the right of consolidation to moving parties on the basis of consolidation being seen as an extraordinary remedy under the BIA, *supra.*

10. The BIA is void of any statutory test establishing benchmarks for the consolidation of corporate entities. Limited caselaw on point seems to rely on the equitable jurisdiction of the Court under Section 183.

11. Counsel for the Proposal Trustee submitted two cases for review by the Court. In *Ashley v. Marlow Group Private Portfolio Management Inc.* 2006 CanLII 31307 (On. S.C.), the consolidation was opposed and ultimately denied by the Court. A thorough review of the issue was nonetheless undertaken by Justice Mesbur of the Ontario Superior Court, Commercial List.

12. Justice Mesbur said the following:

> [70] Essentially, a substantive consolidation would treat all of the corporate defendants as one entity. The assets of each would fall into one common pool, to be shared by all their creditors on a *pari passu* basis.
>
> [71] There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. It is common ground, however, that the court has the authority to do so under its equitable jurisdiction under section 183 of the *Act.*
>
> […]
>
> [74] The Receiver goes on to say that all four companies operated as an interrelated entity, with shared premises, telephone, fax, bank accounts and accounting records. The Receiver says that they were operated as a single, consolidated enterprise, and should be treated as such for bankruptcy purposes, because to do so would be most expedient and cost-effective.
>
> […]
>
> [76] CIPF also points out that the Receiver wishes to use the only assets of Securities Inc., some cash, to fund the bankruptcy, and thus there is no practical advantage to any of Securities Inc.'s creditors to having a substantive consolidation of all the estates.
>
> [77] CIPF says that substantive consolidation profoundly affects the substantive rights of debtors and creditors, and thus should be considered an extreme remedy and carefully scrutinized. It involves more than procedural convenience, which of course can be accomplished by the procedural consolidation that everyone supports.

13. The Court ultimately upheld the objection of the creditor, CIPF, on the basis of a lack of evidence that the creditors would NOT be harmed by the consolidation.

14. The second case cited by the solicitors for the Proposal Trustee was the case of *Re Kitchener Frame Limited,* 2012 ONSC 234 ("Kitchener Frame") whereby a Motion to consolidate was granted by Justice Morawetz.

15. Justice Morawetz made the following observations on substantial consolidations:

> [30]…..Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private*

Portfolio Management Inc. (2006) 2006 CANLII 31307 (ON SC), 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley, supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.

[31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

[32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

Disposition

16. On the whole, I am satisfied that the Group is a suitable candidate for an Order for a Consolidated Proposal. After a thorough protocol on service was established by the Court, all creditors of the Group were served and none contested the Motion.

17. I am further satisfied by the evidence submitted in the sixth report of the Proposal Trustee and the six affidavit of Tim Gray that the Group is sufficiently integrated both from a financial and practical perspective that it functions as a centralized company for all intents and purposes.

18. The purpose of the BIA is to facilitate financial rehabilitation in a fair and structured atmosphere while protecting the integrity of the process and all of its participants, including creditors.

19. The Proposal Trustee's evidence, including the accommodation of the GAPL creditors, strikes the right balance of efficiency and equity which will ultimately serve to streamline the proposal process, create savings for all parties and facilitating a faster restructuring of the Group.

20. For the above-noted reasons, I grant the Motion for a Consolidated Proposal in the case of the Group companies.

____

Natalie H. LeBlanc
Registrar

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

2015 ONSC 6562 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

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Preliminary Matter

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

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[3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

[4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

[5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

[6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

[7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

[8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

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[9] The plant employs twelve part and full time employees.

[10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

[11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

[12] The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

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[13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

[14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC's debt and security at a substantial discount.

[15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

[16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

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iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

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> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

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[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

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materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

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b) the DIP agreement and charge

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

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[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

[30] In *Re Comstock Canada Ltd.*¸ 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > …the purpose of the *CCAA*… is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> …
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

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[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

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> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

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[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

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> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp*.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> 7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is

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necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

"Justice H.A. Rady"
Justice H.A. Rady

Date: October 28, 2015

2015 ONSC 6562 (CanLII)

CITATION: Electro Sonic Inc. (Re), 2014 ONSC 942
COURT FILE NO.: 31-1835443 and 31-1835488
DATE: 20140210

2014 ONSC 942 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic Inc.

AND IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

BEFORE: D. M. Brown J.

COUNSEL: H. Chaiton, for the Applicants, Electro Sonic Inc. and Electro Sonic of America LLC

I. Aversa, for the Royal Bank of Canada

HEARD: February 10, 2014

REASONS FOR DECISION

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

[1] Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

[2] On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

[3] Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

[4] Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

[5] In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

[6] Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender – Royal Bank of Canada – it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

[7] The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

[8] The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

[9] RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

[10] As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

[11] *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property

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in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[12] In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

(i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;

(ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;

(iii) the operations of ESI and ESA are highly integrated;

(iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corporation v. Xchange Technology Group LLC*, 2013 ONSC 6783, para. 19; and,

(v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

[13] The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

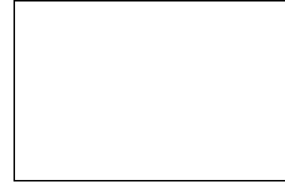
D. M. Brown J.

Date: February 10, 2014

2014 ONSC 942 (CanLII)

Last Revised: January 2019

Clerk's Stamp:



COURT FILE NUMBER	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **[THE DEBTOR(S)]**
APPLICANT:	
RESPONDENT(S):	
DOCUMENT	**ALBERTA TEMPLATE CCAA INITIAL ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**[LAW FIRM NAME]** [Address] [Address] Solicitor: ● Telephone: ● Facsimile: ● Email: ● File Number: ●
DATE ON WHICH ORDER WAS PRONOUNCED:	
NAME OF JUDGE WHO MADE THIS ORDER:	
LOCATION OF HEARING:	

[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING THE ACCOMPANYING EXPLANATORY NOTES.]

UPON the application of **[NAME]** (the "**Applicant**"); **AND UPON** having read the Originating Application, the Affidavit of ●; and the Affidavit of Service of ● **[if applicable]**, filed; **AND UPON** reading the consent of **[NAME]** to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order **[if applicable]**; **AND UPON** hearing counsel for ●; **AND UPON** reading the Pre-Filling Report of **[Monitor's Name]**; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient **[if applicable]** and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

   (d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of **[NAME]** sworn **[DATE]** or replace it with another substantially

similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.] **[See Explanatory Note]**

5. To the extent permitted by law, the Applicant shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

   (b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

   (b) payment for goods or services actually supplied to the Applicant following the date of this Order.

7. The Applicant shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicant.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicant shall, subject to such requirements as are imposed by the CCAA **[and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph [33]),]** have the right to:

    (a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding **[$]** in any one transaction or **[$]** in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

    (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

    (c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicant deems appropriate, in accordance with section 32 of the CCAA; and

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

    all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including **[DATE – MAX. 30 DAYS]**, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

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

    (a) empower the Applicant to carry on any business that the Applicant is not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

(e) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

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

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicant, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicant

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

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or

after the date of this Order, nor shall any person, other than the Interim Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct.

21. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the “**Directors' Charge**”) on the Property, which charge shall not exceed an aggregate amount of **[$]**, as security for the indemnity provided in paragraph **[20]** of this Order. The Directors' Charge shall have the priority set out in paragraphs **[37]** and **[39]** herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

    (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph **[20]** of this Order.

APPOINTMENT OF MONITOR

23. **[MONITOR'S NAME]** is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicant with the powers

and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the Interim Lender and its counsel on a **[TIME INTERVAL]** basis of financial and other information as agreed to between the Applicant and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than **[TIME INTERVAL]**, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

(f) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicant to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicant or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

26. The Monitor shall provide any creditor of the Applicant and the Interim Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

27. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor, and counsel to the Applicant shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a **[TIME INTERVAL]** basis and, in

addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the respective amount[s] of $●**,** to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, if any, and the Applicant's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **[$]**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs **[37]** and **[39]** hereof.

INTERIM FINANCING

31. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from **[INTERIM LENDER'S NAME]** (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed **[$]** unless permitted by further order of this Court.

32. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the Interim Lender dated as of **[DATE]** (the "**Commitment Letter**"), filed.

33. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. **[see**

Explanatory Notes] The Interim Lender's Charge shall have the priority set out in paragraphs **[37]** and **[39]** hereof.

35. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon **[●]** days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

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

VALIDITY AND PRIORITY OF CHARGES

37. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of **[$]**);

Second – Interim Lender's Charge; and

Third – Directors' Charge (to the maximum amount of **[$]**).

38. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. Each of the Directors' Charge, the Administration Charge, and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person. **[See Explanatory Notes.]**

40. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the Interim Lender's Charge, unless the Applicant also obtains the prior written consent of the Monitor, the Interim Lender, and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

41. The Directors' Charge, the Administration Charge, **[the Commitment Letter, the Definitive Documents,]** and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof **[, including the**

Commitment Letter or the Definitive Documents,] shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, **[the Applicant entering into the Commitment Letter,]** or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicant pursuant to this Order, **[including the Commitment Letter or the Definitive Documents,]** and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

42. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lender's Charge, and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

43. The Monitor shall (i) without delay, publish in **[newspapers specified by the Court]** a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

44. The E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: **[●]**) shall be valid and effective service. Subject to Rules 11.25 and 11.26 this Order shall constitute an order for substituted service pursuant to Rule 11.28 of the Rules of Court. Subject to paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL '**[●]**'."

GENERAL

45. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

46. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

47. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicant, the Business or the Property.

48. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

49. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

50. Any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

____

Justice of the Court of Queen’s Bench of Alberta

Clerk's stamp:

COURT/ESTATE FILE NUMBER	24-2878531
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED
APPLICANT:	NILEX INC.
DOCUMENT	**ORDER (approving extension of time to file a proposal, administration charge, and other relief)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP 3500, 855 – 2nd Street S.W. Calgary, AB T2P 4J8 Attn: Kelly Bourassa / Alexia Parente Telephone: 403-260-9697 / 416-863-2417 Facsimile: 403-260-9700 E-mail: kelly.bourassa@blakes.com / alexia.parente@blakes.com File Ref.: 99580/8

DATE ON WHICH ORDER WAS PRONOUNCED: November 8, 2022

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta (via Webex)

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice J.S. Little

UPON THE APPLICATION by Nilex Inc. (the "**Company**"), for an order, among other things: (a) extending the time for the Company to file a proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (the "**BIA**"); (b) approving an Administration Charge (defined below); (c) approving the Sale Process (defined below) and its continuation; (d) approving the continued use of the Cash Management System (defined below); and (e) approving the distribution of the Garnished Funds (defined below) out of Court to the Company and directing any future Garnished Funds to be paid to the Company;

AND UPON HAVING READ the Application, the Affidavit of Jeff Allen sworn October 31, 2022 (the "**First Allen Affidavit**"), the First Report of KSV Restructuring Inc. in its capacity as proposal trustee of the Company (in such capacity, the "**Proposal Trustee**") dated October 31, 2022 (the "**First Report**"), and the Affidavit of Service of Lindsay Farr sworn November 3, 2022;

AND UPON HEARING the submissions of counsel for the Company, the Proposal Trustee, the Canadian Imperial Bank of Commerce ("**CIBC**"), and such other counsel in attendance;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application, and time for service of this application is abridged to that actually given.

EXTENSION OF TIME TO FILE A PROPOSAL

2. Pursuant to Section 50.4(9) of the BIA, the time for the Company to file a proposal is hereby extended to January 10, 2023 (as that date may be extended by further order of the Court, the "**Proposal Extension Date**").

NO INTERFERENCE WITH RIGHTS

3. Until and including the Proposal Extension Date, no individual, firm, corporation, governmental body, or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, or take any further action to issue or enforce any garnishee summons, except with the written consent of the Company and the Proposal Trustee, or leave of this Court.

CONTINUATION OF SERVICES

4. Until and including the Proposal Extension Date, all Persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Company, including without limitation all purchase orders, supply agreements, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Company;

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

ADMINISTRATION CHARGE

5. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company (collectively, the "**Administrative Professionals**") shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Administrative Professionals on a bi-weekly basis, or as they may otherwise agree.

6. The Administrative Professionals shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the Company's present and future assets, undertakings and property of every nature and kind whatsoever and wherever situate, including all proceeds thereof (collectively, the "**Property**"), which charge shall not exceed an aggregate amount of $350,000 (before GST), as security for payment of their respective professional fees and disbursements incurred at their normal rates and charges, both before and after the making of this Order, in respect of this proceeding.

7. The Administration Charge shall have the priority set out in paragraphs 21 and 23 hereof.

CASH MANAGEMENT SYSTEM AND LENDER PRIORITY CHARGE

8. The Company's execution and performance under the forbearance agreement dated as of October 17, 2022 between the Company and CIBC (among others), as may be amended from time to time (the "**Forbearance Agreement**") is hereby approved.

9. The Company shall be entitled to continue to utilize the credit facilities (the "**Cash Management System**") granted by CIBC under the Credit Agreement, as defined and described in the First Allen Affidavit (the "**Credit Agreement**"). For greater certainty, (i) the Company is authorized to borrow, repay and re-borrow such amounts from time to time as the Company may consider necessary or desirable under the Credit Agreement, subject to the terms and conditions of the Forbearance Agreement; and (ii) CIBC is authorized to apply receipts and deposits made to the Company's bank accounts, whether directly or through blocked accounts, against the indebtedness of the Company to CIBC in accordance with the Forbearance Agreement, whether such indebtedness arose before or after the date of this Order; provided, however that no advances made by CIBC to the Company under the Credit Agreement on or after the date hereof shall be used to pay the Company's obligations that were owing to CIBC prior to the date hereof.

10. The Cash Management System will be governed by the terms of the Credit Agreement and the Forbearance Agreement and such other documentation applicable to the Cash Management System. CIBC shall be an unaffected creditor in these proceedings, and the rights and remedies of CIBC shall be unaffected by paragraphs 3 and 4 of this Order or any other stay of proceedings that may be granted in these proceedings.

11. CIBC shall be entitled to the benefit of and is hereby granted a charge (the "**Lender Priority Charge**") on the Property, which charge shall not exceed an aggregate principal amount of 20,000,000 plus interest, fees and expenses, as security for any advances made under the Credit Agreement from and after the filing of the NOI.

12. The Lender Priority Charge shall have the priority set out in paragraphs 21 and 23 hereof.

13. The payments made by the Company pursuant to this Order, the Credit Agreement and the Forbearance Agreement, and the granting of the Lender Priority Charge shall not constitute or be deemed to be a preference, fraudulent conveyance or transfer at undervalue or other challengeable or reviewable transaction under the BIA or any

applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law. The rights of CIBC under this Order, including without limitation the Lender Priority Charge, shall be enforceable in any bankruptcy, interim receivership, or receivership or in any proceedings under the *Companies' Creditors Arrangement Act* (Canada) of the Company or Property.

D&O CHARGE

14. The Company shall indemnify the directors and officers against obligations and liabilities that they may incur in their role as directors and officers after the filing of the NOI, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's and officer's gross negligence or wilful misconduct.

15. Each of the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of the Property, which charge shall not exceed an aggregate amount of $925,000, as security for the indemnity provided in this Order.

16. The D&O Charge shall have the priority set out in paragraphs 21 and 23 hereof.

17. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge; and

    (b) the Company's directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy.

KERP

18. The Company's key employee retention plan (the "**KERP**") described in the First Report is hereby approved and the Company is authorized and directed to make the payments contemplated thereunder should the beneficiaries become entitled thereto in accordance with the terms and conditions of the KERP.

19. The beneficiaries of the KERP are hereby granted a charge (the "**KERP Charge**") on the Property which charge shall not exceed an aggregate amount of $800,000, as security for all obligations under the KERP.

20. The KERP Charge shall have the priority set out in paragraphs 21 and 23 hereof.

PRIORITY OF CHARGES

21. The priorities of the Administration Charge, the Lender Priority Charge, the D&O Charge, and the KERP Charge, as between them, shall be as follows:

    (a) First – Administration Charge;

    (b) Second –Lender Priority Charge;

    (c) Third – D&O Charge; and

    (d) Fourth – KERP Charge.

    (collectively, the "**Charges**").

22. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

23. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

24. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Company also obtains the prior written consent of the Proposal Trustee and the other beneficiaries of the Charges affected thereby, or further order of this Court.

SALE PROCESS

25. The sale process (the "**Sale Process**") commenced prior to the filing of the notice of intention to file a proposal by the Company in this proceeding, as described in the First Report, is commercially reasonable and is hereby ratified and approved.

26. The Company, with the assistance of the Proposal Trustee and Valitas Capital Partners, is hereby authorized and directed to continue the Sale Process, and do all things reasonably necessary to conduct and give full effect to the Sale Process and carry out the obligations thereunder, including taking any additional steps or executing additional documents as may be necessary or desirable in order to carry out and complete the Sale Process and a transaction or transactions thereunder.

27. The Company is authorized to apply to this Honourable Court for advice and directions in connection with the Sale Process.

FUNDS PAID OUT OF COURT

28. The Clerk of the Court of the King's Bench of Alberta is hereby directed to release to the Company all funds currently being held by it, or which may be paid into Court subsequent to this Order, pursuant to garnishee summons issued in Court of King's Bench File Number 1903-07838 (the "**Garnished Funds**").

29. The Company shall deposit the Garnished Funds in the Company's accounts with CIBC and they shall be applied in accordance with the provisions of the Credit Agreement and the Cash Management System to reduce the amounts outstanding to CIBC as first priority secured creditor.

30. Any Person who has received a garnishee summons directing it to pay funds to the Clerk of the Court is hereby directed to pay any such funds directly to the Company to be deposited by the Company into its accounts with CIBC and applied in accordance with the provisions of the Credit Agreement and the Cash Management System.

SEALING

31. Notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*, Alta Reg 124/2010, confidential appendix 1 ("**Confidential Appendix**") of the First Report shall until further

Order of this Honourable Court, be sealed on the Court file and kept confidential to be shown only to a Justice of the Court of King's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Confidential Appendices in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states:

THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED IN COURT FILE NO. 24-2878531. THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO THE SEALING ORDER ISSUED BY THE HONOURABLE JUSTICE C.M. JONES ON NOVEMBER 9, 2022.

32. The Company and the Proposal Trustee are empowered and authorized, but not directed, to provide the Confidential Appendix (or any portion thereof, or information contained therein) to any interested party, entity or person that the Company or Proposal Trustee considers reasonable in the circumstances, subject to confidentiality arrangements satisfactory to the Company or the Proposal Trustee.

33. Any party may apply to set aside paragraph 31 of this order upon providing the Company, Proposal Trustee and all other interested parties with 5 days notice of such application.

MISCELLANEOUS MATTERS

34. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Proposal Trustee will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Proposal Trustee's reports shall be filed by the Clerk of the Court notwithstanding that they do not include an original signature.

35. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order, and to assist the Proposal Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Proposal Trustee, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Proposal Trustee and its agents in carrying out the terms of this Order.

36. Each of the Company or the Proposal Trustee shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

37. Any interested party (including the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SERVICE OF ORDER

38. Service of this Order shall be deemed good and sufficient:

    (a) by serving same on the persons who were served with notice of this Application and any other parties attending or represented at the hearing of the Application; and

    (b) by posting a copy of this Order on the Proposal Trustee's website at: Nilex Inc. (ksvadvisory.com).

39. Service of this Order on any other person is hereby dispensed with.

40. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta

District of: Ontario
Division No.: 09-Toronto
Court No.: 31-3038619
Estate No.: 31-3038619

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY, THE 27TH
	)	
JUSTICE CONWAY	)	DAY OF FEBRUARY, 2024

B E T W E E N:

(Court Seal)

IN THE MATTER OF NOTICE OF INTENTION TO MAKE
A PROPOSAL OF
BRR LOGISTICS LIMITED

ORDER

THIS MOTION, made by BRR Logistics Limited (the "**Company**"), pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") was heard this day by video conference at 330 University Avenue, Toronto, Ontario in accordance with the Guidelines to Determine Mode of Proceeding in Civil.

ON READING the Notice of Motion, the Affidavit of Michael Wakefield sworn February 23, 2024 and the exhibits thereto (the "**Wakefield Affidavit**"), and the First Report of BDO Canada Limited ("**BDO**") dated February 23, 2024 (the "**First Report**"), in its capacity as proposal trustee of the Company (in such capacity, the "**Proposal Trustee**"), and on being advised that the secured creditors who are likely affected by the charge created herein were given notice, and on hearing the submissions of counsel for the Company and counsel for the Proposal Trustee, and

those other parties present, no one else appearing although duly served as appears from the Affidavit of Service of Shallon Garrafa, filed,

SERVICE AND INTERPRETATION

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and Motion Record of the Company are hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service hereof.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined shall have the meanings given to such terms in the Wakefield Affidavit or the First Report, as applicable.

EXTENSION OF THE PROPOSAL PERIOD

3. **THIS COURT ORDERS** that, pursuant to subsection 50.4(9) of the BIA, the time for filing a proposal with the Official Receiver in the proceedings of the Company, including the stay of proceedings, is extended up to and including April 15, 2024.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**"). The Company is authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or

employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Company shall be entitled to continue to utilize any cash management system currently in place or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank or financial institution providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Company of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any individual, firm, corporation, governmental body or agency or any other entities (all of the foregoing, collectively being “**Persons**”, and individually, a “**Person**”) other than the Company, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, solely in its capacity as provider of the Cash Management System only, an unaffected creditor under any proposal filed by the Company with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System on or after the date of this Order.

6. **THIS COURT ORDERS** that the Company shall be entitled, but not required, to pay the following expenses, whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee medical, dental, vision, insurance and similar benefit plans or

arrangements), vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing practices, compensation policies and arrangements of the Company;

(b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

(c) amounts owing for goods or services actually provided to the Company prior to the date of this Order by third parties if, in the opinion of the Company, such third party is critical to the Company's business and ongoing operations of the Company, provided that such payments shall: (i) be consistent with the cash flow forecast appended to the First Report, (ii) not exceed an aggregate amount of $100,000, and (iii) be approved in advance by the Proposal Trustee or by further Order of the Court.

PROFESSIONAL FEES

7. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee and counsel for the Company on a bi-weekly basis.

8. **THIS COURT ORDERS** that the Proposal Trustee and its legal counsel shall pass their accounts from time to time and, for this purpose, the accounts of the Proposal Trustee and its legal

counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

9. **THIS COURT ORDERS** that the Proposal Trustee, counsel to the Proposal Trustee, and the Company's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Company's counsel, the Proposal Trustee and its counsel both before and after the making of this Order in respect of these proceedings.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge shall not be required, and that the Administration Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Administration Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that the Administration Charge shall constitute a charge on the Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except any validly perfected security interest in favour of equipment lessors.

12. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Proposal Trustee under the BIA or as an officer of this Court, the Proposal Trustee shall incur no

liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded to the Proposal Trustee under the BIA or any applicable legislation.

APPROVAL OF LIQUIDATION PLAN

13. **THIS COURT ORDERS** that the Liquidation Plan, as described and defined in the First Report, be and is hereby approved, and the Company and the Proposal Trustee, as applicable, are hereby authorized to take such steps as are necessary to carry out the Liquidation Plan.

DISTRIBUTION TO SECURED CREDITOR

14. **THIS COURT ORDERS** that the Company is hereby authorized to make distributions to Sallyport Commercial Finance ULC ("**Sallyport**") from the sales of inventory and collections of accounts receivable subsequent to January 31, 2024 up to the amount of the indebtedness owing to Sallyport, as detailed in the First Report.

SALES OUT OF ORDINARY COURSE

15. **THIS COURT ORDERS** that the Company is hereby authorized to complete sales of inventory and equipment outside of the ordinary course of business:

(a) without the necessity for further Court approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $500,000 in the aggregate; and

(b) provided that all such transactions are approved by the Proposal Trustee.

APPROVAL OF PROPOSAL TRUSTEE REPORT AND ACTIVITIES

16. **THIS COURT ORDERS** that the First Report and the conduct and activities of the Proposal Trustee described therein are hereby approved, provided that only the Proposal Trustee, in its personal capacity and only with respect to its own personal liability shall be entitled to rely upon or utilize in any way such approval.

GENERAL

17. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in these proceedings, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial) shall be valid and effective service. Subject to Rule 17.05 of the Rules of Civil Procedure (the "**Rules**"), this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol and shall be accessible by selecting the Company's name from the engagement list at the following URL '<https://www.bdo.ca/services/financial-advisory-services/business-restructuring-turnaround-services/current-engagements>'.

18. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Company and the Proposal Trustee are at liberty to serve

or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Company's creditors or other interested parties at their respective addresses as last shown on the records of the Company and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

19. **THIS COURT ORDERS** that the Proposal Trustee shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in these proceedings (the "**Service List**"). The Proposal Trustee shall post the Service List, as may be updated from time to time, on the case website as part of the public materials in relation to these proceedings. Notwithstanding the foregoing, the Proposal Trustee shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

20. **THIS COURT ORDERS** that the Company and the Proposal Trustee and their respective counsel are at liberty to serve or distribute this Order, and other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Company's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

21. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States, to give effect to this Order and to assist the Company, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and the Proposal Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Proposal Trustee in any foreign proceeding, or to assist the Company and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

22. **THIS COURT ORDERS** that each of the Company or the Proposal Trustee shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

23. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order, and this Order is enforceable without the need for entry and filing.

(Signature of judge, officer or registrar)

IN THE MATTER OF NOTICE OF INTENTION TO MAKE
A PROPOSAL OF
BRR LOGISTICS LIMITED

District of: Ontario
Division No.: 09-Toronto
Court No.: 31-3038619
Estate No.: 31-3038619

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at
Toronto

ORDER

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Gregory Azeff (LSO#: 45324C)
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Tel: 416.597.6087

Lawyers for BRR Logistics Limited

Form 7 Rule 3.8

Clerk's Stamp

COURT FILE NO.	2201-
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BR CAPITAL LP, BR CAPITAL INC., ICE HEALTH SYSTEMS LP, ICE HEALTH SYSTEMS GP LP, ICE HEALTH SYSTEMS INC., HEALTH EDUCATION LP, HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL LP, FIRST RESPONSE INTERNATIONAL GP LP, FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD. AND SESCI HEALTH SERVICES INC. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF HEALTH SYSTEMS INC., HELP INC., FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD AND SESCI HEALTH SERVICES INC. UNDER THE *BUSINESS CORPORATIONS ACT*, RSA 2000, CH B-9, AS AMENDED
APPLICANTS	BR CAPITAL LP, BR CAPITAL INC., ICE HEALTH SYSTEMS LP, ICE HEALTH SYSTEMS GP LP, ICE HEALTH SYSTEMS INC., HEALTH EDUCATION LP, HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL LP, FIRST RESPONSE INTERNATIONAL GP LP, FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD. AND SESCI HEALTH SERVICES INC.
DOCUMENT	**ORIGINATING APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone: (403) 298-1938 / (403) 298-1018 Facsimile: (403) 263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com

File No. A167833
Attention: Tom Cumming / Stephen Kroeger

NOTICE TO THE RESPONDENTS

This application is made against you.

You have the right to state your side of this matter before the master.

To do so, you must be in Court when the application is heard as shown below:

Date:	October 14, 2022
Time:	3:00 p.m.
Where:	By Webex (see Webex details at **Schedule "B"**)
Before Whom:	The Honourable Justice C. Dario in Commercial Chambers

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

1. The applicants, BR Capital LP ("**BR LP**"), BR Capital Inc. ("**BR GP**"), Ice Health Systems LP ("**ICE LP**"), Ice Health Systems GP LP ("**ICE GP LP**"), Ice Health Systems Inc. ("**ICE AB Inc.**"), Health Education LP ("**HE LP**"), Health Education GP LP ("**HE GP LP**"), Help Inc. ("**HE Inc.**"), First Response International LP ("**FRI LP**"), First Response International GP LP ("**FRI GP LP**"), First Response International Inc. ("**FRI Inc.**"), Ice Health Systems Ltd. ("**ICE Ltd.**") and SESCI Health Services Inc. ("**SECSI**") (collectively the "**Applicants**") apply for an Order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "***BIA***") seeking, *inter alia*, the following relief and substantially in the form attached hereto as **Schedule "A"**:

   (a) abridging the time for service of notice of this Application, deeming service of notice of this Application to be good and sufficient, and declaring that there is no other person who ought to have been served with notice of this Application;

   (b) directing that the proposal proceedings and estates of the Applicants be procedurally consolidated and continue under a single estate (each individual estate being an "**Estate**", and the consolidated estate being the "**Consolidated Estate**"),

authorizing and directing the Proposal Trustee to administer the Estates making up the Consolidated Estate on a consolidated basis, and granting ancillary relief arising from the procedural consolidation of the Estates (the "**Consolidated Proposal Proceeding**");

(c) declaring that:

(i) the Applicants' counsel, Gowling WLG (Canada) LLP ("**Gowling**"), KPMG Inc. ("**KPMG**") in its capacity as proposal trustee of the Applicants (the "**Proposal Trustee**") and the Proposal Trustee's counsel, Osler, Hoskin & Harcourt, LLP (collectively, the "**Administrative Professionals**"), be paid their reasonable fees and disbursements incurred in and in preparation for the Consolidated Proposal Proceeding; and

(ii) the Administrative Professionals, as security for their reasonable professional fees and disbursements incurred both before and after the granting of the requested Order, shall have the benefit of and are hereby granted a security and charge (the "**Administration Charge**") on all present and after-acquired property of the Applicants (the "**Property**"), which charge shall be in the aggregate amount of $350,000;

(d) approving a secured, non-revolving interim financing facility in the maximum principal amount of $430,010 (the "**Interim Financing Facility**") created pursuant to a letter loan agreement dated September 16, 2022 (the "**Interim Financing Agreement**") between 2443970 Alberta Inc. ("**244**"), as administrative agent for and on behalf of a syndicate of lenders (244, in such capacity, the "**Interim Agent**", and such lenders, together with the Interim Agent, the "**Interim Lenders**") and the Applicants;

(e) declaring that the Property is subject to a security and charge (the "**Interim Lenders' Charge**") in favour of the Interim Lenders to secure the payment and performance of the Interim Financing Facility and the Applicants' indebtedness, liabilities and obligations under the Interim Financing Agreement;

(f) declaring that the Property is subject to a security and charge in favour of the directors and officers of the corporate applicants, ICE AB Inc., HE Inc., FRI Inc., ICE Ltd. and SESCI, and the chief financial officer and chief executive officer of BR LP (all such directors and officers being collectively referred to as the "**Directors**") over the Property to indemnify the Directors against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the Proposal Proceedings in an amount not to exceed $300,000 (the "**D&O Charge**"), other than obligations and liabilities incurred as a result of their gross negligence or wilful misconduct;

(g) declaring that the Administration Charge, Interim Financing Charge and D&O Charge (collectively, the "***BIA* Charges**") are priority charges that rank ahead of any and all charges, security interests, liens, trusts, deemed trusts and encumbrances against the Property, including liens and trusts created by federal and provincial legislation, and that the *BIA* Charges rank, as between themselves, in the following order of priority:

First, the Administration Charge;

Second, the Interim Financing Charge; and

Third, the D&O Charge;

(h) extending the 30 day time period within with the Applicants are required to file a proposal, ending on October 15, 2022 and October 16, 2022 (the "**Stay Period**"), by an additional 45 day period ending November 29, 2022 (the "**Stay Extension**"); and

(i) such further and other relief as the Applicants may request and this Honourable Court may grant.

Grounds for making this application:

Background

2. BR LP is an Alberta limited partnership formed pursuant to a limited partnership agreement dated February 28, 2006 between BR GP, an Alberta corporation, as general partner, and Peter Hoven, as initial limited partner, as amended from time to time.

3. BR LP is the sole limited partner of ICE LP, HE LP and FRI LP, each being Alberta limited partnerships. The general partner of ICE LP is ICE GP LP, an Alberta limited partnership, and the general partner of ICE GP LP is ICE AB Inc., an Alberta corporation. ICE LP owns all of the shares of ICE Health Systems Inc. ("**ICE NV**"), a Nevada corporation, and ICE Ltd., an Alberta corporation. ICE Ltd. owns all of the shares in SESCI Health Services MX ("**SHS MX**"), a Mexico corporation, and SESCI, an Alberta corporation. ICE NV and SHS MX are not Applicants in these proposal proceedings.

4. The general partner of FRI LP is FRI GP LP, an Alberta limited partnership, and the general partner of FRI GP LP is FRI Inc., an Alberta corporation. The general partner of HE LP is HE GP LP, an Alberta limited partnership, and the general partner of HE GP LP is HE Inc., an Alberta corporation.

5. ICE LP, HE LP and FRI LP have developed and own cloud based software systems supporting dental and medical clinics and the dissemination of medical information (collectively, the "**Software**") and all intellectual property associated therewith. The development and marketing of such Software was financed by the issuance of units in BR LP and the issuance by BR LP of unsecured promissory notes to approximately 40 noteholders in the aggregate principal amount of $6,923,921 (collectively, the "**BR Notes**").

6. ICE LP licenses its Software to ICE NV and ICE Ltd. ICE NV sublicenses such Software to customers in the United States, and ICE Ltd. sublicenses the Software to its customers in Canada and elsewhere in the world. HE LP and FRI LP each licence their Software to customers in Canada.

7. The market disruptions caused by the global COVID-19 pandemic reduced both the revenues received by the Applicants under their licences and the demand for new licenses. As a result BR LP is unable to repay the amounts outstanding under the BR Notes or other liabilities as they became due.

8. On September 15 and 16, 2022, each of the Applicants filed a notice of intention to make a proposal (collectively, the "**NOIs**") pursuant to section 50.4(1) of the *BIA* (such proceedings, the "**Proposal Proceedings**") naming KPMG Inc. as the Proposal Trustee.

9. As a result of the filing of the NOIs, all proceedings against the Applicants and this Property were automatically stayed for an initial period of thirty (30) days.

Consolidation

10. The Applicants form a closely connected group of partnerships and corporations whose parent limited partnership is BR LP that ran one business. All operations are directed through BR LP; however, the Applicants maintain separate books and records. Approximately 95% of the indebtedness is in BR LP, but the property, consisting of the Software and licenses, are owned by subsidiary limited partnerships and corporations.

11. An Order procedurally consolidating the Estates will allow the Estates to be managed more efficiently and economically and is necessary and appropriate to:

 (a) enable the Court to efficiently determine common questions of fact and law between the parties;

 (b) clarify the issues and claims being advanced by parties as they relate to the same transaction or series of transactions;

 (c) ensure consistency and avoid the possibility of conflicting decisions; and

 (d) facilitate the efficient and economic resolution of the Applicants' restructuring proceedings.

Administration Charge

12. The Applicants request that this Honourable Court grant the Administration Charge against the Property in the maximum amount of $350,000 to secure the reasonable professional

fees and disbursements of the Administrative Professionals.

13. There are many complex legal, accounting and technical issues which the Applicants must address in order to formulate and submit to their creditors and this Honourable Court a proposal which will successfully address their financial difficulties. The Administrative Professionals are integral to successfully developing a viable proposal, and in order to ensure their participation, the Administration Charge is required to protect and secure their fees and disbursements.

14. The Administration Charge is reasonable and appropriate in the circumstances and critical to the success of the Applicants' restructuring proceedings.

Interim Financing

15. The Applicants have prepared a 13-week cash flow forecast (the "**Cash Flow Forecast**") in which the estimated working capital requirements for operating, restructuring costs the fees and disbursements of the Administrative Professionals will, without additional funding, exceed the Applicants' estimated revenues. According to the Cash Flow Forecast, the Applicants will require an immediate cash injection and over the 13-week period will require financing in the approximate amount of $430,010.

16. Under the Interim Financing Facility, up to $430,010 will be made available to the Applicants based on the Cash Flow Forecast and the requirements of the Interim Financing Agreement. The Applicants' ability to draw is conditional upon Court approval of the Interim Financing Facility and Interim Financing Agreement and the granting of the Interim Lender's Charge.

17. The Interim Financing Agreement permits additional financing in order to fund the implementation of a proposal that is accepted by the affected creditors, approved by this Honourable Court, and on terms acceptable to the Interim Lenders.

18. The terms of the Interim Financing Facility are reasonable and in line with prevailing practices in the insolvency industry, and the proposed borrowings thereunder are

appropriate in the circumstances and sufficient to fund the Applicants' cash flow needs through to December 10, 2022.

The D&O Charge

19. The Applicants' Directors will play a critical role in their restructuring and have identified a need for the granting of the D&O Charge as security for the Applicants' indemnification for possible obligations and liabilities which they may incur in their capacity as directors and officers.

20. The granting of the D&O Charge, in the amount of $300,000, is in line with prevailing insolvency practices, the Applicants do not have existing Directors' liability insurance coverage, such insurance coverage is not available at a reasonable cost, and the proposed amount is appropriate in the circumstances.

21. The Proposal Trustee supports this Application

22. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Extension of the Stay Period

23. The Applicants require an extension of the Stay Period to continue the restructuring of their businesses and to work towards making a viable proposal to its creditors.

24. The Stay Extension is appropriate for, *inter alia,* the following reasons:

   (a) the Applicants have acted and continue to act in good faith and with due diligence;

   (b) no creditor will be materially prejudiced by the requested Stay Extension; and

   (c) the Stay Extension is necessary to allow Applicants sufficient time to finalize a Proposal, hold a meeting to allow creditors of the Applicants to vote on the Proposal and, if approved by the requisite majorities, seek approval of the Court and implement the Proposal according to its terms.

25. The Proposal Trustee supports the Stay Extension.

Material or evidence to be relied on:

26. The Affidavit of Mark Genuis, sworn October 5, 2022, to be filed;

27. The Affidavit of James Lawson, to be filed;

28. Bench Brief of the Applicants, to be filed;

29. The first report of the Proposal Trustee, to be filed; and

30. Such further and other material as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

31. Rules 1.2, 1.3, 3.2(2)(d), 3.8, 11.27 and 13.5 of the Alberta *Rules of Court*, Alta Reg 124/2010;

32. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended; and

33. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

34. None.

How the application is proposed to be heard or considered:

34. Before the presiding Justice in Commercial Chambers via Webex.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

Schedule "A"

Draft Order

Clerk's Stamp

COURT FILE NO.	●
COURT	COURT OF KING'S BENCH OF ALBERTA (IN BANKRUPTCY & INSOLVENCY)
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BR CAPITAL LP, BR CAPITAL INC., ICE HEALTH SYSTEMS LP, ICE HEALTH SYSTEMS GP LP, ICE HEALTH SYSTEMS INC., HEALTH EDUCATION LP, HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL LP, FIRST RESPONSE INTERNATIONAL GP LP, FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD AND SESCI HEALTH SERVICES INC. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF HEALTH SYSTEMS INC., HELP INC., FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD AND SESCI HEALTH SERVICES INC. UNDER THE *BUSINESS CORPORATIONS* ACT, RSA 2000, CH B-9, AS AMENDED
DOCUMENT	**ORDER (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming / Stephen Kroeger** Phone: 403.298.1938 / 403.298.1018 Fax: 403.263.9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A167833

DATE ON WHICH ORDER WAS PRONOUNCED: October 14, 2022

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice C. Dario in Commercial Chambers

UPON THE APPLICATION of BR Capital LP ("**BR LP**"), BR Capital Inc. ("**BR GP**"), Ice Health Systems LP ("**ICE LP**"), Ice Health Systems GP LP ("**ICE GP LP**"), Ice Health Systems Inc. ("**ICE AB Inc.**"), Health Education LP ("**HE LP**"), Health Education GP LP ("**HE GP LP**"), Help Inc. ("**HE Inc.**"), First Response International LP ("**FRI LP**"), First Response International GP LP ("**FRI GP LP**"), First Response International Inc. ("**FRI Inc.**"), Ice Health Systems Ltd. (**"ICE Ltd.**") and SESCI Health Services Inc. ("**SECSI**") (collectively, the "**Applicants**"), filed October 5, 2022; **AND UPON** reading Affidavit of Mark Genuis, sworn October 5, 2022 (the "**Genuis Affidavit**") and the supplemental Affidavit of Mark Genuis, sworn October 6, 2022; **AND UPON** reading the Report of KPMG Inc. in its capacity as proposal trustee of the Applicants (in such capacity, the "**Proposal Trustee**"); **AND UPON** hearing submissions by counsel for the Applicants, counsel for the Proposal Trustee and any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other than those persons served is entitled to service of the notice of application.

PROCEDURAL CONSOLIDATION

2. The bankruptcy estates of the Applicants BR LP (Estate No. 25-095315), BR GP (Estate No. 25-2865866), ICE LP (Estate No. 25-095322), ICE GP LP (Estate No. 25-095321), ICE AB Inc. (Estate No. 25-2865872), HE LP (Estate No. 25-095320), HE GP LP (Estate No. 25-095318), HE Inc. (Estate No. 25-2865870), FRI LP (Estate No. 25-095317), FRI GP LP (Estate No. 25-095316), FRI Inc. (Estate No. 25-2865869), ICE Ltd. (Estate No.25-2866171) and SESCI (Estate No. 25-2865873) (each individually an "**Estate**") shall, subject to further order of the Court, be procedurally consolidated into one estate (the "**Consolidated Estate**") and shall continue under Estate No. 25-095315 (with the proceeding in respect thereof being the "**Consolidated Proposal Proceeding**").

3. Without limiting the generality of the foregoing, the Proposal Trustee is hereby authorized and directed to administer the Consolidated Estates on a consolidated basis for all purposes in carrying out its administrative duties and other responsibilities as proposal

trustee under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "***BIA***") as if the Consolidated Estate were a single estate and the Consolidated Proposal Proceeding were a single proceeding under the *BIA*, including without limitation:

(a) the meeting of creditors of the Applicants may be convened and conducted jointly, and the votes of creditors at such meeting shall be calculated on a consolidated basis;

(b) the Proposal Trustee is authorized to issue consolidated reports in respect of the Applicants; and

(c) the Proposal Trustee is authorized to deal with all filings and notices relating to the proposal proceedings of the Applicants, each as required under the *BIA*, on a consolidated basis.

4. Any pleadings or other documents served or filed in the Consolidated Proposal Proceeding by any party shall be deemed to have been served or filed in each of the proceedings comprising the Consolidated Proposal Proceeding.

5. A copy of this Order shall be filed by the Applicants in the Court file for each of the Estates but any subsequent document required to be filed will be hereafter only be required to be filed in the Consolidated Estate (Estate No. 25-095315).

6. The procedural consolidation of the Estates pursuant to this Order shall not:

(a) affect the legal status or corporate structure of the Applicants; or

(b) cause any Applicant to be liable for any claim for which it is otherwise not liable, or cause any Applicant to have an interest in an asset to which it otherwise would not have.

7. The Estates are not substantively consolidated, and nothing in this Order shall be construed to that effect.

8. The Proposal Trustee may apply to this Court for advice and directions with respect to the implementation of this Order or with respect to any other matter relating to the procedural consolidation of the Consolidated Estate.

ADMINISTRATION CHARGE

9. Legal counsel to the Applicants, the Proposal Trustee and Osler, Hoskin & Harcourt LLP, legal counsel to the Proposal Trustee, as security for their respective professional fees and disbursements incurred in preparing for and during these Consolidated Proposal Proceedings, and both before and after the granting of this Order, shall be entitled to the benefit of, and are hereby granted, a security and charge (the "**Administration Charge**") on all of the Applicants' present and after-acquired assets, property and undertakings (the "**Property**"), which charge shall not exceed $350,000.

INTERIM FINANCING

10. The Applicants are hereby authorized and empowered to obtain and borrow under an interim financing facility (the "**Interim Financing Facility**") pursuant to the interim financing facility commitment letter dated July 26, 2022 (the "**Interim Financing Commitment Letter**"), among the Applicants as borrowers and 2443970 Alberta Inc. ("**244**") as administrative agent for and on behalf of a group of lenders (244, in such capacity, the "**Interim Agent**", and such lenders, together with the Interim Agent, the "**Interim Lenders**"), provided that borrowings under the Interim Financing Facility shall not exceed the principal amount of $430,010 unless permitted by further order of this Court and agreed to by the Interim Lenders.

11. The Interim Financing Facility shall be on the terms and subject to the conditions set forth in the Interim Financing Commitment Letter attached as Exhibit "●" to the Genuis Affidavit, as such Interim Financing Commitment Letter may be amended in accordance with its terms.

12. The Interim Lenders shall be entitled to the benefit of and are hereby granted a security and charge on the Property (the "**Interim Lenders' Charge**") as security for the payment and performance of the indebtedness, liabilities and obligations of the Applicants to the Interim Lenders under the Interim Financing Commitment Letter

and the Interim Financing Facility created thereby in the principal amount of $430,010 together with any interest accrued thereon or costs and expenses incurred thereunder.

D&O INDEMNIFICATION AND CHARGE

13. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers after the filing of the Applicants' notices of intention to file a proposal, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director or officer's gross negligence or willful misconduct.

14. Each of the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on all of the Property, which shall not exceed an aggregate amount of $300,000, as security for the indemnity provided in this Order.

PRIORITY OF CHARGES

15. The filing, registration or perfection of the Administration Charge, the Interim Lenders' Charge and the D&O Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

16. The Charges shall constitute a security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"). The ranking as between the Charges shall be as follows:

(a) first, the Administration Charge;

(b) second, the Interim Lenders' Charge; and

(c) third, the D&O Charge.

17. Except as otherwise provided herein, or as may be approved by this Honourable Court, the Applicants shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants obtain the prior written consent of the beneficiaries of the Charges (the "**Chargees**") or further order of this Court.

18. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the *BIA*, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the *BIA*;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they, or any one of them, is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and

(iii) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

EXTENSION OF TIME TO FILE A PROPOSAL

20. The time within which the Applicants are required to file a proposal to their creditors with the Official Receiver, under section 50.4 of the *BIA* is hereby extended to November 29, 2022.

21. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

J.C.Q.B.A

SCHEDULE "B"

WEBEX DETAILS

Virtual Courtroom 60 has been assigned for the above noted matter:

Virtual Courtroom Link:
https://albertacourts.webex.com/meet/virtual.courtroom60

Instructions for Connecting to the Meeting

1. Click on the link above or open up Chrome or Firefox and cut and paste it into your browser address bar.
2. If you do not have the Cisco Webex application already installed on your device, the site will have a button to install it. Follow installation instructions. Enter your full name and email address when prompted
3. Click on the **Open Cisco Webex Meeting**.
4. You will see a preview screen. Click on **Join Meeting**.

Key considerations for those attending:

1. Please connect to the courtroom **15 minutes prior** to the start of the hearing.
2. Please ensure that your microphone is muted and remains muted for the duration of the proceeding, unless you are speaking. Ensure that you state your name each time you speak.
3. If bandwidth becomes an issue, some participants may be asked to turn off their video and participate by audio only.
4. **Note: Recording or rebroadcasting of the video is prohibited.**
5. **Note: It is highly recommended you use headphones with a microphone or a headset when using Webex. This prevents feedback.**

If you are a non-lawyer attending this hearing remotely, **you must** complete the undertaking located here: https://www.albertacourts.ca/qb/resources/announcements/undertaking-and-agreement-for-non-lawyers
For more information relating to Webex protocols and procedures, please visit:
https://www.albertacourts.ca/qb/court-operations-schedules/webex-remote-hearings-protocol

You can also join the meeting via the "Cisco Webex Meetings" App on your smartphone/tablet or other smart device. You can download this via the App marketplace and join via the link provided above.

I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 17 day of Dec., 2019

Registrar at Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

COURT FILE NUMBER	25-2581252 25-2582159
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED
	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRAKOPOLIS IoT CORP.
	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRAKOPOLIS SaaS CORP.
APPLICANTS:	TRAKOPOLIS IoT CORP. and TRAKOPOLIS SaaS CORP.
DOCUMENT	**ORDER** **(Extension of the Stay, Administration Charge, FA Charge, D&O Charge)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Osler, Hoskin & Harcourt LLP Suite 2500, TransCanada Tower 450 – 1st Street SW Calgary, Alberta T2P 5H1 Solicitors: Randal Van de Mosselaer / Emily Paplawski Phone: 403.260.7060 / 7071 Fax: 403.260.7024 Email: RVandemosselaer@osler.com / Epaplawski@osler.com Matter: 1205888

DATE ON WHICH ORDER WAS PRONOUNCED: December 16, 2019

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Mr. Justice A. D. Macleod

UPON THE APPLICATION of Trakopolis IoT Corp. and Trakopolis SaaS Corp. (together, "**Trakopolis**" and each a "**Debtor**") among other things, approving and extending the time for Trakopolis to file a proposal to January 24, 2020, pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**"); AND UPON having reviewed the Affidavit of Chris Burchell, sworn November 25, 2019 (the "**Burchell Affidavit**"), the Confidential Affidavit of Chris Burchell, sworn November 25, 2019 (the "**Confidential Burchell Affidavit**"), the Supplemental Affidavit of Chris Burchell, sworn December 13, 2019 (the "**Supplemental Burchell Affidavit**"), the Supplemental Confidential Affidavit of Chris Burchell, sworn December 13, 2019 (the "**Supplemental Confidential Burchell Affidavit**"), the First Report of Alvarez & Marsal Canada Inc., in its capacity as Trustee (the "**Proposal Trustee**") under the Notices of Intention to Make a Proposal of Trakopolis ("**NOIs**"), filed November 7 and 9, 2019, and the Supplemental First Report of the Propsoal Trustee; **AND UPON** hearing the submissions of counsel for Trakopolis, the Proposal Trustee and ESW Holdings, Inc. ("**ESW**"), and no one appearing for any other person on the service list;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this Application, and time for service of this Application is abridged to that actually given.

EXTENSION OF THE STAY

2. Trakopolis is hereby granted, pursuant to s. 50.4(9) of the BIA, an extension of the time for Trakopolis to file a proposal, such extension being to January 24, 2020.

ADMINISTRATION CHARGE

3. The Proposal Trustee, Proposal Trustee's counsel, and Trakopolis's counsel as security for the professional fees and disbursements incurred both before and after the NOIs, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on Trakopolis's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the

Proposal Trustee, Proposal Trustee's Counsel and Trakopolis's counsel. The Administration Charge shall have the priority set out in paragraphs 5 to 7 hereof.

THE FINANCIAL ADVISOR ENGAGEMENT LETTER AND CHARGE

4. The engagement letter (the "**EL**") between Canaccord Genuity Corp. (the "**FA**") and the Companies dated December 10, 2019, including the fees payable as set out therein, are hereby approved.

5. The FA shall be entitled to the benefit of and is hereby granted a charge (the "**FA Charge**") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements incurred pursuant to the EL. The Administration Charge shall have the priority set out in paragraphs 5 to 7 hereof.

DIRECTORS' AND OFFICERS' CHARGE

6. The charge granted to the directors and officers of Trakopolis by paragraph 2 of the December 6, 2019 Order of this Court in the within Action (the "**D&O Charge**") shall have the priority set out in paragraphs 7 to 9 hereof.

VALIDITY AND PRIORITY OF CHARGES

7. The Priorities of the Charges (as defined below), as between them, shall be as follows:

   First – Administration Charge (to the maximum of $250,000) and the FA Charge (to the maximum of $200,000), on a *pari passu* basis;

   Second – D&O Charge (to the maximum of $150,000)

   (collectively, the "**Charges**").

8. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding that any such failure to file, register, record or perfect.

9. Notwithstanding anything else in this Order, there shall be no amounts owing under the FA Charge unless or until Trakopolis has closed a restructuring transaction (a "**Restructuring Transaction**") within the meaning of the EL, namely, any restructuring, reorganization, rescheduling, repayment, refinancing or recapitalization of all or any material portion of the liabilities of the Trakopolis, however such result is achieved, including, without limitation, through a plan of arrangement, reorganization or liquidation or proposal in the within proceedings, or under the *Companies' Creditors Arrangement Act,* or under the laws of the province of Alberta, an exchange offer or consent solicitation, covenant relief, a rescheduling of debt maturities, a change in interest rates, a settlement or forgiveness of debt, a conversion of debt into equity, or other amendments to the Trakopolis debt instruments. For further clarification, any transaction following the appointment of a Receiver on application by ESW shall not constitute a Restructuring Transaction.

10. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**").

CONSOLIDATION

11. The Proposal Trustee is entitled to administer procedural matters relating to the bankruptcy proceedings of Trakopolis on a consolidated basis (the "**Consolidated NOI Proceedings**"). All materials filed with the court clerk in respect of Court of Queen's Bench of Alberta in Bankruptcy and Insolvency Estate Nos. 25-2581252 and 25-2582159 may be filed exclusively in Estate No. 25-2581252. A copy of this order will be filed in the Court file for each of the Debtor's respective estates, but any other document required to be filed in the Consolidated NOI Proceedings shall be filed in Estate No. 25-2581252.

12. The Consolidated NOI Proceedings will be in relation to procedural matters only and do not:

    (a) affect the separate legal status and corporate structure of the Debtors; or

(b) cause either Debtor to be liable for any claim for which it is otherwise not liable, or cause either Debtor to have an interest in an asset to which it otherwise would not have.

13. Without limiting the generality of the foregoing, the Proposal Trustee is authorised to carry out its administrative duties and responsibilities as trustee-in-bankruptcy and as proposal trustee under the BIA as if the Consolidated NOI Proceedings were a single proceeding under the BIA, including without limitation:

(a) the meetings of creditors of the Debtors may be convened and conducted jointly;

(b) the Proposal Trustee is authorised to issue consolidated reports in respect of the Debtors; and

(c) the Proposal Trustee is authorized to deal with all filings and notices relating of the proposal proceedings of the Debtors, each as required under the BIA on a consolidated basis.

MISCELLANEOUS

14. Trakopolis shall serve by courier, fax transmission, email transmission or ordinary post, a copy of this Order on all parties present at this Application and on all parties who are presently on the service list established in these proceedings and such service shall be deemed good and sufficient for all purposes.

Justice of the Court of Queen's Bench of Alberta

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

2020 ONSC 1482 (CanLII)

COURT OF ONTARIO, SUPERIOR COURT OF JUSTICE (IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

HEARD: March 6, 2020

DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*[1]. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group

[1] RSC 1985, C. B-3 as amended

of three secured creditors ("the noteholders"). Dominion takes the view that "there is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings."

[4] If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15th, 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of $28 million although that is inclusive of intercompany debt.

[5] If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the "as is" value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another $2.3 million in debt in priority to all other creditors.

[6] The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

Background

[7] Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

[8] Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

[9] Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka's remaining management nor in the business plan the proponents now seek to put forward.

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[10] I have reviewed the First Report of the Proposal Trustee (Deloittes). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly $650,000.00 to complete the construction and $160,000.00 to purchase inventory.

[11] The interim financing plan is expensive and would add $2.3 million in debt to the burden already in place. A large potion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

[12] In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

Analysis

[13] All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files.[2]

[14] All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the "confidential document brief" will be sealed until further order.[3]

[15] This is not a plan of rearrangement under the *Companies' Creditors Arrangement Act*[4] nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of

[2] See *Electro Sonic Inc. (Re),* 2014 ONSC 942 (Commercial List)
[3] See *Canwest Publishing Inc. (Re),* 2010 ONSC 222 (Commercial List) @ paras 63 - 65
[4] *Companies' Creditors Arrangement Act,* R.S.C., 1985 c. C-36

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proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court.[5]

[16] The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

Factors to be considered

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

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[17] It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another $2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration.[6] Still it is part of the analysis. $2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

[18] I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario.[7]

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[5] See *Cumberland Trading Inc. (Re),* (1994) 23 CBR (3d) 225 (Ont. Ct., Gen Div., Commercial List)
[6] See *OVG Inc., (Re),* 2013 ONSC 1794
[7] See: https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities

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[19] Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

[20] The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

[21] I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

[22] There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least $15 million in secured debt and over $9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

[23] There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

[24] I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal.[8]

Conclusion & Order

[25] I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

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[8] See *Mustang GP Ltd (Re),* 2015 ONSC 6562

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[26] During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

[27] In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

[28] I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

[29] The parties may also arrange to speak to the matter if any party seeks costs.

Mr. Justice C. MacLeod

Date: March 9, 2020

2020 ONSC 1482 (CanLII)

2020 ONSC 1482 (CanLII)

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

2020 ONSC 1482 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

DECISION AND REASONS

Mr. Justice C. MacLeod

Released: March 9, 2020

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218
Docket: 2101-0002-AC
2101-0004-AC
Registry: Calgary

2021 ABCA 66 (CanLII)

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Docket: 2101-0004-AC

Between:

Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish,
Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi,
Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,

Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi,
Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi,
Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani
and Ali Nilforoush

Applicants

- and -

Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

Application for Permission to Appeal

2021 ABCA 66 (CanLII)

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

Introduction

[1] The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

[2] The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

[3] On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

[4] During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

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[5] On December 17, 2020, the chambers judge granted the requested orders. The applicants wish to appeal those orders and submit that leave is not required, or in the alternative, that leave ought to be granted in the circumstances.

[6] For the reasons that follow, I have concluded that leave to appeal is required. I have considered the leave application and conclude that the test for leave has not been met.

Is leave to appeal required?

[7] Under section 193 of the BIA, an appeal exists as of right from bankruptcy proceedings in limited circumstances:

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

[8] While at first blush the section, and in particular s 193(c), appears broad, the provision has been narrowly interpreted. The provision, and the BIA generally, are to be interpreted purposively, to ensure bankruptcy proceedings are administered efficiently and expeditiously.

[9] Applicants seeking to avoid the requirement for leave often rely on ss 193(a) and (c), and this appeal is no exception.

[10] Looking first at s 193(a), the investors submit that the SAVO approves vesting title to assets free and clear of all charges and claims, including those of the investors, and thus their future rights are being negatively impacted. I do not accept that submission. Future rights are not procedural rights or commercial advantages, which is in reality what the investors assert. The submission that they no longer have a claim against the assets of Greenfire overlooks the reality that they are not asserting future rights, but rather present rights, and that any proceeds of sale will be available for distribution to creditors in accordance with the BIA. See *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15; *Ravelston Corp., Re*, 2005 CanLII 63802 at para 17, [2005] OJ No 5351 (Ont CA); *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 CBR 240 (Ont CA); *Dominion Foundry Co., Re* (1965), 1965 CanLII 596, 52 DLR (2d) 79 (Man CA); and *Fiber Connections Inc. v SVCM Capital Ltd.*, 2005 CanLII 15454, 10 CBR (5th) 201 (Ont CA).

[11] The situation is similar to that in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225. In *Bending Lake*, the Ontario Court of Appeal considered whether leave

to appeal a sale and vesting order was required under s 193, it having been submitted that "future rights" were engaged. The court held that to the extent a SAVO affects the rights of those with an economic interest in the debtor, only the present, existing rights of the debtor's creditors and shareholders are affected, not their future rights (para 27). The court examined the applicant's real complaint - the "commercial advantages or disadvantages that may accrue from the order challenged on appeal" (para 28), for example eliminating shareholder equity or precluding efforts by the shareholders to raise financing (the precise circumstances here). The court determined that those are existing, not future rights. The same is true in this case.

[12] Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of "value of the property" within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt's assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.

[13] The court in *Bending Lake* also considered the scope of s 193(c). Justice Brown adopted a contextual approach and identified two factors that should inform any interpretation of the subsections: first, the predecessor section to s 193(c) was enacted at a time when the BIA did not include the right to seek leave to appeal, and this prompted courts to give categories of appeals as of right a wide and liberal interpretation to avoid shutting out meritorious appeals. Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, requires leave under s. 13. No principled basis exists to distinguish the treatment of a sale by a receiver or trustee from that under the CCAA. Brown JA concluded that these factors militated against employing an expansive interpretation. He favoured an approach alive to the needs of modern, real time insolvency litigation. He concluded that s 193(c) does not apply to: (i) orders procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss.

[14] In *Dominion Foundry,* an attempt to set aside a sale of assets by a trustee as being improvident was considered procedural, and therefore not falling within s. 193(c). In *Alternative Fuel Systems Inc. v EDO (Canada) Limited*, 1997 ABCA 273, 206 AR 295, this court concluded that where the issue was an order directing acceptance of a tender for the assets of a bankrupt estate, the order was procedural – it was a challenge to the method by which assets were sold. The same is true here. The issue before the supervising judge was whether the SAVO and IFO were appropriate methods of securing financing for the current operation and a purchase of the assets so as to ultimately monetize them to satisfy creditors to the extent possible.

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[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

a) whether the point on appeal is of significance to the practice;
b) whether the point raised is of significance to the action itself;
c) whether the appeal is *prima facie* meritorious or frivolous; and
d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw,* 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

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(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

[24] The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was "too little too late" was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire's counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not "the usual" transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

[25] The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

[26] Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced $4 million between December 19 and 21, and a further $4.5 million between December 29 and January 19. That is, $8.5 million of a total of $20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

[27] The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me – whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

[28] In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of "too little too late". Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

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Conclusion

[29] I have concluded that leave to appeal is required. The test for leave has not been met, and leave to appeal is denied.

Application heard on February 10, 2021

Reasons filed at Calgary, Alberta
this 18th day of February, 2021

Paperny J.A.

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Appearances:

R. Zahara
J.J. Bourchier (no appearance)
for the Athabasca Workforce Solutions Inc.

D. LeGeyt
R.E. Algar
J.D. Murphy (no appearance)
for Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

A.C. Maerov
K. Ryland (no appearance)
for Alvarez Marsal Canada Inc.

K.L. Fellows Q.C.
J.J. Maslowski
R.L.R. Hamilton (no appearance)
for Trafigura Canada General Partnership

K. Kashuba
J. Mann (no appearance)
for McIntytre Partners

D.S. Nishimura
for Behrokh Azarian et al.

G.G. Plester
for Regional Municipality of Wood Buffalo

J.W. Reid
for ABC Funding LLC

CITATION: Northstar Aerospace, Inc. (Re), 2013 ONSC 1780
COURT FILE NO.: CV-12-9761-00CL
DATE: 20130409

2013 ONSC 1780 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA COMPANY, Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **C. J. Hill and J. Szumski, for Ernst & Young Inc., Court-Appointed Monitor**

J. Wall, for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment

P. Guy and K. Montpetit, for the Former Directors and Officers Group

Steven Weisz, for Fifth Third Bank

ENDORSEMENT

Motion Overview

[1] This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 (the "Initial Order").

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[2] If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

[3] For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

[4] In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

[5] The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

[6] The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

[7] The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

[8] Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

[9] On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

[10] A number of background facts have been set out in *Northstar Aerospace, Inc. (Re),* 2012 ONSC 4423 (*Northstar*) and *Northstar Aerospace, Inc. (Re)* 2012 ONSC 6362. A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar, supra.*

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Directors' Indemnification and Directors' Charge

[11] The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

[12] Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[13] Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

[14] The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

[15] The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

> 11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[16] Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the

general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

[17] On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

[18] As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

[19] Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

> 25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

[20] The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

(a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;

(b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and

(c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

[21] As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre-Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

[22] The WeirFoulds Proof of Claim provides that:

> This proof of claim is filed in order to preserve the right to commence:

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(1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and

(2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

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[23] For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

[24] The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

[25] In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

[26] The Monitor's counsel appropriately sets out the issues of this motion, as follows:

(a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;

(b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;

(c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and

(d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

[27] I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

[28] The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

[29] The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications, Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) and *Canwest Publishing Inc., Re*, 2010 ONSC 222.

[30] In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

[31] The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million …

[32] The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

[33] The scope of a section 11.51 charge is limited in several ways:

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(a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;

(b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and

(c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

[34] In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

[35] In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, *supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

[36] Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

[37] The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

[38] It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

<u>Order</u>

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[39] In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

(1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;

(2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and

(3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

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MORAWETZ J.

Date: April 9, 2013

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

2014 ONSC 514 (CanLII)

ENDORSEMENT

[1] The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has

no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

[3] The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

[4] First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

[5] Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[6] Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

[7] Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

[8] Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

[9] Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

[10] For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

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Administration Charge

[11] Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

[12] Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

[17] The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

[18] First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

[19] Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

[20] Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

[21] Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

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The SISP

[22] The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

[23] First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

[24] Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

[25] Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

[26] Lastly, the Proposal Trustee supports the proposed SISP.

[27] Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

[28] The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

[29] Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[30] Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

[31] For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

[32] Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

[33] As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

[34] In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

[35] Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

[36] Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

[37] The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

[38] The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

[39] First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

[40] Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

[41] Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

[42] Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

2014 ONSC 514 (CanLII)

Released: February 7, 2014

2014 ONSC 514 (CanLII)

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

2016 ONSC 1044 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

2016 ONSC 1044 (CanLII)

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

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[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

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The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute “qualified bids”: No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

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Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.,* 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.,* 2010 SCC 60 at para 24; *Re Indalex Ltd*., [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd*., 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

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(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

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[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp*., [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.,* [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

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(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.,supra.*

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

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[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.,* 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

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D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

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[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

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Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.,* Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc.* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

<u>Sealing Order</u>

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

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(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

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COURT FILE NO.: CV-09-8247-00CL
DATE: 20090811

2009 CanLII 42046 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF Grant Forest Products Inc., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

ENDORSEMENT

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

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[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

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[5] Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

[6] Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. … Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

> the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

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case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.,* [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp*. [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

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[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

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[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> 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.

[20] The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

[22] In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc*. (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

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necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

2009 CanLII 42046 (ON SC)

[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

NEWBOULD J.

DATE: August 11, 2009

CITATION: Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980
COURT FILE NO.: CV-18-603054-00CL
DATE: 20181121

2018 ONSC 6980 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC., Applicants

BEFORE: S.F. Dunphy J.

COUNSEL: *Maria Konyukhova and Kathryn Esaw* for Applicants

Jeffrey Levine, for the Official Committee of Unsecured Creditors

David Bish, for Richter Advisory Group, Monitor

Danish Afroz, for Deerfield Management Company, L.P.

HEARD at Toronto: November 16, 2018

REASONS FOR DECISION

[1] This case raises for determination the always-troubling question of Key Employee Retention Plans (or “KERPs”) and Key Employee Incentive Plans (or “KEIPs”). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

[2] For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

[3] The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies’ Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the

same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

[4] As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

[5] In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors – Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. – possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

[6] These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

[7] I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

[8] Stated differently – Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

[9] Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims.

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Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

[10] This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

[11] The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

[12] While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

[13] The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

[14] The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

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[15] The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the “super-stretch” targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

[16] Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

[17] The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company’s Board was involved as was the debtor’s counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

[18] The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

[19] With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

[20] The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim – and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

[21] In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

[22] Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

[23] KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

[24] The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. “Key” is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out “key” in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise “key” employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a “bunker mentality” causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- “business as usual” is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

[25] While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

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- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more – sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

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[26] What is wanting to sort out these competing interests is one thing that the court – on its own at least – is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial "eyes and ears of the court" comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

[27] What the court is unable to supply on its own can be summed up in the phrase "business judgment". Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company's business judgment. In my view, the court's role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

[28] Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

[29] My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re),* 2012 ONSC 3767 (CanLII),

relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
d. the employees' history with and knowledge of the debtor;
e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
h. whether the payments under the KERP are payable upon the completion of the restructuring process.

[30] I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process – from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly

[1] See also Pepall J. (as she then was) in *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) at para. 49-52.

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benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

[31] In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

[32] The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

[33] The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed

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incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

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[34] The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

[35] Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

[36] The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

[37] In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

[38] The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

[39] Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

[40] In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of

the debtor companies or completion of the sales process and – for the KERP program at least – the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

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[41] The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees – critical to the Canadian business being sold – would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

[42] The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

[43] At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

[44] I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

[45] The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

[46] The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

[47] The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the

bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold[2], Target, Stretch and Super Stretch).

[48] The real controversy on the motion was in respect of the KEIP.

[49] It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

[50] They also object to the level of incentives relative to salary as being unacceptably high.

[51] The answer to both of these objections lies in the peculiar facts of this case.

[52] The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight – and the past efforts of the employees – that has made the targets appear to be such an easy goal.

[53] Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

[2] The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

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[54] I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

[55] The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

[56] I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

[57] In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

[58] Order accordingly.

S.F. Dunphy J.

Date: November 21, 2018

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ALBERTA

RULES OF COURT

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Edmonton, AB T5K 2P7
Phone: 780-427-4952

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Part 6:
Resolving Issues and Preserving Rights

What this Part is about: This Part is designed to resolve issues and questions arising in the course of a Court action. It includes rules describing how applications are made to the Court and responded to by others, rules for questioning on affidavits and questioning witnesses before a hearing, and rules for preserving, protecting and obtaining evidence inside and outside Alberta.

The Part also

- describes resources and rules available to assist the Court (experts and referees), and
- includes special rules for replevin and interpleader proceedings.

Division 4
Restriction on Media Reporting
and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

6.31 An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

6.32 When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or applications judge assigned to application

6.33 A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020;136/2022

Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Persons having standing at application

6.35 The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

6.36 Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

Information note

If a rule in this Division is not complied with, the person who does not comply may be liable to a penalty under rule 10.49 *[Penalty for contravening the rules]* and to have the matter taken into consideration when a costs award is made (see rule 10.33(2)(f) *[Court considerations in making a costs award]*. The person may also be liable to be declared in civil contempt of Court under rule 10.52 *[Declaration of civil contempt]* if a Court order is not complied with and to have a pleading, claim or defence struck out or an action or application stayed under rule 10.53(1)(d) *[Punishment for civil contempt of Court]*.

Division 5
Facilitating Proceedings

Notice to admit

6.37(1) A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, summary trial or trial, either or both of the following:

(a) any fact stated in the notice, including any fact in respect of a record;

(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.

(2) A copy of the notice must be served on each of the other parties.

(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that

(a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or

(b) sets out an objection on the ground that some or all of the matters for which admissions are requested are, in whole or in part,

(i) privileged, or

(ii) irrelevant, improper or unnecessary.

(4) A copy of the statement must be served on each of the other parties.

(5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admission is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.

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 réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

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

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

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

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

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

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

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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

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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.

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.

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*

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.*

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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.

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

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.

Lois et règlements cités

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

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.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

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

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

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

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

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.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

IACOBUCCI J. —

I. Introduction

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

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

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

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

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

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

II. Facts

II. Les faits

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

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

4 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.

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

5 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*.

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

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

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

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

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.

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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.

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

10

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.

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. Relevant Statutory Provisions

III. Dispositions législatives

11

Federal Court Rules, 1998, SOR/98-106

Règles de la Cour fédérale (1998), DORS/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.

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. Judgments Below

IV. Les décisions antérieures

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

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

12

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

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,

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

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

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.

17

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

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.

18

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

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.

19

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

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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.

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

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

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

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

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.

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.

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.

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.

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

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

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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.

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

24

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.

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

25

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.

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

26

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

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.

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) Robertson J.A. (dissenting)

(2) Le juge Robertson (dissident)

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.

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.

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.

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.

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.

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.

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.

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.

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31

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

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.

32

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

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of 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.

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

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

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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.

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

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.

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. 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?

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. 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

VI. Analyse

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

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

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

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

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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.

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

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.

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

37

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.

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

38

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.

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

39

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

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 accuseds' right to a fair trial.

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

> A publication ban should only be ordered when:
>
> (a) Such a ban is <u>necessary</u> in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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

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

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

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

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est <u>nécessaire</u> pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

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

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

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

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

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

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

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

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

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

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. 11*d*) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

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

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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 <u>any</u> important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

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

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

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

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

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

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

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

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

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

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

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

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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.

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) The Rights and Interests of the Parties

(2) Les droits et les intérêts des parties

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

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).

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

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

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

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

51

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.

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

52

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.

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

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

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

53

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

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 :

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

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-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

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

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

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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.

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

57

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.

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 of the Test to this Appeal*

(1) Necessity

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

(1) Nécessité

58

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

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

59

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.

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

60

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

Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

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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.

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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.

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

64

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.

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

65

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

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

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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 <u>reasonably</u> 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 <u>raisonnables</u> 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) <u>The Proportionality Stage</u>

(2) <u>L'étape de la proportionnalité</u>

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

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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.

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) *Salutary Effects of the Confidentiality Order*

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

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

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

71 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.

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

72 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

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. 2*b*) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

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]

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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.

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

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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.

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.

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However, as mentioned above, to some extent the search for truth may actually be <u>promoted</u> 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

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

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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.

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.

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

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.

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

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.

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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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".

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 ».

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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.

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.

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.

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.

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.

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 <u>either</u> the public interest in freedom of expression <u>or</u> the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

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 <u>ni</u> sur l'intérêt du public à la liberté d'expression <u>ni</u> sur les droits commerciaux ou le droit de l'appelante à un procès

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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.

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

90 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.

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

VII. Conclusion

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

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

VII. Conclusion

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

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

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Appeal allowed with costs.

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

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

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

Pourvoi accueilli avec dépens.

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

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

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

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2021 SCC 25 (CanLII)

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

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

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

Indexed as: Sherman Estate *v.* Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

Répertorié : Sherman (Succession) *c.* Donovan

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

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

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

Held: The appeal should be dismissed.

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

discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexpliqués ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

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serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

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

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

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

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

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Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

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

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

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

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

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integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

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

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

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

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

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

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

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

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

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

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

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

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rouleau et Hourigan), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), qui a infirmé une décision du juge Dunphy, 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Pourvoi rejeté.

Chantelle Cseh et *Timothy Youdan*, pour les appelants.

Iris Fischer et *Skye A. Sepp*, pour les intimés.

Peter Scrutton, pour l'intervenant le procureur général de l'Ontario.

Jaqueline Hughes, pour l'intervenant le procureur général de la Colombie-Britannique.

Ryder Gilliland, pour l'intervenante l'Association canadienne des libertés civiles.

Ewa Krajewska, pour l'intervenant le Centre d'action pour la sécurité du revenu.

Robert S. Anderson, *c.r.*, pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, pour l'intervenante British Columbia Civil Liberties Association.

Khalid Janmohamed, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et Mental Health Legal Committee.

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The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

KASIRER J. —

LE JUGE KASIRER —

I. Overview

I. Survol

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

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

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

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

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proportionality, the benefits of that order restricting openness outweigh its negative effects.

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

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

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist,

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

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recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

plaidoyer en faveur du prononcé d'ordonnances de mise sous scellés des dossiers d'homologation. Les intimés s'opposent à ce que de telles ordonnances soient rendues, rappelant que la protection de la vie privée est généralement considérée comme une faible justification à une exception à la publicité des débats. Ils affirment qu'après tout, presque chaque procédure judiciaire entraîne un certain dérangement dans la vie des personnes concernées et que ces atteintes à la vie privée doivent être tolérées parce que la publicité des débats judiciaires est essentielle à une saine démocratie.

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

[6] Le présent pourvoi offre donc l'occasion de trancher la question de savoir si la vie privée peut constituer un intérêt public suivant la jurisprudence relative à la publicité des débats judiciaires et, dans l'affirmative, si la publicité des débats menace sérieusement la vie privée en l'espèce au point de justifier le type d'ordonnances demandé par les appelants.

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

[7] Pour les motifs qui suivent, je propose de reconnaître qu'un aspect de la vie privée constitue un intérêt public important pour l'application du test pertinent énoncé dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522. La tenue de procédures judiciaires publiques peut mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui me semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, est sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée.

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

[8] Dans la présente affaire, et en gardant cet intérêt à l'esprit, on ne peut pas dire que le risque pour la vie privée est suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en est de même du risque pour la sécurité physique en l'espèce. Dans les circonstances, la Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés et je suis donc d'avis de rejeter le pourvoi.

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II. Background

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

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

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

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

II. Contexte

[9] Bernard Sherman et Honey Sherman, figures importantes du monde des affaires et de la philanthropie, ont été retrouvés morts dans leur résidence de Toronto en décembre 2017. Leur décès apparemment inexpliqué a suscité un vif intérêt chez le public et une attention médiatique intense. En janvier de l'année suivante, le service de police de Toronto a annoncé que les décès faisaient l'objet d'une enquête pour homicides. Au moment où l'affaire a été portée devant les tribunaux, l'identité et le mobile des personnes responsables demeuraient inconnus.

[10] Les successions du couple et les fiduciaires des successions (collectivement les « fiduciaires »)[1] ont cherché à réfréner l'attention médiatique intense provoquée par les événements. Les fiduciaires souhaitaient veiller au transfert harmonieux des biens du couple, à distance de ce qu'ils percevaient comme un intérêt morbide du public pour les décès inexpliqués et la curiosité suscitée par les importantes sommes d'argent apparemment en jeu.

[11] Quand le temps est venu d'obtenir auprès de la Cour supérieure de justice leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires (« personnes touchées ») de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les fiduciaires ont soutenu que, si les renseignements contenus dans les dossiers judiciaires étaient révélés au public, la sécurité des personnes touchées serait menacée et leur vie privée compromise tant et aussi longtemps que les décès demeureraient inexpliqués et que les personnes responsables de la tragédie seraient en liberté. À l'appui de leur demande, ils ont fait valoir qu'il existait un risque réel et important que les personnes touchées subissent un préjudice sérieux en raison de la diffusion publique des documents dans les circonstances.

[1] Comme l'indique l'intitulé de la cause, les appelants en l'espèce ont, tout au long des procédures, été désignés comme suit : « succession de Bernard Sherman et fiduciaires de la succession et succession de Honey Sherman et fiduciaires de la succession ». Dans les présents motifs, les appelants sont appelés les « fiduciaires » par souci de commodité.

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

III. Proceedings Below

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

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension

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

[12] Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par Kevin Donovan, un journaliste qui avait rédigé une série d'articles sur le décès du couple, ainsi que par Toronto Star Newspapers Ltd., le journal pour lequel il écrivait (collectivement le « Toronto Star »)[2]. Le Toronto Star a affirmé que les ordonnances portaient atteinte à ses droits constitutionnels à la liberté d'expression et à la liberté de la presse, ainsi qu'au principe corollaire selon lequel les activités des tribunaux devraient être accessibles au public comme moyen de garantir l'équité et la transparence de l'administration de la justice.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (le juge Dunphy)*

[13] Examinant la question de savoir si les circonstances justifiaient une atteinte au principe de la publicité des débats judiciaires, le juge de première instance s'est appuyé sur l'arrêt *Sierra Club* de notre Cour. Il a souligné qu'une ordonnance de confidentialité ne devrait être accordée que si [TRADUCTION] : « (1) elle est nécessaire [. . .] pour écarter un risque sérieux pour un intérêt important en l'absence d'autres options raisonnables pour écarter ce risque, et (2) ses effets bénéfiques l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression et l'intérêt du public à la publicité des débats judiciaires » (par. 13(d)).

[14] Le juge de première instance a examiné la question de savoir si les intérêts des fiduciaires seraient servis par l'octroi des ordonnances de mise sous scellés. À son avis, les fiduciaires avaient correctement mis en évidence deux intérêts légitimes à l'appui d'une exception au principe de la publicité des débats judiciaires, à savoir [TRADUCTION] « la

[2] L'utilisation du terme « Toronto Star » pour désigner collectivement les deux intimés ne devrait pas être interprétée comme indiquant que seule la société Toronto Star Newspapers Ltd. participe au présent pourvoi. Monsieur Donovan est le seul intimé à avoir été une partie devant toutes les cours. Toronto Star Newspapers Ltd. a participé à la première instance, mais, sur consentement, elle a été retirée comme partie à la Cour d'appel. Par une ordonnance de la juge Karakatsanis datée du 25 mars 2020, Toronto Star Newspapers Ltd. a été ajoutée en tant qu'intimée devant notre Cour.

of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

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

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

protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers », et « une crainte raisonnable d'un risque de préjudice chez les personnes connues comme ayant un intérêt à recevoir ou à administrer les biens des défunts » (par. 22-25). S'agissant du premier intérêt, le juge de première instance a conclu que [TRADUCTION] « le degré d'atteinte à cette vie privée et à cette dignité est déjà extrême et [. . .] insoutenable » (par. 23). En ce qui a trait au deuxième intérêt, bien qu'il ait souligné qu'« il aurait été préférable d'inclure des éléments de preuve objectifs de la gravité de ce risque, obtenus, par exemple, auprès des policiers responsables de l'enquête », il a conclu que « l'absence de tels éléments de preuve n'est pas fatale » (par. 24). Les inférences nécessaires pouvaient plutôt être tirées des circonstances, notamment [TRADUCTION] « la volonté de la personne ou des personnes ayant perpétré les crimes de recourir à une violence extrême pour obéir à un mobile quelconque » (*ibid.*). Il a conclu que [TRADUCTION] « l'incertitude actuelle » était source d'une crainte raisonnable du risque de préjudice, et qu'en outre, le préjudice prévisible était « grave » (*ibid.*).

[15] Le juge de première instance a finalement accepté l'argument des fiduciaires selon lequel ces intérêts [TRADUCTION] « l'emportent très fortement » sur ce qu'il a qualifié d'intérêt public proportionnellement restreint à l'égard des « dossiers essentiellement administratifs » en cause (par. 31 et 33). Il a donc conclu que les effets bénéfiques des ordonnances de mise sous scellés sur les droits et les intérêts des personnes touchées l'emportaient sensiblement sur leurs effets préjudiciables.

[16] Enfin, le juge de première instance a examiné la question de savoir quelle ordonnance protégerait les personnes touchées tout en portant le moins possible atteinte au principe de la publicité des débats judiciaires. Il a décidé que, si l'on devait apporter aux deux dossiers le caviardage nécessaire à la protection des intérêts qu'il avait constatés, il n'en resterait plus aucun passage digne d'intérêt susceptible d'être divulgué. Des ordonnances de mise sous scellés d'une durée indéterminée ne lui semblaient toutefois pas une bonne solution. Le juge de première instance a donc fait placer sous scellés les dossiers pour une période initiale de deux ans, avec possibilité de renouvellement.

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

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

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

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

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

B. *Cour d'appel de l'Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (les juges Doherty, Rouleau et Hourigan)*

[17] L'appel interjeté par le Toronto Star a été accueilli à l'unanimité et les ordonnances de mise sous scellés ont été levées.

[18] La Cour d'appel a examiné les deux intérêts qui avaient été soulevés devant le juge de première instance au soutien des ordonnances visant à mettre sous scellés les dossiers d'homologation. En ce qui concerne la nécessité de protéger la vie privée et la dignité des victimes de crimes violents et de leurs êtres chers, elle a rappelé que le type d'intérêt qui est à juste titre protégé par une ordonnance de mise sous scellés doit comporter un élément d'intérêt public. Citant l'arrêt *Sierra Club*, la Cour d'appel a écrit que [TRADUCTION] « [d]es préoccupations personnelles ne peuvent à elles seules justifier une ordonnance de mise sous scellés de documents qui seraient normalement accessibles au public en vertu du principe de la publicité des débats judiciaires » (par. 10). Elle a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas cette qualité d'intérêt public.

[19] Bien qu'elle ait reconnu que la sécurité personnelle des gens constituait, de manière générale, un intérêt public important, la Cour d'appel a écrit qu'il n'y avait aucun élément de preuve en l'espèce permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Le juge de première instance avait commis une erreur sur ce point : [TRADUCTION] « l'idée selon laquelle les bénéficiaires et les fiduciaires sont en quelque sorte en danger parce que les Sherman ont été assassinés n'est pas une inférence, mais une conjecture. Elle ne justifie aucunement l'octroi d'une ordonnance de mise sous scellés » (par. 16).

[20] La Cour d'appel a conclu que les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation. Elle a donc accueilli l'appel et annulé les ordonnances.

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C. *Subsequent Proceedings*

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

IV. Submissions

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

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

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical

C. *Procédures subséquentes*

[21] L'ordonnance de la Cour d'appel annulant les ordonnances de mise sous scellés a été suspendue en attendant l'issue du présent pourvoi. Le Toronto Star a présenté une requête pour être autorisé à déposer de nouveaux éléments de preuve dans le cadre du pourvoi, éléments de preuve qui comprennent des documents d'enregistrement des droits immobiliers, des transcriptions du contre-interrogatoire d'un détective sur l'enquête relative aux meurtres ainsi que divers articles de presse. Ces éléments de preuve, affirme-t-il, étayent la conclusion selon laquelle les ordonnances de mise sous scellés devraient être levées. La requête a été renvoyée à notre formation.

IV. Moyens

[22] Les fiduciaires ont interjeté appel devant notre Cour pour demander le rétablissement des ordonnances de mise sous scellés rendues par le juge de première instance. En plus de contester la requête en production de nouveaux éléments de preuve, ils soutiennent que les ordonnances sont nécessaires pour écarter un risque sérieux pour la vie privée et la sécurité physique des personnes touchées, et que les effets bénéfiques de la mise sous scellés des dossiers d'homologation judiciaire l'emportent sur les effets préjudiciables du fait de limiter la publicité des débats judiciaires. Les fiduciaires soutiennent que deux erreurs de droit ont amené la Cour d'appel à conclure autrement.

[23] Premièrement, ils soutiennent que la Cour d'appel a conclu à tort que la vie privée est une préoccupation personnelle qui ne peut, à elle seule, constituer un intérêt important suivant l'arrêt *Sierra Club*. Les fiduciaires affirment que le juge de première instance a qualifié à bon droit la vie privée et la dignité comme un intérêt public important qui, étant exposé à un risque sérieux, justifiait les ordonnances. Ils demandent à notre Cour de reconnaître que la vie privée constitue en elle-même un intérêt public important pour les besoins de l'analyse.

[24] Deuxièmement, les fiduciaires avancent que la Cour d'appel a commis une erreur en infirmant la conclusion du juge de première instance selon

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harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

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

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

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

laquelle il y avait un risque sérieux de préjudice physique. Ils font valoir que la Cour d'appel n'a pas reconnu que les tribunaux sont habilités à tirer des inférences raisonnables sur le fondement de la raison et de la logique, même en l'absence d'éléments de preuve précis du risque allégué.

[25] Les fiduciaires affirment que ces erreurs ont amené la Cour d'appel à annuler à tort les ordonnances de mise sous scellés. En réponse aux questions qui leur ont été posées à l'audience, les fiduciaires ont reconnu qu'une ordonnance de caviardage de certains documents dans le dossier ou encore une interdiction de publication pourrait contribuer à apaiser certaines de leurs préoccupations, mais ils ont maintenu qu'aucune de ces mesures ne constituait une solution de rechange raisonnable aux ordonnances de mise sous scellés dans les circonstances.

[26] Les fiduciaires font également valoir que la protection de ces intérêts l'emporte sur les effets préjudiciables des ordonnances. Ils soutiennent que la nature des procédures d'homologation successorale dans la présente affaire atténue l'importance du principe de la publicité des débats judiciaires. Étant donné qu'elle n'est ni contentieuse ni, à proprement parler, nécessaire au transfert des biens au décès, l'homologation est une procédure judiciaire de nature [TRADUCTION] « administrative », ce qui réduit la nécessité d'appliquer le principe de la publicité des débats judiciaires à l'espèce (par. 113-114).

[27] Le Toronto Star soutient pour sa part que la Cour d'appel n'a commis aucune erreur en annulant les ordonnances de mise sous scellés et que l'appel devrait être rejeté. Selon le Toronto Star, bien que la vie privée puisse constituer un intérêt important quand elle révèle la présence d'un élément public, les fiduciaires ont seulement fait état d'un désir subjectif de la part des personnes touchées en l'espèce d'éviter toute publicité supplémentaire, laquelle n'est pas préjudiciable en soi. De l'avis du Toronto Star et de certains des intervenants, la position des fiduciaires reviendrait à permettre à cette part d'inconvénients et d'embarras propre à toute instance judiciaire à avoir préséance sur l'intérêt dans la publicité des débats judiciaires, un principe qui est garanti par la *Charte canadienne des droits et libertés* et dans

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is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

lequel toute la société a un intérêt. Le Toronto Star soutient également que les renseignements contenus dans les dossiers judiciaires ne sont pas de nature très sensible. En ce qui a trait à la question de savoir si les ordonnances de mise sous scellés étaient nécessaires pour protéger les personnes touchées d'un préjudice physique, le Toronto Star fait valoir que la Cour d'appel a eu raison de conclure que les fiduciaires n'avaient pas établi l'existence d'un risque sérieux pour cet intérêt.

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

[28] Subsidiairement, le Toronto Star affirme que, même s'il existe un risque sérieux pour un intérêt important quelconque, les ordonnances de mise sous scellés ne sont pas nécessaires, car le risque pourrait être écarté par une autre ordonnance moins sévère. De plus, il soutient que les ordonnances ne sont pas proportionnées. En cherchant à minimiser l'importance de la publicité des débats judiciaires dans les procédures d'homologation, les fiduciaires invitent à adopter, à l'égard de la pondération des effets de l'ordonnance, une approche inflexible, incompatible avec le principe de la publicité qui s'applique à toutes les procédures judiciaires. Quoi qu'il en soit, il existe précisément un intérêt public à l'égard de la publicité des débats dans la présente affaire, étant donné que les certificats demandés peuvent avoir une incidence sur les droits de tiers et que la publicité des débats garantit l'équité des procédures, qu'elles soient contestées ou non.

V. Analysis

V. Analyse

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

[29] L'issue du pourvoi dépend de la question de savoir si le juge de première instance aurait dû rendre les ordonnances de mise sous scellés conformément au test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires, test établi par notre Cour dans l'arrêt *Sierra Club*.

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

[30] La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de notre démocratie (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23-26). On dit souvent de la liberté de la presse de rendre compte

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principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

des procédures judiciaires qu'elle est indissociable du principe de publicité. [TRADUCTION] « En rendant compte de ce qui a été dit et fait dans un procès public, les médias sont les yeux et les oreilles d'un public plus large qui aurait parfaitement le droit d'y assister, mais qui, pour des raisons purement pratiques, ne peut le faire » (*Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, par. 16, citant *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339-1340, le juge Cory). Le pouvoir d'imposer des limites à la publicité des débats judiciaires afin de servir d'autres intérêts publics est reconnu, mais il doit être exercé avec modération et en veillant toujours à maintenir la forte présomption selon laquelle la justice doit être rendue au vu et au su du public (*Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, par. 32-39; *Sierra Club*, par. 56). Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir cette présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger ces autres intérêts publics lorsqu'ils entrent en jeu (*Mentuck*, par. 33). Les parties conviennent qu'il s'agit du cadre d'analyse approprié à appliquer pour trancher le présent pourvoi.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra*

[31] Les parties et les tribunaux d'instance inférieure ne s'entendent pas, cependant, sur la façon dont ce test s'applique aux faits de la présente affaire et cela nécessite des éclaircissements sur certains points de l'analyse établie dans l'arrêt *Sierra Club*. Plus fondamentalement, il y a désaccord sur la façon dont un intérêt important à la protection de la vie privée pourrait être reconnu de telle sorte qu'il justifierait des limites à la publicité des débats, et en particulier lorsque la vie privée peut constituer une question d'intérêt public. Les parties font valoir deux principes établis dans la jurisprudence de la Cour à l'appui de leur position respective. Tout d'abord, notre Cour a souvent fait observer que la vie privée est une valeur fondamentale nécessaire au maintien d'une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest (dissident, mais non sur ce point); *Nouveau-Brunswick*, par. 40).

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Club test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

Dans certains cas, les tribunaux ont invoqué la vie privée pour justifier l'application d'une exception à la publicité des débats judiciaires conformément au test établi dans *Sierra Club* (voir, p. ex., *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, par. 11 et 17). En même temps, la jurisprudence reconnaît qu'un certain degré d'atteinte à la vie privée — qui entraîne des inconvénients, voire de la contrariété ou de l'embarras — est inhérent à toute instance judiciaire accessible au public (*Nouveau-Brunswick*, par. 40). Par conséquent, le maintien de la présomption de la publicité des débats judiciaires signifie reconnaître que ni la susceptibilité individuelle ni le simple désagrément personnel découlant de la participation à des procédures judiciaires ne sont susceptibles de justifier l'exclusion du public des tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 185; *Nouveau-Brunswick*, par. 41). Déterminer le rôle de la vie privée dans le cadre de l'analyse prévue dans l'arrêt *Sierra Club* exige de concilier ces deux idées, et c'est là le nœud du désaccord entre les parties. Le droit à vie privée n'est pas absolu et le principe de la publicité des débats judiciaires n'est pas sans exception.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[32] Pour les motifs qui suivent, je ne suis pas d'accord avec les fiduciaires pour dire que l'intérêt en matière de vie privée apparemment illimité qu'ils invoquent constitue un intérêt public important au sens de *Sierra Club*. Leur revendication large n'est pas axée sur les éléments de la vie privée qui méritent une protection publique dans le contexte de la publicité des débats judiciaires. Cela ne veut pas dire, cependant, que la protection de la vie privée ne peut jamais justifier une mesure exceptionnelle comme les ordonnances de mise sous scellés sollicitées en l'espèce. Bien que le simple embarras causé par la diffusion de renseignements personnels dans le cadre d'une procédure judiciaire publique ne suffise pas à justifier une limite à la publicité des débats judiciaires, il existe des circonstances où un aspect de la vie privée d'une personne revêt une dimension d'intérêt public manifeste.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this

[33] La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne.

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

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

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dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

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

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

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

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

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prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

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

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

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at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

public à l'égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l'arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] "l'une des caractéristiques d'une société démocratique" » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l'administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

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

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d'analyse par analogie avec le test de l'arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d'une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps. Dans l'arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d'un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s'exprimant encore une fois au nom de la Cour à l'unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d'un litige » (par. 53). Il a en

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case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

même temps précisé que l'intérêt important doit être exprimé en tant qu'intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n'aurait pas été suffisant, mais « l'intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l'égard de la jurisprudence relative à l'arrêt *Oakes*, laquelle met l'accent sur l'objectif « urgen[t] et rée[l] » d'un texte de loi d'application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L'expression « intérêt important » vise donc un large éventail d'objectifs d'intérêt public.

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

[42] Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants pour l'application de ce test, je partage l'opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu'ils constatent les intérêts publics importants (par. 56). Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d'une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d'une part, un intérêt important et celui de constater, d'autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu'un intérêt public important valide n'est pas sérieusement menacé au vu des faits de l'affaire ou, à l'inverse, parce que les intérêts constatés, qu'ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of

[43] Le test énoncé dans *Sierra Club* continue d'être un guide approprié en ce qui a trait à l'exercice du pouvoir discrétionnaire des tribunaux dans des

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

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of

affaires comme en l'espèce. L'étendue de la catégorie d'« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4e éd. 2020), par. 3.185; J. Bailey et J. Burkell, « Revisiting the Open Court Principle in an Era of Online Publication : Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information » (2016), 48 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l'obligation de démontrer l'existence d'un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S'ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l'imposition d'une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d'analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l'homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n'a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l'imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l'écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

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estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire, et la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence — s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire.

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

[45] Il est vrai que d'autres mécanismes de planification successorale non assujettis à une procédure d'homologation peuvent permettre que le transfert du patrimoine soit effectué en dehors des voies ordinaires de la succession testamentaire ou *ab intestat* — c'est le cas, par exemple, de certaines assurances et prestations de retraite, et de certains biens détenus en copropriété. Cependant, cela ne change rien au caractère nécessairement public des procédures d'homologation. Le fait que les transferts non assujettis à une procédure d'homologation soustraient aux regards du public certains renseignements se rapportant à l'administration d'une succession ne signifie pas que les fiduciaires en l'espèce, en demandant au tribunal de leur délivrer des certificats, ne font pas d'une façon ou d'une autre intervenir ce principe. Les fiduciaires sollicitent les avantages qui découlent de la procédure judiciaire publique d'homologation : la transparence garantit que le tribunal successoral exerce son pouvoir de manière équitable et efficace (*Vancouver Sun*, par. 25; *Nouveau-Brunswick*, par. 22). La forte présomption en faveur de la publicité des débats judiciaires s'applique manifestement aux procédures d'homologation et les fiduciaires doivent satisfaire au test des limites discrétionnaires à cette publicité.

B. *The Public Importance of Privacy*

B. *L'importance pour le public de la protection de la vie privée*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its

[46] Comme il a été mentionné précédemment, je ne suis pas d'accord avec les fiduciaires pour dire qu'un intérêt illimité en matière de vie privée constitue un intérêt public important au sens du test des

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manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

limites discrétionnaires à la publicité des débats judiciaires. Pourtant, dans certaines de ses manifestations, la vie privée revêt une importance sociale allant au-delà de la personne la plus immédiatement touchée. Sur ce fondement, elle ne peut être exclue en tant qu'intérêt qui pourrait justifier, dans les circonstances appropriées, une limite à la publicité des débats judiciaires. En fait, la Cour a dans divers contextes reconnu l'importance pour le public de la vie privée, ce qui permet de mieux comprendre pourquoi l'aspect plus restreint de la vie privée lié à la protection de la dignité constitue un intérêt public important.

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

[47] Soit dit en tout respect, je ne puis souscrire à la manière dont la Cour d'appel a statué sur l'allégation des fiduciaires selon laquelle il existe un risque sérieux pour l'intérêt à la protection de la vie privée personnelle dans la présente affaire. Pour les juges d'appel, les préoccupations en matière de vie privée soulevées par les fiduciaires équivalent à des [TRADUCTION] « [p]réoccupations personnelles » qui ne peuvent, « à elles seules », satisfaire à l'exigence énoncée dans *Sierra Club* voulant qu'un intérêt important soit exprimé en tant qu'intérêt public (par. 10). Au paragraphe 10 de ses motifs dans l'affaire qui nous occupe, la Cour d'appel s'est appuyée sur l'arrêt *H. (M.E.) c. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, où il a été conclu que [TRADUCTION] « [d]es intérêts purement personnels ne peuvent justifier des ordonnances de non-publication ou de mise sous scellés » (par. 25). Citant les arrêts *MacIntyre* et *Sierra Club* de notre Cour comme des décisions faisant autorité à cet égard, la cour a poursuivi en soulignant que « les préoccupations personnelles d'une partie, y compris les préoccupations relatives à la détresse émotionnelle et à l'embarras bien réels que peuvent subir les parties quand la justice est rendue en public, ne satisferont pas à elle seules au volet nécessité du test » (par. 25). En toute déférence, j'estime que la Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité dans la présente affaire et dans *Williams*. Les préoccupations personnelles qui s'attachent à des aspects de la vie privée de la personne qui comparaît devant les tribunaux peuvent coïncider avec un intérêt public à la confidentialité.

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

[48] À l'instar de la Cour d'appel, je souscris à l'opinion exprimée en particulier dans *MacIntyre*, une affaire antérieure à la *Charte*, selon laquelle lorsque la publicité des débats judiciaires entraîne une atteinte à la vie privée qui perturbe « la susceptibilité des personnes en cause » (p. 185), cette préoccupation est généralement insuffisante pour justifier une ordonnance de mise sous scellés ou une ordonnance semblable et ne constitue pas un intérêt public important suivant l'arrêt *Sierra Club*. Cependant, je ne suis pas d'accord avec la Cour d'appel dans la présente affaire et dans *Williams* pour dire que c'est parce que l'atteinte n'occasionne que des [TRADUCTION] « préoccupations personnelles ». Certaines préoccupations personnelles — même « à elles seules » — peuvent coïncider avec des intérêts publics importants au sens de *Sierra Club*. Pour reprendre l'expression du juge Binnie dans *F.N. (Re)*, 2000 CSC 35, [2000] 1 R.C.S. 880, par. 10, il y a un « droit du public à la confidentialité » qui touche, d'abord et avant tout, la personne concernée et qui est très certainement une préoccupation personnelle. Même dans *Williams*, la Cour d'appel a pris soin de souligner que lorsque, sans protection de la vie privée, une personne serait exposée à [TRADUCTION] « un risque important de préjudice émotionnel [. . .] débilitant », une exception à la publicité des débats devrait être permise (par. 29-30). Pour savoir si un intérêt en matière de vie privée reflète un « droit du public à la confidentialité », il ne s'agit donc pas de se demander si l'intérêt est le reflet ou tire sa source de « préoccupations personnelles » relatives à la vie privée des personnes concernées. Il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public en matière de confidentialité. Ces intérêts relatifs à la vie privée peuvent, à mon avis, être des intérêts publics importants au sens de *Sierra Club*. Il est vrai que la vie privée d'une personne est d'une importance primordiale pour celle-ci. Cependant, notre Cour reconnaît depuis longtemps que la protection de la vie privée est, dans divers contextes, dans l'intérêt de la société dans son ensemble.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on

[49] La proposition selon laquelle la vie privée est importante, non seulement pour la personne touchée, mais également pour notre société, est profondément enracinée dans la jurisprudence de la Cour en dehors

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court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

du contexte du test des limites discrétionnaires à la publicité des débats judiciaires. Cela aide à expliquer pourquoi la vie privée ne saurait être rejetée en tant que simple préoccupation personnelle. Cependant, les différences clés dans ces contextes sont telles que l'importance pour le public de la vie privée ne saurait être transposée sans adaptation dans le contexte de la publicité des débats judiciaires. Seuls certains aspects particuliers des intérêts en matière de vie privée peuvent constituer des intérêts publics importants suivant l'arrêt *Sierra Club*.

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

[50] Dans le contexte de l'art. 8 de la *Charte* et des mesures législatives sur la protection de la vie privée dans le secteur public, le juge La Forest a cité un universitaire américain spécialiste de la vie privée, Alan F. Westin, à l'appui de la thèse selon laquelle la vie privée est une valeur fondamentale de l'État moderne; il l'a fait d'abord dans *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428 (motifs concordants), puis dans *Dagg*, par. 65 (dissident, mais non sur ce point). Dans ce dernier arrêt, le juge La Forest a écrit : « La protection de la vie privée est une valeur fondamentale des États démocratiques modernes. Étant l'expression de la personnalité ou de l'identité unique d'une personne, la notion de vie privée repose sur l'autonomie physique et morale — la liberté de chacun de penser, d'agir et de décider pour lui-même » (par. 65 (références omises)). Notre Cour a entériné à l'unanimité cette déclaration dans *Lavigne*, par. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59).

[51] De plus, dans l'arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733 (« *TTUAC* »), qui a été jugé dans le contexte d'une loi régissant l'utilisation de renseignements par des organisations, il a été reconnu que l'objectif de fournir à une personne un certain droit de regard sur les renseignements la concernant était « intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l'importance va de soi » (par. 24). L'importance de la vie privée, son « caractère quasi constitutionnel » et son rôle dans la protection de l'autonomie morale continuent de trouver écho dans notre jurisprudence récente (voir, p. ex., *Lavigne*, par. 24; *Bragg*, par. 18, la juge Abella, citant *Toronto Star Newspaper Ltd. c. R.*,

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In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean,

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

2012 ONCJ 27, 289 C.C.C. (3d) 549, par. 40-41 et 44; *Douez c. Facebook, Inc.*, 2017 CSC 33, [2017] 1 R.C.S. 751, par. 59). Dans l'arrêt *Douez*, les juges Karakatsanis, Wagner (maintenant juge en chef) et Gascon ont insisté sur le même point, ajoutant que « la croissance d'Internet — un réseau quasi atemporel au rayonnement infini — a exacerbé le préjudice susceptible d'être infligé à une personne par une atteinte à son droit à la vie privée » (par. 59).

[52] La protection de la vie privée en tant qu'intérêt public est mise en évidence par des aspects particuliers de cette protection présents dans les lois fédérales et provinciales (voir, p. ex., *Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21; *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5 (« LPRPDE »); *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, c. F.31; *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 5; *Code civil du Québec*, art. 35 à 41)[3]. En outre, en examinant la constitutionnalité d'une exception législative au principe de la publicité des débats judiciaires, notre Cour a reconnu que la protection de la vie privée de la personne pouvait constituer un objectif urgent et réel (*Edmonton Journal*, p. 1345, le juge Cory; voir également les motifs concordants de la juge Wilson, à la p. 1354, dans lesquels a explicitement été souligné « l'intérêt public à la protection de la vie privée de l'ensemble des parties aux affaires matrimoniales par rapport à l'intérêt public à la publicité du processus judiciaire »). L'importance sociale et publique de la vie privée de la personne trouve également un appui continu dans la doctrine (voir, p. ex., A. J. Cockfield, « Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies » (2007), 40 *U.B.C. L. Rev.* 41, p. 41; K. Hughes, « A Behavioural Understanding of Privacy and its Implications for Privacy Law » (2012), 75 *Mod. L. Rev.* 806, p. 823; P. Gewirtz,

[3] Au moment de la rédaction des présents motifs, la Chambre des communes étudiait un projet de loi destiné à remplacer la première partie de la *LPRPDE* : le projet de loi C-11, *Loi édictant la Loi sur la protection de la vie privée des consommateurs et la Loi sur le Tribunal de la protection des renseignements personnels et des données et apportant des modifications corrélatives et connexes à d'autres lois*, 2e sess., 43e lég., 2020.

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however, that privacy generally is an important public interest in the context of limits on court openness.

« Privacy and Speech », [2001] *Sup. Ct. Rev.* 139, p. 139). Il est donc inapproprié, en toute déférence, de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. Cela ne signifie pas, cependant, que la vie privée est, de façon générale, un intérêt public important dans le contexte de l'imposition de limites à la publicité des débats judiciaires.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[53] Le fait que l'affaire dont était saisi le juge de première instance concernait des personnes défendant leurs propres intérêts en matière de vie privée, intérêts qui étaient indéniablement importants pour elles en tant qu'individus, ne signifie pas qu'il n'y a aucun intérêt public en jeu. Dans *F.N. (Re)*, il était question de l'intérêt personnel que les jeunes contrevenants avaient à garder l'anonymat dans les procédures judiciaires afin de favoriser leur réadaptation personnelle (par. 11). Selon le juge Binnie, la société dans son ensemble avait un intérêt dans les perspectives personnelles de réadaptation de l'adolescent visé. Cette même idée exposée dans *F.N. (Re)* a été citée à l'appui de la conclusion selon laquelle l'intérêt en cause dans *Sierra Club* était un intérêt public. Cet intérêt, qui prenait tout d'abord sa source dans une entente touchant personnellement les parties contractantes concernées, était une question de nature privée qui, en plus de son intérêt personnel pour les parties, faisait état d'un « intérêt public à la confidentialité » (*Sierra Club*, par. 55). De même, si les fiduciaires ont un intérêt personnel à protéger leur vie privée, cela ne signifie pas que le public n'a pas un intérêt à cet égard, car — comme l'a clairement souligné la Cour —, cet intérêt est lié à l'autonomie morale et à la dignité, lesquelles constituent des préoccupations urgentes et réelles.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of

[54] Dans le présent pourvoi, le Toronto Star avance que les préoccupations légitimes en matière de vie privée seraient efficacement protégées par une ordonnance discrétionnaire dans le cas où il y aurait [TRADUCTION] « quelque chose de plus » pour les élever au-delà des préoccupations et de la susceptibilité personnelles (m.i., par. 73). Le Centre d'action pour la sécurité du revenu, par exemple, soutient que la protection de la vie privée sert les intérêts du public qui consistent à prévenir les préjudices et à faire en sorte que les particuliers ne soient pas

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privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

dissuadés de recourir aux tribunaux. Je reconnais que ces notions sont liées, mais il faut, à mon avis, prendre soin de ne pas confondre l'importance pour le public de la vie privée avec l'importance pour le public d'autres intérêts; des aspects de la vie privée, comme la dignité, peuvent constituer des intérêts publics importants en soi. Un risque pour la vie privée personnelle peut être lié à un risque de préjudice psychologique, comme c'était le cas dans l'affaire *Bragg* (par. 14; voir également J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 2.4.1). Cependant, il se peut que les préoccupations relatives à la vie privée ne coïncident pas toujours avec le désir d'éviter un préjudice psychologique et soient plutôt axées, par exemple, sur la protection de la réputation professionnelle d'une personne (voir, p. ex., *R. c. Paterson* (1998), 102 B.C.A.C. 200, par. 76, 78 et 87-88). De même, il peut y avoir des circonstances où la perspective de devoir communiquer les renseignements personnels nécessaires à la poursuite d'une action en justice peut dissuader une personne d'intenter cette action (voir *S. c. Lamontagne*, 2020 QCCA 663, par. 34-35 (CanLII)). De la même manière, la perspective de devoir communiquer des renseignements commerciaux sensibles aurait nui à la conduite de la défense d'une partie dans *Sierra Club* (par. 71), ou pourrait inciter une personne à régler un litige prématurément (K. Eltis, *Courts, Litigants, and the Digital Age* (2e éd. 2016), p. 86). Cependant, cela ne signifie pas nécessairement qu'un intérêt public en matière de vie privée est entièrement subsumé dans de telles préoccupations. Je tiens à souligner, par exemple, que les préoccupations relatives à l'accès à la justice ne s'appliquent pas lorsque l'intérêt à protéger en matière de vie privée est celui d'un tiers au litige, comme un témoin, dont l'accès aux tribunaux n'est pas en cause et à qui il n'est pas loisible de mettre fin au litige et d'éviter toute incidence sur sa vie privée (voir, p. ex., *Himel c. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, par. 58; voir également Rossiter, section 2.4.2(2)). En tout état de cause, la reconnaissance de ces importants intérêts publics connexes et valides ne permet pas de savoir si certains aspects de la vie privée constituent en eux-mêmes des intérêts publics importants et ne diminue en rien le caractère public distinctif de la vie privée, examiné précédemment.

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[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

[55] En fait, les atteintes particulières à la vie privée ayant été occasionnées par la publicité des débats judiciaires ne sont pas passées inaperçues et n'ont pas non plus été écartées au motif qu'il s'agissait de simples préoccupations personnelles. Les tribunaux ont exercé leur pouvoir discrétionnaire de limiter la publicité des débats judiciaires afin de protéger les renseignements personnels de la publicité, y compris pour empêcher que soient divulgués l'orientation sexuelle d'une personne (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), sa séropositivité (voir, p. ex., *A.B. c. Canada (Citoyenneté et Immigration)*, 2017 CF 629, par. 9 (CanLII)), et ses antécédents de toxicomanie et de criminalité (voir, p. ex., *R. c. Pickton*, 2010 BCSC 1198, par. 11 et 20 (CanLII)). Notre Cour a souligné cette nécessité de concilier l'intérêt du public à l'égard de la vie privée et le principe de la publicité des débats judiciaires (voir, p. ex., *Edmonton Journal*, p. 1353, la juge Wilson). Dans un article de doctrine, la juge en chef McLachlin a expliqué que [TRADUCTION] « [s]i nous nous préoccupons sérieusement de la vie intime des gens, nous devons protéger un minimum de vie privée. De même, si nous nous préoccupons sérieusement de notre système judiciaire, les débats judiciaires doivent être publics. La question est de savoir comment concilier ces deux impératifs d'une manière qui soit équitable et raisonnée » (« Courts, Transparency and Public Confidence – To the Better Administration of Justice » (2003), 8 *Deakin L. Rev.* 1, p. 4). En cherchant à concilier ces deux impératifs, il faut alors se demander si la dimension de la vie privée en cause constitue un intérêt public important qui, lorsqu'il est sérieusement menacé, justifierait de réfuter la forte présomption en faveur de la publicité des débats judiciaires.

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

C. *L'intérêt public important en matière de vie privée se rapporte à la protection de la dignité de la personne*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy

[56] Bien que l'importance pour le public de la protection de la vie privée ait clairement été reconnue par la Cour dans divers contextes, la prudence est de mise lorsqu'il s'agit d'utiliser cette notion dans le cadre du test des limites discrétionnaires à la publicité des débats judiciaires. Il est bien établi en droit que les procédures judiciaires publiques, de par leur

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are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

nature, peuvent être une source de désagrément et d'embarras, et l'on considère généralement que ces atteintes à la vie privée ne sont pas suffisamment importantes pour réfuter la présomption de publicité des débats. Le Toronto Star a exprimé la crainte que la reconnaissance de la vie privée en tant qu'intérêt public important n'allège le fardeau de preuve incombant aux demandeurs, car la vie privée des parties à un litige sera, à certains égards, toujours menacée dans les procédures judiciaires. Je conviens que l'exigence de démontrer l'existence d'un risque sérieux pour un intérêt important est un élément préliminaire clé de l'analyse qui doit être maintenu afin de protéger le principe de la publicité des débats judiciaires. La reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité si la vie privée est définie trop largement sans tenir compte de son caractère public.

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

[57] La vie privée pose des défis dans l'application du test des limites discrétionnaires à la publicité des débats judiciaires en raison de la diffusion nécessaire de renseignements que supposent des procédures publiques. Il convient de rappeler que lorsqu'il a écrit, dans l'arrêt *MacIntyre*, que « le secret est l'exception et que la publicité est la règle », le juge Dickson, plus tard juge en chef, examinait explicitement un argument relatif à la vie privée en revenant sur un point de vue préconisé maintes fois auparavant devant les tribunaux selon lequel « le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos » (p. 185 (je souligne)), et en rejetant celui-ci. Le juge Dickson a rejeté l'opinion selon laquelle les préoccupations personnelles en matière de vie privée exigent des audiences à huis clos, expliquant qu'« [e]n règle générale, la susceptibilité des personnes en cause ne justifie pas qu'on exclut le public des procédures judiciaires » (*ibid.*).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For

[58] Bien qu'il ait rendu sa décision avant le prononcé de l'arrêt *Dagenais* et qu'il ne commente donc pas les étapes précises de l'analyse telles que nous les comprenons aujourd'hui, j'estime que le juge Dickson a, à juste titre, reconnu que le principe de la publicité des débats judiciaires apporte des limites nécessaires au droit à la vie privée. Quoique les particuliers puissent s'attendre à ce que les renseignements qui les concernent ne soient pas révélés

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example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

dans le cadre de procédures judiciaires, le principe de la publicité des débats judiciaires s'oppose par présomption à cette attente. Par exemple, dans l'arrêt *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, le juge LeBel a conclu que la « partie qui engage un débat judiciaire renonce, à tout le moins en partie, à la protection de sa vie privée » (par. 42). L'arrêt *MacIntyre* et les jugements similaires reconnaissent — en affirmant que la publicité est la règle et le secret, l'exception — que le droit à la vie privée, quelle qu'en soit la définition, cède le pas, dans une certaine mesure, à l'idéal de la publicité des débats judiciaires. Je partage le point de vue selon lequel le principe de la publicité des débats suppose que cette limite au droit à la vie privée est justifiée.

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

[59] Le Toronto Star a donc raison d'affirmer que la vie privée des personnes sera très souvent en quelque sorte menacée dans les procédures judiciaires. Les litiges entre et concernant des particuliers qui se déroulent dans le cadre de débats judiciaires publics révèlent nécessairement des renseignements qui pourraient autrement être restés à l'abri des regards du public. En fait, tout comme la Cour d'appel en l'espèce, les tribunaux ont explicitement fait mention de cette préoccupation lorsqu'ils ont conclu que de simples inconvénients ne suffisaient pas à franchir le seuil initial du test (voir, p. ex., *3834310 Canada inc. c. Chamberland*, 2004 CanLII 4122 (C.A. Qc), par. 30). Affirmer que toute incidence sur la vie privée d'une personne suffit à établir un risque sérieux pour un intérêt public important pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires pourrait rendre cette exigence préliminaire théorique. Le sort de nombreuses causes dépendrait de la pondération à l'étape de la proportionnalité. Une telle évolution reviendrait à déroger à l'arrêt *Sierra Club*, qui constitue le cadre approprié à appliquer, lequel doit être maintenu.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90

[60] De plus, la reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée pourrait s'avérer trop indéterminée et difficile à appliquer. La vie privée est une notion complexe et contextuelle (*Dagg*, par. 67; voir également B. McIsaac, K. Klein et S. Brown, *The Law of Privacy in Canada* (feuilles mobiles), vol. 1, p. 1-4; D. J.

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Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

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

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such

Solove, « Conceptualizing Privacy » (2002), 90 *Cal. L. Rev.* 1087, p. 1090). En fait, notre Cour a décrit la nature des limites à la vie privée comme étant dans un état de « confusion [. . .] sur le plan théorique » (*R. c. Spencer*, 2014 CSC 43, [2014] 2 R.C.S. 212, par. 35). Cela dépend en grande partie du contexte dans lequel la vie privée est invoquée. Je suis d'accord avec le Toronto Star pour dire que la reconnaissance de la vie privée, sans nuances, comme un intérêt important dans le contexte du test des limites discrétionnaires à la publicité des débats judiciaires, ainsi que le revendiquent les fiduciaires en l'espèce, susciterait énormément de confusion. Il serait difficile pour les tribunaux de mesurer un risque sérieux pour un tel intérêt, en raison de ses multiples facettes.

[61] Bien que je reconnaisse la validité de ces préoccupations, je ne suis pas d'accord pour dire qu'elles exigent que la vie privée ne soit jamais prise en considération lorsqu'il s'agit de décider s'il existe un risque sérieux pour un intérêt public important. J'arrive à cette conclusion pour deux raisons. Premièrement, il est possible d'atténuer le problème de la complexité de la vie privée en se concentrant sur l'objectif qui sous-tend la protection publique de la vie privée, lequel est pertinent dans le cadre du processus judiciaire, de manière à s'en tenir précisément à l'aspect qui transcende les intérêts des parties dans ce contexte. Cette dimension plus restreinte de la vie privée est la protection de la dignité, un intérêt public important qui peut être menacé par la publicité des débats judiciaires. D'ailleurs, plutôt que d'essayer d'appliquer une notion unique et complexe de la vie privée à tous les contextes, notre Cour s'est généralement arrêtée sur des intérêts plus précis en matière de vie privée adaptés à la situation particulière en cause (*Spencer*, par. 35; *Edmonton Journal*, p. 1362, la juge Wilson). C'est ce qu'il faut faire en l'espèce, en vue de cerner l'aspect public de la vie privée que la publicité des débats risque de miner indûment.

[62] Deuxièmement, je rappelle que, pour franchir la première étape de l'analyse, il ne suffit pas d'invoquer un intérêt important, mais il faut aussi réfuter la présomption de publicité des débats en démontrant l'existence d'un risque sérieux pour cet intérêt. Le

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

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

fardeau d'établir l'existence d'un risque pour un tel intérêt au vu des faits d'une affaire donnée constitue le véritable seuil initial à franchir pour la personne cherchant à restreindre la publicité. Il n'est jamais suffisant d'alléguer la seule existence d'un intérêt public important reconnu. Démontrer l'existence d'un risque sérieux pour cet intérêt demeure toujours nécessaire. Ce qui importe, c'est que l'intérêt soit précisément défini de manière à ce qu'il n'englobe que les aspects de la vie privée qui font entrer en jeu des objectifs publics légitimes, de sorte que le seuil à franchir pour établir l'existence d'un risque sérieux pour cet intérêt demeure élevé. De cette manière, les tribunaux peuvent efficacement maintenir la garantie de la présomption de publicité des débats.

[63] Plus particulièrement, pour maintenir l'intégrité du principe de la publicité des débats judiciaires, un intérêt public important à l'égard de la protection de la dignité devrait être considéré sérieusement menacé seulement dans des cas limités. Rien en l'espèce n'écarte le principe selon lequel le secret en matière de procédures judiciaires doit être exceptionnel. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte au principe de la publicité des débats judiciaires (*MacIntyre*, p. 185; *Nouveau-Brunswick*, par. 40; *Williams*, par. 30; *Coltsfoot Publishing Ltd. c. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, par. 97). Ces principes n'empêchent pas de reconnaître l'importance du caractère public d'un intérêt en matière de vie privée quand celui-ci est lié à la protection de la dignité. Ils obligent simplement à faire la preuve de l'existence d'un risque sérieux pour cet intérêt de manière à justifier, à titre exceptionnel, une restriction à la publicité des débats, comme c'est le cas pour tout intérêt public important au regard de l'arrêt *Sierra Club*. Comme l'expliquent les professeures Sylvette Guillemard et Séverine Menétrey, « [l]a confidentialité des débats peut se justifier notamment pour protéger la vie privée des parties [. . .] La jurisprudence affirme cependant que l'embarras ou la honte ne sont pas des motifs suffisants pour ordonner le huis clos ou la non-publication » (*Comprendre la procédure civile québécoise* (2e éd. 2017), p. 57).

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

[64] Comment devrait-on considérer que l'intérêt en matière de vie privée en cause soulève un intérêt public important qui est pertinent pour les besoins du test des limites discrétionnaires à la publicité des débats judiciaires dans le présent contexte? Il est utile de rappeler que les ordonnances rendues en première instance avaient été demandées pour limiter l'accès aux documents et aux renseignements figurant dans les dossiers judiciaires. L'argument des fiduciaires sur ce point était directement axé sur le risque de diffusion immédiate et à grande échelle, par le Toronto Star, de renseignements permettant d'identifier des personnes ainsi que d'autres renseignements sensibles contenus dans les documents placés sous scellés. Les fiduciaires soutiennent que cette diffusion constituerait une atteinte injustifiée à la vie privée des personnes touchées, qui s'ajouterait à la contrariété qu'elles ont déjà subie en raison de la publicité ayant entouré le décès des Sherman.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[65] À mon avis, il est bon de laisser les personnes libres de fixer des limites quant à savoir à quel moment les renseignements très sensibles les concernant seront communiqués à d'autres personnes dans la sphère publique, et de quelle manière et dans quelle mesure ils le seront. En effet, en choisissant la manière dont on se présente en public, on protège son autonomie morale et sa dignité en tant que personne. La Cour a eu l'occasion de faire ressortir le lien entre l'intérêt en matière de vie privée mis en jeu par la tenue de procédures judiciaires publiques et la protection de la dignité plus particulièrement. Par exemple, dans l'arrêt *Edmonton Journal*, la juge Wilson a souligné que la disposition contestée, qui devait avoir pour effet de limiter la publication de détails sur des procédures matrimoniales, portait sur « un aspect un peu différent de la vie privée, un aspect qui se rapproche davantage de la protection de la dignité personnelle [. . .], c'est-à-dire l'angoisse et la perte de dignité personnelle qui peuvent résulter de la publication dans les journaux de détails gênants de la vie privée d'une personne » (p. 1363-1364). Citons comme autre exemple l'affaire *Bragg*, dans laquelle la protection de la capacité des jeunes à contrôler des renseignements sensibles avait été considérée comme favorisant le respect [TRADUCTION] « de leur dignité, de leur intégrité personnelle et de leur autonomie » (par. 18, citant *Toronto Star Newspaper Ltd.*, par. 44).

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

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990

[66] Conformément à cette jurisprudence, je relève, par exemple, que le législateur québécois a expressément fait ressortir la protection de la dignité lorsque le test énoncé dans l'arrêt *Sierra Club* a été codifié dans le *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* »), art. 12 (voir Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 12). Selon l'art. 12 *C.p.c.*, un tribunal peut faire exception de façon discrétionnaire au principe de la publicité si « l'ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d'intérêts légitimes importants » l'exige.

[67] La notion d'ordre public témoigne d'une souplesse analogue à la notion d'intérêt public important suivant l'arrêt *Sierra Club*; elle rappelle pourtant que l'intérêt invoqué transcende, en ce qui a trait à son importance et à ses conséquences, la susceptibilité purement subjective des personnes touchées. Tout comme l'« intérêt public important » qui doit être sérieusement menacé pour justifier des ordonnances de mise sous scellés dans le présent pourvoi, l'ordre public englobe un large éventail de principes généraux et de normes impératives qu'un législateur et les tribunaux considèrent comme fondamentaux pour une société donnée (voir *Goulet c. Cie d'Assurance-Vie Transamerica du Canada*, 2002 CSC 21, [2002] 1 R.C.S. 719, par. 42-44, citant *Godbout c. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), p. 2570, conf. par [1997] 3 R.C.S. 844). Comme l'a écrit un juge québécois en renvoyant à l'arrêt *Sierra Club* avant l'adoption de l'art. 12 *C.p.c.*, l'intérêt doit être considéré comme étant défini « en termes d'intérêt public à la confidentialité » (voir *3834310 Canada inc.*, par. 24, le juge Gendreau s'exprimant au nom de la Cour d'appel). Parmi les diverses considérations qui composent la notion d'ordre public et d'autres intérêts légitimes évoqués par l'art. 12 *C.p.c.*, il est significatif que la dignité, et non une référence générale à la vie privée, au préjudice ou à l'accès à la justice, se soit vu accorder une place de choix. En effet, c'est cet aspect restreint de la vie privée considéré comme un droit fondamental que les tribunaux ont retenu avant l'adoption de l'art. 12 *C.p.c.* — « ce qui fait partie de la vie intime de la personne, bref ce qui constitue un

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CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

cercle personnel irréductible » (*Godbout*, p. 2569, le juge Baudouin; voir également *A. c. B.*, 1990 CanLII 3132 (C.A. Qc), par. 20, le juge Rothman).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[68] La « protection de la dignité des personnes concernées » est désormais consacrée comme l'archétype de l'intérêt d'ordre public à l'art. 12 *C.p.c.* C'est le modèle de l'intérêt public important à la confidentialité de *Sierra Club* qui sert à justifier une exception à la publicité des débats (S. Rochette et J.-F. Côté, « Article 12 », dans L. Chamberland, dir., *Le grand collectif : Code de procédure civile — Commentaires et annotations* (5e éd. 2020), vol. 1, p. 102; D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6e éd. 2020), vol. 1, par. 1-111). La dignité donne une expression concrète à cet intérêt d'ordre public parce que toute la société a intérêt à ce qu'elle soit protégée, malgré ses liens personnels avec les personnes touchées. Cette codification de la notion d'intérêt public important de *Sierra Club* souligne l'importance primordiale de la dignité humaine et la pertinence de limiter la publicité des débats judiciaires sur ce fondement au lieu de donner une interprétation trop large à la vie privée qui pourrait par ailleurs ne pas convenir au contexte de la publicité des débats.

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

[69] Dans le même ordre d'idée, on a fait valoir qu'il est utile de considérer que la vie privée se fonde sur la dignité dans le contexte des défis que posent les communications numériques (K. Eltis, « The Judicial System in the Digital Age : Revisiting the Relationship between Privacy and Accessibility in the Cyber Context » (2011), 56 *R.D. McGill* 289, p. 314).

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

[70] Il est également significatif, à mon avis, que le juge de première instance en l'espèce ait explicitement reconnu, en réponse aux arguments pertinents des fiduciaires, un intérêt à [TRADUCTION] « la protection de la vie privée et de la dignité des victimes d'actes criminels ainsi que de leurs êtres chers » (par. 23 (je souligne)). Cela montre clairement que la préoccupation centrale des personnes touchées à cet égard n'est pas simplement de protéger leur vie privée en tant que telle, mais bien de protéger leur vie privée là où elle coïncide avec le caractère public de leurs intérêts en matière de dignité.

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

[71] Les atteintes à la vie privée qui entraînent une perte de contrôle à l'égard de renseignements personnels fondamentaux peuvent porter préjudice à la dignité d'une personne, car elles minent sa capacité à présenter de manière sélective certains aspects de sa personne aux autres (D. Matheson, « Dignity and Selective Self-Presentation », dans I. Kerr, V. Steeves et C. Lucock, dir., *Lessons from the Identity Trail : Anonymity, Privacy and Identity in a Networked Society* (2009), 319, p. 327-328; L. M. Austin, « Re-reading Westin » (2019), 20 *Theor. Inq. L.* 53, p. 66-68; Eltis (2016), p. 13). La dignité, employée dans ce contexte, est un concept social qui consiste à présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée (voir de manière générale Matheson, p. 327-328; Austin, p. 66-68). La dignité est minée lorsque les personnes perdent le contrôle sur la possibilité de fournir des renseignements sur elles-mêmes qui touchent leur identité fondamentale, car un aspect très sensible de qui elles sont qu'elles n'ont pas décidé consciemment de communiquer est désormais accessible à autrui et risque de façonner la manière dont elles sont perçues en public. Cela a même été évoqué par le juge La Forest, dissident mais non sur ce point, dans l'arrêt *Dagg*, lorsqu'il a parlé de la notion de vie privée comme « [é]tant l'expression de la personnalité ou de l'identité unique d'une personne » (par. 65).

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

[72] En cas d'atteinte à la dignité, l'incidence sur la personne n'est pas théorique, mais pourrait entraîner des conséquences humaines réelles, y compris une détresse psychologique (voir de manière générale *Bragg*, par. 23). Dans l'arrêt *Dyment*, le juge La Forest a fait remarquer dans ses motifs concordants que la notion de vie privée est essentielle au bien-être d'une personne (p. 427). Vu sous cet angle, un intérêt en matière de vie privée, lorsqu'il protège les renseignements fondamentaux associés à la dignité qui est nécessaire au bien-être d'une personne, commence à ressembler beaucoup à l'intérêt relatif à la sécurité physique également soulevé en l'espèce, dont la nature importante et publique n'est pas débattue, et n'est pas non plus, selon moi, sérieusement discutable. Lorsque le fonctionnement des tribunaux menace le bien-être physique d'une

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

personne, l'administration de la justice en souffre, car un système judiciaire responsable est sensible aux dommages physiques qu'il inflige aux individus et s'efforce d'éviter de tels effets. De même, j'estime qu'un tribunal responsable doit être sensible et attentif aux dommages qu'il cause à d'autres éléments fondamentaux du bien-être individuel, notamment la dignité individuelle. Ce parallèle aide à comprendre que la dignité est une dimension plus limitée de la vie privée, pertinente en tant qu'intérêt public important dans le contexte de la publicité des débats judiciaires.

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

[73] Je suis donc d'avis que protéger les gens contre la menace à leur dignité qu'entraîne la diffusion de renseignements révélant des aspects fondamentaux de leur vie privée dans le cadre de procédures judiciaires publiques constitue un intérêt public important pour l'application du test.

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

[74] Insister sur la valeur sous-jacente de la vie privée lorsqu'il s'agit de protéger la dignité d'une personne de la diffusion de renseignements privés dans le cadre de débats judiciaires publics permet de surmonter les critiques selon lesquelles la vie privée sera toujours menacée dans un tel cadre et constitue une notion théoriquement complexe. La publicité des débats donne lieu à des atteintes à la vie privée personnelle dans presque tous les cas, mais la dignité en tant qu'intérêt public dans la protection de la sensibilité fondamentale d'une personne entre plus rarement en jeu. Plus précisément, et conformément à l'approche prudente servant à reconnaître des intérêts publics importants, cet intérêt en matière de vie privée, bien qu'il soit déterminé par rapport au contexte factuel plus large, ne sera sérieusement menacé que lorsque le caractère sensible des renseignements touche à l'aspect le plus intime de la personne.

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

[75] S'il porte essentiellement sur la protection de la dignité d'une personne, cet intérêt sera miné dans le cas de renseignements qui révèlent quelque chose de sensible sur elle en tant qu'individu, par opposition à des renseignements d'ordre général révélant peu ou rien sur ce qu'elle est en tant que personne. Par conséquent, les renseignements qui

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

seront révélés en raison de la publicité des débats judiciaires doivent être constitués de détails intimes ou personnels concernant une personne — ce que notre Cour a décrit, dans sa jurisprudence relative à l'art. 8 de la *Charte*, comme le cœur même des « renseignements biographiques » — pour qu'un risque sérieux pour un intérêt public important soit reconnu dans ce contexte (*R. c. Plant*, [1993] 3 R.C.S. 281, p. 293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 60; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 46). La dignité transcende les inconvénients personnels en raison de la nature très sensible des renseignements qui pourraient être révélés. Notre Cour a tracé dans l'arrêt *Cole* une ligne de démarcation similaire entre le caractère sensible des renseignements personnels et l'intérêt du public à protéger ces renseignements en ce qui a trait au cœur même des renseignements biographiques. Elle a conclu que « les Canadiens raisonnables et bien informés » seraient plus disposés à reconnaître l'existence d'un intérêt en matière de vie privée lorsque les renseignements pertinents concernent le cœur même des « renseignements biographiques » ou, « [a]utrement dit, plus les renseignements sont personnels et confidentiels » (par. 46). La présomption de publicité des débats signifie que le simple désagrément associé à des atteintes moindres à la vie privée sera généralement toléré. Cependant, il est dans l'intérêt public de veiller à ce que cette publicité n'entraîne pas indûment la diffusion de ces renseignements fondamentaux qui menacent la dignité — même s'ils sont « personnels » pour la personne touchée.

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

[76] Selon le test des limites discrétionnaires à la publicité des débats judiciaires, il incombe au demandeur de démontrer que l'intérêt public important est sérieusement menacé. Reconnaître que la vie privée, considérée au regard de la dignité, n'est sérieusement menacée que lorsque les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles permet d'établir un seuil compatible avec la présomption de publicité des débats. Ce seuil est tributaire des faits. Il répond à la préoccupation, mentionnée précédemment, portant que les dossiers judiciaires comportent fréquemment des renseignements personnels, mais conclure que cela suffit à franchir le

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

seuil du risque sérieux dans tous les cas mettrait en péril la structure du test. Exiger du demandeur qu'il démontre le caractère sensible des renseignements comme condition nécessaire à la conclusion d'un risque sérieux pour cet intérêt a pour effet de limiter le champ d'application de l'intérêt aux seuls cas où la justification de la non-divulgation des aspects fondamentaux de la vie privée d'une personne, à savoir la protection de la dignité individuelle, est fortement en jeu.

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

[77] Il n'est aucunement nécessaire en l'espèce de fournir une liste exhaustive de l'étendue des renseignements personnels sensibles qui, s'ils étaient diffusés, pourraient entraîner un risque sérieux. Qu'il suffise de dire que les tribunaux ont démontré la volonté de reconnaître le caractère sensible des renseignements liés à des problèmes de santé stigmatisés (voir, p. ex., *A.B.*, par. 9), à un travail stigmatisé (voir, p. ex., *Work Safe Twerk Safe c. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, par. 28 (CanLII)), à l'orientation sexuelle (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), et au fait d'avoir été victime d'agression sexuelle ou de harcèlement (voir, p. ex., *Fedeli c. Brown*, 2020 ONSC 994, par. 9 (CanLII)). Je prends acte également de l'observation du Centre d'action pour la sécurité du revenu, intervenant, selon laquelle des renseignements détaillés quant à la structure familiale et aux antécédents professionnels pourraient, dans certaines circonstances, constituer des renseignements sensibles. Dans chaque cas, il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses

[78] Je marque ici un temps d'arrêt pour souligner que je renvoie ci-dessus aux décisions relatives à l'art. 8 de la *Charte* à seule fin de donner une idée des types de renseignements qui sont plus ou moins personnels et qui méritent donc une protection publique. Pour mesurer avec précision l'incidence de la divulgation sur la dignité, il est essentiel que l'analyse différencie ainsi les renseignements. Ce qui est utile, c'est que l'un des facteurs permettant de déterminer si l'attente subjective d'un demandeur en

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

matière de vie privée est objectivement raisonnable dans la jurisprudence relative à l'art. 8 met l'accent sur la mesure dans laquelle les renseignements sont privés (voir, p. ex., *R. c. Marakah*, 2017 CSC 59, [2017] 2 R.C.S. 608, par. 31; *Cole*, par. 44-46). Cependant, bien que la consultation de ces décisions puisse être avantageuse à cette fin précise, cela ne veut pas dire que le reste de l'analyse relative à l'art. 8 est pertinent pour l'application du test des limites discrétionnaires à la publicité des débats. Par exemple, demander aux fiduciaires quelle était leur attente raisonnable en matière de vie privée en l'espèce pourrait entraîner une analyse circulaire visant à déterminer s'ils s'attendaient raisonnablement à ce que leurs dossiers judiciaires soient accessibles au public ou s'ils s'attendaient raisonnablement à réussir à obtenir leur mise sous scellés. En conséquence, la jurisprudence relative à l'art. 8 n'est utile qu'à la fin décrite ci-dessus.

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

[79] Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. Bien qu'il s'agisse manifestement d'une question de fait, il est possible de faire certaines observations générales en l'espèce pour guider cette appréciation.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today,

[80] Je souligne que la mesure dans laquelle les renseignements seraient diffusés en l'absence d'une exception au principe de la publicité des débats judiciaires peut avoir une incidence sur le caractère sérieux du risque. Si le demandeur invoque le risque que les renseignements personnels en viennent à être connus par un large segment de la population en l'absence d'une ordonnance, il s'agit manifestement d'un risque plus sérieux que si le résultat était qu'une poignée de personnes prendrait connaissance des mêmes renseignements, toutes autres choses étant égales par ailleurs. Par le passé, l'obligation d'être physiquement présent pour obtenir des renseignements dans le cadre de débats judiciaires publics ou à partir d'un dossier judiciaire signifiait que les renseignements étaient, dans une certaine

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courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

mesure, protégés parce qu'ils n'étaient [TRADUCTION] « pratiquement pas connus » (D. S. Ardia, « Privacy and Court Records : Online Access and the Loss of Practical Obscurity » (2017), 4 *U. Ill. L. Rev.* 1385, p. 1396). Cependant, aujourd'hui, les tribunaux devraient prendre en considération le contexte des technologies de l'information, qui a facilité la communication de renseignements et le renvoi à ceux-ci (voir Bailey et Burkell, p. 169-170; Ardia, p. 1450-1451). Dans ce contexte, il peut fort bien être difficile pour les tribunaux d'avoir la certitude que les renseignements ne seront pas largement diffusés en l'absence d'une ordonnance.

[81] Il y aura lieu, bien sûr, d'examiner la mesure dans laquelle les renseignements font déjà partie du domaine public. Si la tenue de procédures judiciaires publiques ne fait que rendre accessibles ce qui est déjà largement et facilement accessible, il sera difficile de démontrer que la divulgation des renseignements dans le cadre de débats judiciaires publics entraînera effectivement une atteinte significative à cet aspect de la vie privée se rapportant à l'intérêt en matière de dignité auquel je fais référence en l'espèce. Cependant, le seul fait que des renseignements soient déjà accessibles à un segment de la population ne signifie pas que les rendre accessibles dans le cadre d'une procédure judiciaire n'exacerbera pas le risque pour la vie privée. La vie privée n'est pas une notion binaire, c'est-à-dire que les renseignements ne sont pas simplement soit privés, soit publics, d'autant plus que, en raison de la technologie en particulier, il vaut mieux considérer la confidentialité absolue comme difficile à atteindre (voir, de manière générale, *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 37; TTUAC, par. 27). Le fait que certains renseignements soient déjà accessibles quelque part dans la sphère publique n'empêche pas qu'une diffusion additionnelle de ceux-ci puisse nuire davantage à l'intérêt en matière de vie privée, en particulier si la diffusion appréhendée de renseignements très sensibles est plus large ou d'accès plus facile (voir de manière générale Solove, p. 1152; Ardia, p. 1393-1394; E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 346).

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

[82] De plus, la probabilité que la diffusion évoquée par le demandeur se produise réellement a également une incidence sur le caractère sérieux du risque. Je m'empresse de dire qu'il est implicite dans la notion de risque que le demandeur n'a pas besoin d'établir que la diffusion appréhendée se produira assurément. Cependant, plus la probabilité de diffusion des renseignements est grande, plus le risque pour l'intérêt en matière de vie privée lié à la protection de la dignité sera sérieux. Bien qu'elle l'ait fait dans un contexte différent, la Cour a déjà conclu que l'ampleur du risque est le fruit de la gravité du préjudice appréhendé et de sa probabilité (*R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 86).

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

[83] Cela dit, la probabilité que les renseignements personnels très sensibles d'une personne soient diffusés en l'absence de mesures de protection de la vie privée sera difficile à quantifier avec précision. Il convient également de souligner que la probabilité dans ce contexte n'a pas à être quantifiée en termes mathématiques ou numériques. Les tribunaux peuvent plutôt simplement déterminer cette probabilité à la lumière de l'ensemble des circonstances et mettre en balance ce facteur avec d'autres facteurs pertinents.

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

[84] Enfin, rappelons que la susceptibilité individuelle à elle seule, même si elle peut théoriquement être associée à la notion de « vie privée », est généralement insuffisante pour justifier de restreindre la publicité des débats judiciaires lorsqu'elle ne surpasse pas les inconvénients et les désagréments inhérents à la publicité des débats (*MacIntyre*, p. 185). Un demandeur ne pourra établir que le risque est suffisant pour justifier une limite à la publicité des débats que dans des cas exceptionnels, lorsque la perte de contrôle appréhendée des renseignements le concernant est fondamentale au point de porter atteinte de manière significative à sa dignité individuelle. Ces circonstances mettent en jeu « des valeurs sociales qui ont préséance », qui vont au-delà des atteintes plus ordinaires propres à la participation à une procédure judiciaire et qui, comme l'a reconnu le juge Dickson, pourraient justifier de restreindre la publicité des débats (p. 186-187).

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

[85] En résumé, l'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a certainement un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Bien qu'il soit évalué en fonction des faits de chaque cas, le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. La reconnaissance de cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée et de la valeur sous-jacente de la dignité individuelle, tout en permettant aussi de maintenir la forte présomption de publicité des débats.

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

D. *Les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important*

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

[86] Comme il a été clairement indiqué dans *Sierra Club*, une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour un intérêt public important. Les arguments soulevés dans le présent pourvoi portaient sur la question de savoir si la vie privée constitue un intérêt public important et si les faits en l'espèce révèlent l'existence de risques sérieux pour la vie privée et la sécurité. Bien que le large intérêt en matière de vie privée que font valoir les fiduciaires ne puisse être invoqué pour justifier une limite à la publicité des débats, la notion plus restreinte de vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test. Je reconnais aussi qu'un risque pour la sécurité physique représente un intérêt public important, un point qui n'est pas

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either. This alone is sufficient to conclude that the sealing orders should not have been issued.

contesté en l'espèce. Par conséquent, la question pertinente à la première étape est celle de savoir s'il existe un risque sérieux pour l'un de ces intérêts ou pour ces deux intérêts. Pour les motifs qui suivent, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour l'un ou l'autre de ces intérêts. Cela suffit en soi pour conclure que les ordonnances de mise sous scellés n'auraient pas dû être rendues.

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

(1) Le risque pour la vie privée allégué en l'espèce n'est pas sérieux

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

[87] Comme je l'ai déjà dit, l'intérêt public important en matière de vie privée doit être considéré comme un intérêt propre à la protection de la dignité individuelle et non comme l'intérêt largement défini que les fiduciaires ont demandé à la Cour de reconnaître. Pour établir l'existence d'un risque sérieux à l'égard de cet intérêt, les renseignements contenus dans les dossiers judiciaires qui préoccupent les fiduciaires doivent être suffisamment sensibles du fait qu'ils touchent au cœur même des renseignements biographiques des personnes touchées. Si ce n'est pas le cas, il n'y a pas de risque sérieux qui justifierait une exception à la publicité des débats. Si, par contre, c'est le cas, il faut alors se demander si les faits de l'espèce permettent d'établir l'existence d'un risque sérieux.

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

[88] Le juge de première instance n'a jamais explicitement constaté de risque sérieux pour l'intérêt en matière de vie privée qu'il a relevé, mais, dans la mesure où il est implicitement arrivé à cette conclusion, je ne puis, en toute déférence, partager son point de vue. Sa conclusion se limitait à l'observation selon laquelle [TRADUCTION] « [l]e degré d'atteinte à cette vie privée et à cette dignité [c.-à-d. celle des victimes et de leurs êtres chers] est déjà extrême et, j'en suis sûr, insoutenable » (par. 23). Cependant, l'attention intense dont les Sherman ont fait l'objet jusqu'à la présentation de leur demande n'est qu'une partie de l'équation. Comme les ordonnances de mise sous scellés ne peuvent qu'offrir une protection contre la divulgation des renseignements contenus dans les dossiers judiciaires se rapportant à l'homologation, le juge de première instance était tenu d'examiner le

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no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

caractère sensible des renseignements précis qu'ils contenaient. Or, il n'a pas procédé à une telle appréciation. Sa conclusion sur le caractère sérieux du risque s'est alors entièrement concentrée sur le risque de préjudice physique, alors que rien n'indiquait qu'il avait conclu que les fiduciaires s'étaient acquittés de leur fardeau quant à la démonstration d'un risque sérieux pour l'intérêt en matière de vie privée. En toute déférence, et en sachant qu'il ne disposait pas du cadre d'analyse précédemment exposé, j'estime qu'en n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique. Cela justifiait une intervention en appel.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[89] En appliquant le cadre approprié aux faits de la présente affaire, je conclus que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées, que j'ai défini précédemment au regard de la dignité, n'est pas sérieux. Les renseignements que les fiduciaires cherchent à protéger ne sont pas très sensibles, ce qui suffit en soi pour conclure qu'il n'y a pas de risque sérieux pour l'intérêt public important en matière de vie privée ainsi défini.

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

[90] Il y a peu de controverse en l'espèce sur la probabilité de diffusion des renseignements contenus dans les dossiers de succession et sur l'étendue de cette diffusion. Il est presque certain que le Toronto Star publiera au moins certains aspects des dossiers de succession si on lui en donne l'accès. Compte tenu de l'important auditoire de l'entreprise médiatique en cause et de la nature très médiatisée des événements entourant la mort des Sherman, je n'ai aucune difficulté à conclure que les personnes touchées perdraient, dans une large mesure, le contrôle des renseignements en question si les dossiers étaient rendus accessibles.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that

[91] Cependant, en ce qui concerne le caractère sensible des renseignements, ceux contenus dans ces dossiers ne révèlent rien de particulièrement privé sur les personnes touchées. Ce qui serait révélé pourrait bien causer des inconvénients et peut-être de l'embarras, mais il n'a pas été démontré que la divulgation toucherait au cœur même des renseignements

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would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

biographiques de ces personnes d'une manière qui minerait leur contrôle sur l'expression de leur identité. Leur vie privée serait certes perturbée, mais il n'a pas été démontré que l'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées serait sérieusement menacé. Tout au plus, les renseignements contenus dans ces dossiers pourraient-ils révéler quelque chose sur la relation entre les défunts et les personnes touchées, en ce qu'ils pourraient dévoiler à qui les défunts ont confié l'administration de leur succession respective, et qui ils voulaient voir ou étaient présumés vouloir voir devenir héritiers de leurs biens à leur décès. Ils pourraient également révéler certaines données personnelles de base, par exemple des adresses. On peut à juste titre présumer qu'il se peut fort bien que certains des bénéficiaires portent un nom de famille autre que Sherman. Je suis conscient que les décès font l'objet d'une enquête pour homicides par le service de police de Toronto. Cependant, même dans ce contexte, aucun de ces renseignements ne donne des indications importantes sur qui ils sont en tant que personnes, et aucun d'eux n'entraînerait non plus un changement fondamental dans leur capacité à contrôler la façon dont ils sont perçus par les autres. Le fait pour des personnes d'être liées par des documents de succession aux victimes d'un meurtre non résolu n'est pas en soi un renseignement très sensible. Il peut être la source de désagréments, mais il n'a pas été démontré qu'il constitue une atteinte à la dignité, en ce qu'il ne touche pas au cœur même des renseignements biographiques de ces personnes. En conséquence, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important comme l'exige l'arrêt *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that

[92] Le fait que certaines des personnes touchées puissent être mineures ne suffit pas non plus à franchir le seuil du caractère sérieux. Bien que le droit reconnaisse que les mineurs sont particulièrement vulnérables aux atteintes à la vie privée (voir *Bragg*, par. 17), le simple fait que des renseignements concernent des mineurs n'écarte pas l'analyse généralement applicable (voir, p. ex., *Bragg*, par. 11). Même en tenant compte de la vulnérabilité accrue des mineurs pouvant être des personnes touchées

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they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

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

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

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

dans les dossiers d'homologation, rien dans la preuve n'indique qu'ils perdraient le contrôle des renseignements les concernant qui révèlent quelque chose se rapprochant du cœur de leur identité. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée des Sherman ne suffit pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité.

[93] De plus, bien qu'elle indique que les renseignements seraient probablement largement diffusés, l'intense attention médiatique dont a fait l'objet la famille à la suite des décès n'est pas en soi révélatrice du caractère sensible des renseignements contenus dans les dossiers d'homologation.

[94] Démontrer que les renseignements qui seraient révélés en raison de la publicité des débats judiciaires sont suffisamment sensibles et privés pour toucher au cœur même des renseignements biographiques des personnes touchées est une condition préalable nécessaire pour établir l'existence d'un risque sérieux pour l'aspect pertinent de la vie privée relatif à l'intérêt public. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Lorsque l'on affirme qu'il existe un risque pour la vie privée, il est essentiel de démontrer non seulement que les renseignements qui concernent des personnes échapperont au contrôle de celles-ci — ce qui sera vrai dans tous les cas —, mais aussi que ces renseignements concernent ce qu'elles sont en tant que personnes, d'une manière qui mine leur dignité. Or, les fiduciaires n'ont pas fait cette preuve.

[95] Par conséquent, même si certains des éléments contenus dans les dossiers judiciaires peuvent fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraîne un risque sérieux pour l'intérêt public important en matière de vie privée, qui a été défini adéquatement dans le présent contexte au regard de la dignité. Pour cette seule raison, je conclus que les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour cet intérêt.

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

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

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

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity

(2) Le risque pour la sécurité physique allégué en l'espèce n'est pas sérieux

[96] Contrairement à ce qu'il en est pour l'intérêt en matière de vie privée soulevé en l'espèce, nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Il convient de souligner que le juge de première instance a correctement traité la protection contre un préjudice physique comme un intérêt important distinct de l'intérêt à l'égard de la protection de la vie privée, et a conclu que ce risque était [TRADUCTION] « prévisible » et « grave » (par. 22-24). La question consiste à savoir si les fiduciaires ont établi que cet intérêt est sérieusement menacé pour l'application du test des limites discrétionnaires à la publicité des débats judiciaires. Le juge de première instance a fait remarquer qu'il aurait été préférable d'inclure des éléments de preuve objectifs du caractère sérieux du risque fournis par le service de police menant l'enquête pour homicides. Il a néanmoins conclu que la preuve de risque pour la sécurité physique des personnes touchées était suffisante pour que le test soit respecté. Selon la Cour d'appel, il s'agit d'une mauvaise interprétation de la preuve, et, de son côté, le Toronto Star convient que la conclusion du juge de première instance quant à l'existence d'un risque sérieux pour la sécurité constitue une simple conjecture.

[97] D'entrée de jeu, je souligne qu'une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Notre Cour a statué qu'il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques (*Bragg*, par. 15-16). Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Une inférence doit tout de même être fondée sur des faits circonstanciels objectifs qui permettent raisonnablement de tirer la conclusion par inférence. Lorsque celle-ci ne peut raisonnablement être tirée à partir des circonstances, elle équivaut à une conjecture (*R. c. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, par. 45).

[98] Comme le soutiennent à juste titre les fiduciaires, ce n'est pas seulement la probabilité du

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

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

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

préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. La question consiste finalement à savoir si le présent dossier permettait au juge de première instance de discerner de manière objective l'existence d'un risque sérieux de préjudice physique.

[99] Il n'était pas loisible au juge de première instance de tirer cette conclusion au vu du dossier. Nul ne conteste que le préjudice physique appréhendé est grave. Je conviens cependant avec le Toronto Star que la probabilité que ce préjudice se produise était conjecturale. La conclusion du juge de première instance quant au caractère sérieux du risque de préjudice physique était fondée sur ce qu'il a appelé [TRADUCTION] « le degré de mystère qui persiste en ce qui concerne à la fois le coupable et le mobile » en lien avec la mort des Sherman et sur sa supposition que ce mobile pourrait être « transposé » aux fiduciaires et aux bénéficiaires (par. 5; voir aussi par. 19 et 23). L'étape suivante du raisonnement, selon laquelle le fait de lever les scellés sur les dossiers de succession amènerait les coupables à commettre leur prochain crime contre une personne mentionnée dans les dossiers, repose sur des conjectures, et non sur les éléments de preuve par affidavit présentés, et ne peut être considérée comme une inférence appropriée ou un quelconque préjudice ou risque de préjudice objectivement discerné. Si tel était le cas, le dossier de succession de chaque victime d'un meurtre non résolu franchirait le seuil initial du test applicable pour déterminer si une ordonnance de mise sous scellés peut être rendue.

[100] En outre, je rappelle que la question à trancher en l'espèce n'est pas de savoir si les personnes touchées sont exposées à un risque pour leur sécurité en général, mais plutôt si la publicité des présents dossiers judiciaires les expose à un tel risque. À la lumière du contenu des dossiers en l'espèce, les

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by this information becoming publicly available was more than negligible.

fiduciaires devaient avancer une autre raison pour laquelle le risque que posait le fait que ces renseignements deviennent accessibles au public était plus que négligeable.

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

[101] Le caractère conjectural du raisonnement menant à la conclusion selon laquelle il existe un risque sérieux de préjudice physique en l'espèce ressort des différences entre les faits en cause et ceux des affaires invoquées par les fiduciaires. Dans *X. c. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, le tribunal a inféré le risque de préjudice physique au motif que le demandeur était un policier qui avait enquêté sur des [TRADUCTION] « affaires portant sur la violence des gangs et des armes à feu dangereuses » et qui avait rédigé des rapports de détermination de la peine pour ces contrevenants, rapports dans lesquels il était identifié par son nom au complet (par. 6). Dans *R. c. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, le juge Watt a considéré qu'il était [TRADUCTION] « évident » que la divulgation d'éléments permettant d'identifier un agent d'infiltration travaillant dans le domaine du contre-terrorisme compromettrait la sécurité de l'agent (par. 41). Dans les deux cas, le danger découlait de faits établissant que les demandeurs entretenaient des relations antagonistes avec de prétendues organisations criminelles ou terroristes. Cependant, dans l'affaire qui nous occupe, les fiduciaires ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Il n'est pas raisonnablement possible au vu du dossier en l'espèce d'inférer tout cela en se fondant sur le décès des Sherman et sur les liens unissant les personnes touchées aux défunts. Il ne s'agit pas d'une inférence raisonnable, mais, comme l'a souligné la Cour d'appel, d'une conclusion reposant sur des conjectures.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*,

[102] Si le simple fait d'invoquer un préjudice physique grave suffisait à démontrer un risque sérieux pour un intérêt important, il n'y aurait pas de seuil valable dans l'analyse. Le test exige plutôt que le risque sérieux invoqué soit bien appuyé par le dossier ou les circonstances de l'espèce (*Sierra*

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at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

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

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

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

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination

Club, par. 54; *Bragg*, par. 15), ce qui contribue au maintien de la forte présomption de publicité des débats judiciaires.

[103] Encore une fois, dans d'autres affaires, des faits circonstanciels pourraient permettre à un tribunal d'inférer l'existence d'un risque sérieux de préjudice physique. Les demandeurs n'ont pas nécessairement à retenir les services d'experts qui attesteront l'existence du risque physique ou psychologique lié à la divulgation. Cependant, sur la foi du présent dossier, le simple fait d'affirmer qu'un tel risque existe ne permet pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel.

E. *Il y aurait des obstacles additionnels à l'octroi d'une ordonnance de mise sous scellés fondée sur le risque d'atteinte à la vie privée allégué*

[104] Bien que cela ne soit pas nécessaire pour trancher le pourvoi, il convient de mentionner que les fiduciaires auraient eu à faire face à des obstacles additionnels en cherchant à obtenir les ordonnances de mise sous scellés sur la base de l'intérêt en matière de vie privée qu'ils ont fait valoir. Je rappelle que, pour satisfaire au test des limites discrétionnaires à la publicité des débats judiciaires, une personne doit démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sierra Club*, par. 53).

[105] Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. La condition selon laquelle l'ordonnance doit être nécessaire oblige le tribunal à examiner s'il existe des mesures autres que l'ordonnance demandée et à restreindre l'ordonnance autant

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of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same

qu'il est raisonnablement possible de le faire pour écarter le risque sérieux (*Sierra Club*, par. 57). Une ordonnance imposant une interdiction de publication pourrait restreindre la diffusion de renseignements personnels aux seules personnes qui consultent le dossier judiciaire pour elles-mêmes et interdire à celles-ci de diffuser davantage les renseignements. Comme je l'ai mentionné, la probabilité et l'étendue de la diffusion peuvent être des facteurs pertinents lorsqu'il s'agit de déterminer le caractère sérieux d'un risque pour la vie privée dans ce contexte. Alors que le Toronto Star serait en mesure de consulter les dossiers faisant l'objet d'une interdiction de publication, par exemple, ce qui pourrait l'aider dans ses enquêtes, il ne pourrait publier, et ainsi diffuser largement, le contenu des dossiers. Une interdiction de publication semble offrir une protection contre ce dernier préjudice, qui a été au centre de l'argumentation des fiduciaires, tout en permettant un certain accès au dossier, ce qui n'est pas possible aux termes des ordonnances de mise sous scellés. En conséquence, même si un risque sérieux pour l'intérêt en matière de vie privée avait été établi, ce risque n'aurait probablement pas justifié une ordonnance de mise sous scellés, car une ordonnance moins sévère aurait probablement suffi à atténuer ce risque de manière efficace. Je m'empresse cependant d'ajouter qu'une interdiction de publication ne peut être prononcée en l'espèce, puisque, comme il a été souligné, le caractère sérieux du risque pour l'intérêt en matière de vie privée en jeu n'a pas été établi.

[106] De plus, les fiduciaires auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables, y compris l'incidence négative sur le principe de la publicité des débats judiciaires (*Sierra Club*, par. 53). Pour mettre en balance les intérêts en matière de vie privée et le principe de la publicité des débats judiciaires, il importe de se demander si les renseignements que l'ordonnance vise à protéger sont accessoires ou essentiels au processus judiciaire (par. 78 et 86; *Bragg*, par. 28-29). Il y aura sans doute des affaires où les renseignements présentant un risque sérieux pour la vie privée, du fait qu'ils toucheront à la dignité individuelle, seront essentiels au litige. Cependant, l'intérêt à ce

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information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

que des renseignements importants et juridiquement pertinents soient diffusés dans le cadre de débats judiciaires publics pourrait bien prévaloir sur toute préoccupation à l'égard des intérêts en matière de vie privée relativement à ces mêmes renseignements. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

VI. Conclusion

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

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

Appeal dismissed.

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

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

VI. Conclusion

[107] La conclusion selon laquelle les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important met fin à l'analyse. En de telles circonstances, les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires, y compris les ordonnances de mise sous scellés qu'ils ont initialement obtenues. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires. Cette conclusion est déterminante quant à l'issue du pourvoi. La décision d'annuler les ordonnances de mise sous scellés rendues par le juge de première instance devrait être confirmée. Étant donné que je suis d'avis de rejeter le pourvoi eu égard au dossier existant, je rejetterais la requête en production de nouveaux éléments de preuve présentée par le Toronto Star au motif que celle-ci est théorique.

[108] Pour les motifs qui précèdent, je rejetterais le pourvoi. Le Toronto Star ne sollicite aucuns dépens, compte tenu des importantes questions d'intérêt public en litige. Dans les circonstances, aucuns dépens ne seront adjugés.

Pourvoi rejeté.

Procureurs des appelants : Davies Ward Phillips & Vineberg, Toronto.

Procureurs des intimés : Blake, Cassels & Graydon, Toronto.

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

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

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

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

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

Procureurs de l'intervenante l'Association canadienne des libertés civiles : DMG Advocates, Toronto.

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

Procureurs de l'intervenant le Centre d'action pour la sécurité du revenu : Borden Ladner Gervais, Toronto.

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

Procureurs des intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc. : Farris, Vancouver.

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

Procureurs de l'intervenante British Columbia Civil Liberties Association : McCarthy Tétrault, Toronto.

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

Procureurs des intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH and Mental Health Legal Committee : HIV & AIDS Legal Clinic Ontario, Toronto.

2021 SCC 25 (CanLII)

Court of Queen's Bench of Alberta

Citation: Dow Chemical Canada ULC v Nova Chemicals Corporation, 2015 ABQB 81

2015 ABQB 81 (CanLII)

Date: 20150205
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Plaintiffs/Defendants by Counterclaim

\- and -

Nova Chemicals Corporation

Defendant/Plaintiff by Counterclaim

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The plaintiffs/defendants by counterclaim Dow Chemical Canada ULC and Dow Europe GmbH and the defendant/plaintiff by counterclaim Nova Chemicals Corporation both apply for orders restricting access to certain documents and records to be entered as evidence at trial and the court proceedings involving those documents and records. They disagree, however, over the nature and extent of such sealing and protective orders. These competing applications raise the issue of whether the documents and proceedings proposed to be preserved as confidential from all but opposing counsel, expert witnesses and certain designated employees of the opposing

party meet the tests of necessity and proportionality set out in ***Sierra Club of Canada v Canada (Minister of Finance)***, [2002] 2 S.C.R. 522. Specifically, the issue is whether the interests sought to be protected constitute "important commercial interests" sufficient to meet the necessity branch of the test, and whether the interests of litigants in a fair trial process are sufficiently addressed by the proposed orders.

II. Nature of litigation

[2] Dow and Nova are the two principal manufacturers of petrochemical products in Alberta. They are joint owners of the E-3 plant located in Joffre, Alberta where ethane is processed to manufacture ethylene and related petro-chemical products, including various liquid co-products. Nova is the sole owner of two additional ethylene production facilities in Joffre ("E1" and "E2"). Since 2001, Dow Canada owns or has owned ethylene facilities in Fort Saskatchewan and Prentiss, Alberta, in Sarnia, Ontario and in Quebec. Dow and Nova are each other's largest competitors for the purchase of ethane and the supply of ethylene in Canada.

[3] Dow Canada and Dow Europe are part of a group of corporations directly or indirectly owned or controlled by the Dow Chemical Company. The Dow group owns a number of ethylene facilities all over the world.

[4] Dow Canada owns a gas polyethylene plant at Prentiss, Alberta which processes the Plaintiffs' ethylene from E3 into polyethylene. In addition to the ethylene produced at E3, Dow Canada has access to other sources of ethylene.

[5] Pursuant to a number of agreements between Nova and Dow Canada, Nova is the operator of E3. Dow Canada and Dow Europe allege that Nova has unlawfully taken for its own use and advantage a portion of their ethylene and other products produced at E3, and that Nova failed to optimize production at E3, resulting in a further loss of ethylene and other products. In relation to the allegation that Nova unlawfully took a portion of their ethylene, Dow Canada and Dow Europe claim damages "equal to the market value of the ethylene and other products ... as well as the profit Dow would have made by upgrading the ethylene into other derivative products."

[6] Nova defends against Dow's claims on the basis that there was a shortage of ethane in the province and, as a result, Dow's purchases of ethane in the area caused or contributed to the ethane shortage experienced by Nova. Nova alleges that it has been unable to acquire sufficient ethane to operate E1, E2 and E3 at their nameplate capacities, and that this requires an allocation of ethane amongst E1, E2 and E3 and thus resulting ethylene amongst Nova and Dow.

III. Positions of the Parties

[7] Pre-trial proceedings in this litigation were conducted under a series of confidentiality orders that were carefully negotiated and consented to by both parties. According to these orders, the parties agreed that certain documents to be disclosed pre-trial were confidential, not in the public domain and involved trade secrets, proprietary or confidential information, strategic interests, research, development or commercial know-how. "Confidential Records" as defined in the primary pre-trial order meant records that contained information that the producing party in good faith believed was so commercially sensitive or proprietary that its disclosure to a non-producing party could cause significant harm to the producing party.

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[8] These Confidential Records included:

a) information relating to the acquisition of feedstock for, and the production and sale of ethylene, co-products, and polyethylene;

b) trade secrets, proprietary production and manufacturing methods, pricing information or customer data used in connection with the business of the producing party; and

c) business and marketing plans.

[9] The orders provided that these Confidential Records be disclosed only to:

a) the Court;

b) in-house counsel for the opposing party and their respective corporate parents;

c) outside counsel for the same parties;

d) up to two employees or former employees of the opposing party, provided that such employees not have a role in future business activities that would provide them with an opportunity to use or rely on the confidential information; and

e) experts or consultants retained by the parties who executed confidentiality undertakings.

[10] The orders provided a mechanism for disagreement on designation of documents as confidential.

[11] The parties have agreed that Confidential Records designated as such under the pre-trial orders that are not intended to be presented as evidence at trial will continue to be deemed confidential under the existing orders.

[12] With respect to previously designated Confidential Records that are to be entered as evidence at trial, Dow proposes that the following categories of trial records should be designated as confidential and should be governed by the same constraints with respect to disclosure as set out in the pre-trial orders;

a) ethane purchase agreements as listed in a schedule to the order and communications relating to such agreements;

b) ethylene sales agreements as listed in a schedule to the order and communications relating to such agreements;

c) sales arrangements for polyethylene and co-products as listed in a schedule to the order and communications relating to such agreements;

d) records containing pricing, volume or cost information for ethane, ethylene, polyethylene and co-products;

e) a “basket” category of documents that may become relevant during trial and that meet the tests for confidentiality;

f) any record created by counsel, experts or the parties using the contents of or information in confidential trial records;

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g) portions of testimony or transcripts that would reveal the content of a confidential trial record; and

h) portions of briefs, memorandum or documents filed during or after the trial that contain confidential trial records or reveal the contents of confidential trial records.

[13] Dow also submits that the trial confidentiality order should contain a protocol for identifying when a document or record may be sought to be entered by counsel either in examination in chief or cross-examination. This protocol would require the party intending to rely on such document to give opposing counsel at least an hour's advance notice, so as to allow opposing counsel to raise any confidentiality issues. It also requires counsel to alert the Court and opposing counsel to the intended use of a document that falls within the categories of confidential trial records to allow the Court to take measures to ensure that the document is not disclosed other than to those permitted to see it.

[14] Nova proposes a narrower order. It submits that the Joffre Site Manufacturing Infrastructure Historian and any record derived therefrom should be a confidential trial record, and Dow agrees. Nova also proposes that certain agreements listed in a schedule to a draft order that appear to be primarily ethane supply and sale agreements and ethylene sales agreements should be confidential. It says that these agreements are different from the categories of ethane purchase agreements and ethylene sales agreements sought to be protected by Dow as they are agreements with third parties that include confidentiality clauses.

[15] The Nova draft order also contains a "basket" provision for records sought to be adduced at trial, and includes, as Dow's draft order does, confidentiality provisions relating to testimony and transcripts and briefs or memoranda, although Nova suggests the redaction of portions of such briefs and memorandum, rather than the protection of such document as a whole. Dow agrees to redaction rather than wholesale protection. Nova's draft order does not include an advance notice protocol.

[16] The list of Nova agreements sought to be designated as confidential include a pipeline agreement and the "Comonomer Purchase and Sales Agreement", both of which Dow agrees should be confidential.

[17] In summary, Nova does not agree that ethane purchase and ethylene sales agreements that do not involve a third-party and contain a confidentiality clause should be designated as confidential. It also submits that a confidentiality order should only cover agreements currently in force and not ones that it characterizes as "stale," in the sense that they are historical and no longer in force. Nova does not agree that sales arrangements for polyethylene or co-products should be confidential, nor records containing information with respect to prices, volumes or costs of ethane, ethylene, polyethylene or co-products.

[18] It must be noted that the orders sought by both Dow and Nova involve two aspects:

a) the denial of public access to documents designated as confidential trial documents and records by way of "sealing orders"; and

b) restrictions on access to certain documents or portions thereof to the opposing party other than designated persons such as counsel, experts and nominated employees, which can be characterized as "protective orders".

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[19] The proposed orders do not propose to deny access to the trial by the public, other than when testimony with respect to confidential trial records is being heard.

IV. The Sierra Club Test

[20] The Supreme Court's decision in ***Sierra Club*** is the governing authority on when a confidentiality order should be granted in civil and commercial cases.

[21] The Sierra Club was the applicant in a judicial review of the federal government's decision to provide financial assistance to the construction and sale to China of two CANDU nuclear reactors by Atomic Energy of Canada Ltd. It opposed any restriction on publication of certain environmental reports attached to documents sought to be entered in evidence in the proceeding. The documents were the property of the Chinese authorities, who agreed to disclose them only on the condition that they be protected by a confidentiality order. The sealing order sought by Atomic Energy of Canada Ltd. related only to access to the public, not to the parties.

[22] Iacobucci, J. for the Court confirmed that 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 in ***Dagenais v Canadian Broadcasting Corp.,*** [1994] 3 S.C.R. 35. He noted that there were "strong similarities" between publication bans in a criminal case and confidentiality orders: para 37. In each case, the fundamental question is whether, in the circumstances, the right to freedom of expression should be compromised.

[23] The Court in ***Sierra Club*** noted that the ***Dagenais*** principles should be tailored to the specific rights and interests engaged in each case: para 38. After reviewing ***Dagenais*** and subsequent cases, Justice Iacobucci concluded at para 53 that a confidentiality order should only be granted in a case such as the one before him when:

a) an order is necessary "in order to prevent a serious risk to an important interest, including a commercial interest," because reasonable alternative measures would not prevent the risk (the "necessity" test); and

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

[24] In paras 53 – 57 of the decision, Justice Iacobucci noted that three important elements were subsumed under the necessity branch of the test:

a) the risk at issue must be real and substantial, well-grounded in the evidence and posing a serious threat to the commercial interest in question;

b) in order to be 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;" and

c) a court must consider not only whether reasonable alternatives to a confidentiality order are available, but should restrict the order as much as is reasonably possible while preserving the commercial interest in question.

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[25] The Court's attempt to clarify the phrase "important commercial interest" is of particular importance in this case. In explaining that an interest cannot merely be specific to the party requesting the order, the Court gave as an example that "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, Justice Iacobucci noted that, as in the case before him, if "exposure of information would cause a breach of a confidentiality agreement, then the interest can be characterized more broadly as the general commercial interest of preserving confidential information" (emphasis added). The Court noted that if there is no general principle at stake, there can be no "important commercial interest": para 55.

[26] This requirement of finding a "general principle" at stake has led to some inconsistency in the application of the ***Sierra Club*** test. It must be considered in the context of the Court's comment that "preserving confidential information" is a "general commercial interest" that would meet the test where exposure of information would cause the breach of a confidentiality agreement. It must also be considered in the context of how the Court in ***Sierra Club*** applied the test to the situation before it.

[27] The Court stated that the commercial interest at stake related to the objective of preserving contractual obligations of confidentiality, citing Atomic Energy's argument that it would suffer irreparable harm to its commercial interests if confidential documents were disclosed. Iacobucci, J. commented that "(i)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": para 59.

[28] What are those criteria? The Court referred with approval to the following:

a) the order sought was similar in nature to a protective order granted in the context of patent litigation, in that it required 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" (para 60); and

b) the information must be of a confidential nature in that it has been accumulated with a reasonable expectation of it being kept confidential, consistently treated and regarded as such, that would be of interest to the applicant's competitors (para 60 – 61).

[29] As noted by John B. Laskin and Dan W. Puchniak in an article entitled "Sealing Orders after ***Sierra Club***", (2003) 27 Adv. Q 173, at 125, ***Sierra Club*** has lowered the bar for protecting confidential commercial information from public disclosure by acknowledging a litigant's commercial interest as an important value. However, the case law before and after ***Sierra Club*** has been divided, perhaps due to the necessity to consider the contextual background of the application, and perhaps because of certain ambiguities in the ***Sierra Club*** test.

[30] Some authority suggests that ***Sierra Club*** applies only to sealing orders, and not to protective orders governing disclosure between the parties: ***Laskin and Puchniak*** p 192, citing ***Bristol-Myers Squibb Co. v Apotex Inc.,*** [2003] F.C.J. No 143 at para 2. However, many cases like this one will involve applications that seek both sealing orders and protective orders, and

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thus the more onerous test for a sealing order set out in ***Sierra Club*** will have to be met in any case. In my view, the better approach is to apply the test to both types of orders at least at the trial stage.

[31] Counsel for Dow has cited cases such as ***GasTOPS Ltd v Forsyth***, 2011 ONCA 186, where the Court found that disclosure of a business plan containing marketing strategy, revenue information and cost structure posed a serious risk to GasTOPS' commercial interest, despite the dated nature of the documents.

[32] In ***Allerex Laboratory Ltd. v Dey Laboratories L.P.,*** [2002] O.J. No. 3168, the Master was satisfied that a sealing order was appropriate, but not a protective order between the parties, apparently on the basis that the parties were not competitors.

[33] Nova cites ***Fairview Donut Inc. v The TDL Group Corp.***, 2010 ONSC 789. That case relies heavily on pre-***Sierra Club*** authority that imposed a "societal values of superordinate importance" hurdle that was not adopted in ***Sierra Club***. The Court also stressed the fact that the litigation was class action litigation, which attracted public attention and interest and the putative class' direct interest in observing and understanding the proceedings.

[34] The Court in ***Fairview Donut*** was clearly unimpressed by the notion that harm would ensue if competitors of Tim Horton's learned "that you must bake a frozen lump of ingredients for a particular length of time at a particular temperature in order to make a muffin".

[35] The disparity in the cases illustrates that the ***Sierra Club*** test must be applied flexibly and contextually.

[36] What is clear is that a decision with respect to whether a sealing or protective order should be granted is an exercise in judicial discretion. The ***Dagenais*** (and thus ***Sierra Club***) test is not meant to be applied mechanically: ***Toronto Star Newspapers Ltd. v Ontario,*** [2005] S.C.J. No. 41 at paras 4, 8 and 31.

[37] Even if the parties have agreed on the scope of a sealing or protective order, where there is no intervener present to argue the interests of the public to free expression, it is incumbent on the Court to take account of these interests without the benefit of argument: ***R v Mentuck***, [2001] S.C.J. NO. 73 at para 38.

V. Application of the Sierra Club Test in this Case

A. Ethane Purchase and Ethylene Sales Agreements

[38] The parties agree that a sealing order and a protective order are appropriate with respect to certain ethane purchase agreements and certain ethylene sales agreements. The difference is that Nova would restrict these orders to agreements with third parties that include a confidentiality provision and that are not "stale" in the sense of still being in force and effect.

[39] Despite their agreement, I must still consider whether these documents meet the ***Sierra Club*** tests of necessity and proportionality, taking into account the public interest.

1. *Necessity*

[40] Nova's submissions are based on Justice Iocobucci's comment in ***Sierra Club*** that, if exposure of information would cause a breach of a confidentiality agreement, the commercial interest can be characterized more broadly as the general commercial interest of preserving

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confidential information: para 55. However, ***Sierra Club*** does not restrict the availability of a sealing order to agreements that contain such clauses. In paras 59 – 61, Justice Iacobucci refers to the "sufficiently important commercial interest" of preserving confidential information that meets the criteria of consistently being treated as confidential, the disclosure of which could reasonably be expected to harm proprietary, commercial or scientific interests of the applicant, that was accumulated with a reasonable expectation of being confidential and that would be of interest to the applicant's competitors.

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[41] The fact that an agreement includes a standard confidentiality clause is evidence that the parties to the contract had a reasonable expectation that the information would be kept confidential, but the lack of such a clause does not necessarily mean that the information is not confidential. The agreement in question must be reviewed in context, with a view to the kind of information it contains, to determine if it gives rise to the general commercial interest of preserving confidential information and satisfies some or all of the criteria referred to by the Court in ***Sierra Club***. When the agreement contains a confidentiality clause, it is simply easier to conclude that the parties had a reasonable expectation that the information would be treated as confidential.

[42] In this case, narrowing the category of ethane purchase agreements and ethylene sales agreements to those that include third party confidentiality clauses appears to prejudice Dow more than Nova. While Dow's ethane purchase agreements may well include confidentiality clauses, Dow sells ethylene primarily to non arms-length entities, and those agreements may not contain, and may not require, the same contractual provisions of confidentiality that would be standard with an unrelated party. It is difficult, however, to see how the absence of a confidentiality clause in such an agreement would imply that the information is not confidential if it meets the criteria set out in ***Sierra Club***. The distinction appears to be one of form rather than substance. The same kind of confidential pricing and volume information is included in all of these types of purchase and sale agreements and there is evidence that the agreements have consistently been treated as confidential, both between the parties to the specific agreements and by the parties to this litigation during the eight years of pre-trial disclosure.

[43] Specifically, Nova submits that the Ethane Supply Agreement between Dow Chemical Canada Inc. and MEGlobal Canada Inc., a joint venture that is 50% owned by Dow and 50% owned by a third party, should not be protected by a sealing or protective order. The evidence from Dow's affiant, Lorrie Deutscher, is that the parties to that agreement do not want details of it made public. While there may be a question of whether disclosure would create a disadvantage in renegotiation between these related parties, the evidence before the Court is that the agreement has consistently been treated as confidential. I am satisfied, given the nature of the information that the agreement contains, that disclosure would harm Dow's commercial interests and be of interest to Dow's competitors, including Nova.

[44] Nova argues that the pre-trial confidentiality orders do not necessarily lead to a sealing order or protective order during trial, given the open-court principle at trial compared to the inherent confidentiality of pre-trial disclosure. I agree that pre-trial orders should not automatically result in trial confidentiality orders.

[45] Messrs. Laskin and Puchniak note that some cases have held that once a pre-trial protective order is granted, the presumption shifts to the other party to show why the court should not extend the protective order into a sealing order at trial: Laskin and Puchniak at 197,

citing ***AB Hassle v Canada (Minister of National Health and Welfare)*** (1998) 81 C.P.R. (3d) 121 at para 10, affd [2000] 3 F.C. 360 (C.A.). While I do not agree that the onus of justifying a broader sealing and protective order should shift from Dow to Nova, it is a factor that Nova consented to, and in fact argued for, protective orders covering a broad range of agreements, documents and records pre-trial, while now alleging that only some of those documents and records contain a sufficiently important commercial interest to pass the test of necessity. The nature of these agreements, documents and records has not changed and Nova continues to assert confidentiality concerns about Nova's agreements containing substantially the same kind of information on prices, volumes and costs.

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[46] Nova also submits that Dow has failed to prove a real and substantial risk to an important commercial interest with respect to the documents it seeks to be protected because Ms. Deutscher does not have direct knowledge of some of the risks of disclosure that she describes in her affidavit, and refers instead to information received from employees directly involved in the type of business activity dealt with in the document.

[47] It is true that, in some instances, Ms. Duetscher's evidence that the proprietary commercial and scientific interests of Dow could reasonably be harmed by the disclosure of the information was weak or indirect. Dow as applicant is obliged to demonstrate this criterion on a balance of probabilities: ***Sierra Club*** para 60. However, Nova provided no evidence to the contrary. In fact Nova submitted before the case management justice or in questioning with respect to pre-trial motions that:

a) information contained in the E1 and E2 historians was proprietary to Nova, confidential to Nova and not shared with its competitors. Nova confirmed that it and Dow are the two largest competitors in the ethane, ethylene, and polyethylene business in Canada;

b) very small differences in manufacturing processes can result in savings, even a quarter of a cent a pound of ethylene, or half a cent a pound of ethylene, that small differences over the vast volumes that these parties produce can result in very significant amounts of money and competitive advantages;

c) the litigation raises confidentiality issues that are different than most cases before the courts, that as the parties are the two largest competitors in the ethane, ethylene, and ethylene derivatives markets in Canada, information about each party's business is closely guarded by such party;

d) there is a strong public interest in preventing the broader dissemination of such highly sensitive data;

e) to provide contract synopses of all Nova's contracts to Dow, which was already buying ethane in the pool area, would give Dow "perfect vision into the total ethane business," which is inappropriate, whether as an issue of competition law or not; and

f) sharing ethane purchase information raises competitive issues, and that access to information as to prices, volumes, and contract durations would have been understood by Nova throughout to have been a serious risk and something Nova would wish to avoid, since access to the information associated with

> prices that have been paid in the past is information that would allow one of the parties to have an advantage over the other.

[48] I am satisfied from a review of the type of information contained in the ethane purchase agreements and ethylene sales agreements presented in evidence, together with Ms. Deutscher's evidence and the previous assertions and submissions of Nova, that the proprietary and commercial interests of Dow could reasonably be harmed by the unrestricted disclosure of these agreements.

[49] However, the evidence is not so clear with respect to agreements that were short in term or dated many years in the past and are no longer in effect, the "stale" information that Nova submits should not be protected. It is difficult to determine at this point of the trial what allegedly "stale" documents may be sought to be produced in evidence by either party, and difficult given this lack of context to impose any rule regarding continued need for confidentiality that may cover all such documents. I will therefore allow submissions to be made on the continued requirement of confidentiality as a result of stale dating or lack of a document's current effect on a document by document basis as the trial proceeds.

[50] In summary, I find as a general rule that the information contained in ethane purchase agreements and ethylene sales agreements is information of a sufficiently important commercial interest to pass the necessity branch of the ***Sierra Club*** test, subject to objections that may be made on the basis of the "staleness" of the documents**.**

[51] In the event that I am wrong, and the information in the agreements does not pass the "important commercial interest" test on the basis of the general commercial interest of preserving confidential information, Dow submits that such disclosure would frustrate the promotion and protection of competition, thus involving a public interest in confidentiality.

[52] Dow notes that confidentiality orders governing both pre-hearing processes and hearings involving competition law are routinely issued by the Competition Tribunal and in litigation involving the Commissioner of Competition. As noted in ***Canada (Commissioner of Competition) v Chatr Wireless Inc.,*** 2011 ONSC 3387 at para 13, in such cases:

> ... the maintenance of confidentiality is important because the disclosure of confidential and competitively-sensitive information to competitors can frustrate the goal of the *Competition Act*, which is the promotion and protection of competition. [This risk] if established, is a "serious risk to the proper administration of justice."

[53] According to the Competition Collaboration Guidelines (Competition Bureau at page 27), competitors exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables raise concerns about damage to competitive markets.

[54] It is clear that the promotion and protection of competition is a matter of public interest, and that Dow and Nova are competitors. Dow submits, therefore, that disclosure of confidential information such as that referred to in the Competition Collaboration Guidelines would undermine this public interest.

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[55] The Competition Tribunal's insight with respect to confidentiality orders and its usual methods of categorizing confidential information are well illustrated in ***Commissioner v Superior Propane Inc., Petro-Canada, The Chancellor Holdings Corporation and ICG Propane Inc.,*** CT 1998-2, Doc #65, Reasons for Order of McKeown, J. as follows:

> On April 9, 1999, the Tribunal issued an Interim Confidentiality Order ("Confidentiality Order"). Pursuant this order, all documents over which made a confidentiality claim are to be classified as either Level A or Level B. Level A documents can be disclosed to counsel and independent experts while Level B documents can be disclosed to counsel, independent experts and two designated representatives of each party.
>
> The Tribunal is of the opinion that the respondents Superior and ICG shall ... designate all their documents as described in the three categories stated as Level A (restricting disclosure to counsel and Superior's experts). These three categories are:
>
> (a) the commercially sensitive information that would have a material impact on the competitive decision-making of Superior's operational managers and employees. Commercially sensitive information includes, among other things, information relating to individual customers, prices discounts, rebates, customer inducements, marketing strategies, strategic business plans and any other matter that may have a material impact on Superior's competitive decision-making;
>
> (b) ... presentations to the Petro-Canada board on the status of the "Project Wizard" public offering of ICG, documents containing sales volumes and budgets, offers for ICG assets by parties other than Superior, information on supply, market outlook, and for the last three years, information on distribution and costs; and
>
> (c) the branch-specific financial information regarding margins, revenue and profitability.
>
> In coming to this decision, I have tried to balance factors such as the scope of legitimate claims for confidentiality based on commercial sensitivity that would have a material impact on the competitive decision-making of Superior's operational managers and employees in the event that the application of the Commissioner is successful, the integrity of the Tribunal process, and the requirements of counsel for the respondents to consult with their clients in preparing their case.

[56] Nova in its pre-trial submissions appears to have acknowledged the need to preserve the confidentiality of certain commercial information in order to maintain and encourage competition. However, it submits that the Competition Collaboration Guidelines are not appropriate here, as the parties are not collaborators but opponents. While the Guidelines do not deal with the situation of competitors in litigation with each other, the effect of denying a sealing and protective order in this case would be to allow one competitor in a two-competitor market to

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acquire confidential business information of the other. This would surely have an effect on competition, with Dow losing confidentiality of significant competitive variables for the benefit of Nova.

[57] I am thus satisfied that the evidence in this case raises the additional public interest concern that denying a sealing and confidentiality order may frustrate the promotion and protection of competition.

[58] I note that Dow has not included a schedule of the agreements that it seeks to have protected under each of the categories at issue, and I direct that they do so within a week of this decision. If there are any surprises in that list, I will hear submissions on the document in question.

[59] With respect to whether alternative measures would satisfy the requirements of confidentiality in the circumstances, I note that, as was the case in ***Sierra Club***, the parties to this litigation are compelled to produce the documents in order to present their case. The pre-trial orders which allowed the opposing party access to the confidential information through counsel, experts who had executed confidentiality agreements, in-house counsel and nominated employees were carefully crafted and thoroughly negotiated. They balance the requirements of disclosure to the opposing party with protection of confidential commercial information between competitors.

[60] Nova submits that the pre-trial orders have created difficulties in obtaining adequate instructions and guidance from its employees directly involved in the business sector in question. I have no doubt that this is a challenge. By definition, the nominated employees must be employees who will no longer be involved in the business sector, thus making them retirees or near-retirees. However, both sides have experts, in-house counsel and outside counsel that have full access to the information and I fail to see any alternative that would not destroy the very confidentiality that the order is seeks to protect.

[61] I am satisfied that there are no reasonable alternative measures to the proposed order, which in any event is agreeable to Nova with respect to the agreements it seeks to protect.

2. *Proportionality*

[62] The salutary effect of an order protecting this category of agreements is that it allows Dow and Nova to present their case while protecting necessary confidential information. This fair trial right affecting both parties must be contrasted with the deleterious effect on Nova's right to present a full defence to Dow's claims of damage while being fettered by restricted access to certain information. Nova submits that this is a serious curtailment of its fair trial rights. The application thus requires me to attempt to balance the fair trial rights of the parties.

[63] On that issue, I must take into account that Dow (and Nova) disclosed confidential information on terms of confidentiality to each other during the pre-trial phase.

[64] Dow gave up the choice of limited disclosure pre-trial, and now faces the reality that the disclosure cannot be reversed, that such disclosure has guided Nova in its defence strategies. Absent a protective order, Dow now risks damage resulting from the disclosure of confidential information it previously disclosed under a pre-trial protective order if it is to proceed with its claims at trial. Practically, its only choice if the protective order it seeks is not granted is to live with the damage of disclosure of confidential information or relinquish certain aspects of its claims by not presenting evidence. While it is true that the pre-trial disclosure orders did not

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guarantee a similar outcome at trial, and such orders do not shift the onus from Dow, the balancing of fair trial rights must take into account the consequences to the parties. Although Nova's counsel may find that obtaining instructions and the best guidance from its client may be made more difficult by the proposed process, the balance favours the fair trial rights of Dow.

[65] With respect to the sealing order sought, and the importance of an open court process to the public, the sealing order would have a relatively minor effect on the core values underlying freedom of expression in this case.

[66] While the order would of course impede the public's right to search for truth to some extent, the public will not be excluded from the courtroom for most of the evidence. The public and the media would only be denied access to certain documents and information that contain confidential information in a highly-technical and specialized business.

[67] While this litigation is of great importance to the parties, it is likely of little interest to the media or the public, other than comment that may arise about the large scale of damages claimed. It is for that reason that I exercised my discretion under Rule 6.28 of the Rules of Court to dispense with the application of Division 4 of the Rules relating to notice to the media of the application.

[68] I am satisfied that, given the nature of the information sought to be protected, the important value of the search for truth which underlies freedom of expression and open justice would be better served by allowing the sealing order sought than by denying the order. As noted by Iacobucci, J., the nature of the proceedings is a factor to guide the Court in determining whether a sealing order should issue, and this litigation is an action between private parties involving technical commercial matters giving rise to little public interest: ***Sierra Club*** at para 83, 87.

[69] I am thus satisfied that, balancing the fair trial rights of the parties and the minimal deleterious effects of the orders sought to the open court principle, the order sought by Dow with respect to ethane purchase agreements and ethylene sales agreements as listed in schedules should be granted, subject to submissions at trial on the issue of staleness.

B. Polyethylene and Co-Product Sale Arrangements

[70] The analysis with respect to necessity and proportionality with respect to these sales agreements is substantially the same as with the ethane and ethylene agreements, and need not be repeated here, except as follows.

[71] Nova's objection to the protection of confidential information contained in these sales agreements is based on the fact that Dow sells most all the polyethylene it produces to related companies, although Dow Canada does sell some polyethylene in Canada at arms length. However, Dow has not disclosed polyethylene customer identities pre-trial. Dow submits, however, that it has disclosed polyethylene customer-specific prices in geographic areas and countries. In addition, information with respect to specific customer sales without identities is contained in certain documents, such as the NUR file. Ms. Deutscher states that Dow's polyethylene business employees have informed her that Dow's third-party customers have the expectation of confidentiality. Pricing with Dow entities for these products is done at a discount to what the contracts define as a "local market price," and certain previously disclosed documents and agreements disclose how to arrive at the intercompany transfer price.

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[72] Despite the lack of customer identities, I am satisfied that the polyethylene and co-produce sales arrangements and records include payment and pricing strategies of Dow that meet the criteria described in ***Sierra Club,*** in that they contain important commercial information that has been consistently treated as confidential, that could harm Dow's commercial interests and that would be of interest to Dow's competitors. The analysis of the proportionality branch of the test would be the same as for the ethane and ethylene agreements, and the protection and sealing orders sought will be granted, subject again to issues of stale-dated information.

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C. Records containing information regarding prices, volumes or costs of ethane, ethylene, polyethylene and co-products.

[73] Dow gives examples of these kinds of records in Ms. Deutscher's affidavit, and she was extensively cross-examined on the information contained in these records. I am satisfied that the records described in Ms. Deutscher's affidavit as examples of this category of confidential information, together with the asset utilization database which contains information as to the utilization of Dow's facilities, including volumes produced and problems encountered, contain information of a sufficiently important commercial interest to pass the necessity test. Dow has demonstrated with respect to these records on a balance of probabilities that its proprietary, commercial and scientific interests could reasonably be harmed by disclosure. However, this is a broad and open-ended category, and any additional records of this type that Dow seeks to protect must be justified on a record-by-record basis.

D. Transcript and Testimony Confidentiality

[74] The parties agree on these provisions, and I am satisfied that they are appropriate in the circumstances, as the protections of a sealing and protective order would be rendered nugatory without them.

E. Basket Clause

[75] Again the parties agree on the need for this provision, and I am satisfied that it is a reasonable way to facilitate applications with respect to documents that may become relevant as the trial unfolds.

F. Expert Reports and Redaction

[76] Dow submits that any record created by counsel, experts, consultants or the parties using the contents of or any information in confidential trial records should also be confidential.

[77] Nova complains that Dow's expert reports have been overly redacted pre-trial on the basis of this principle, illustrating its concerns by reference to one such expert report. Although the pre-trial orders included a mechanism for dealing with issues of over-redaction or disagreements over a confidential designation, no use of this mechanism occurred pre-trial.

[78] Dow submits that this kind of issue can be dealt with by the protocol it wishes the order to include. If counsel are unable to agree on specific redactions to documents intended to be presented in evidence, I accept the protocol as a reasonable method of dealing with the issue. I note that the experts on both sides had access to the same documentation, unredacted, and therefore were not prejudiced in responding to each other's reports.

G. Protocol with respect to Confidential Document Production

[79] It is not clear why Nova opposes the protocol suggested by Dow. However, as I have indicated in my comments relating to records containing information with respect to prices, volumes or costs, and expert reports and redaction, there will be issues that arise as documents are sought to be adduced at trial. The suggested protocol is a reasonable and fair way to ensure that the parties have an opportunity to deal with those issues in a timely and efficient manner.

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Conclusion

[80] The draft order produced by Dow is approved, with the following adjustments:

a) Schedules A, B and C shall be produced by Dow within a week of this decision, and the agreements sought to be protected by Nova will be added to the schedules;

b) only the records described in paragraph 16 of Ms. Deutscher's affidavit and the asset utilization database will be protected under category 2(d), of the draft order and other such records must be the subject of applications for confidentiality on a document-by-document basis;

c) redactions made to the category of records set out in paragraph 3 of the draft order should be negotiated by the parties, with leave to apply with respect to the extent of re-daction if no agreement can be reached; and

d) the Joffre Site Manufacturing Infrastructure Historian will be added to the list of confidential trial records.

[81] Costs may be spoken to if necessary.

Heard on the 27th day of January, 2015.
Dated at the City of Calgary, Alberta this 3rd day of February, 2015.

B.E. Romaine
J.C.Q.B.A.

Appearances:

B.C. Yorke-Slader, Q.C.
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for the Plaintiffs/Defendants by Counterclaim
Dow Chemical Canada ULC and Dow Europe GmbH

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T. Prince
for the Defendant/Plaintiff by Counterclaim
Nova Chemicals Corporation

2015 ABQB 81 (CanLII)

CITATION: Lewis v. Uber Canada Inc., 2023 ONSC 5134
COURT FILE NO.: CV-21-00659095-00CP
DATE: 20230912

2023 ONSC 5134 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lewis

AND:

Uber Canada Inc. et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *Lucy Jackson*, for the plaintiff

Dana Peebles and Geoff Hall, for the defendants

HEARD: September 11, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff in this putative class action seeks damages because, he alleges, the defendants, which operate the food delivery platform UberEats, improperly charge sales tax on the regular purchase price of food orders when promotional discounts are applied. The plaintiff's certification motion is scheduled to be heard on September 27 and 28, 2023.

[2] In advance of the filing of the certification motion material, the defendants seek a protective order. Specifically, they seek a protective order to protect their best evidence about the number of members in the class, which includes evidence about different promotions the defendants offered in different time periods, and the take up of those promotions. The evidence at issue is evidence that the defendants are required to give by virtue of s. 5(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[3] The plaintiff does not oppose the motion.

Legal Principles Relevant to a Protective Order

[4] In *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 1, the Supreme Court of Canada wrote:

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

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[5] The Court confirmed the "strong presumption in favour of open courts", but allowed that exceptional circumstances arise in which competing interests justify a restriction on the open court principle. In such cases, the applicant must demonstrate first, "as a threshold requirement, that openness presents a serious risk to a competing interest of public importance" – a high bar that serves to maintain the strong presumption of open courts: *Sherman Estate*, paras. 2, 3, 37.

[6] The court has inherent jurisdiction to make a confidentiality order, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make an order sealing documents.

[7] The legal test to grant a confidentiality order is set out by the Supreme Court of Canada in *Sherman Estate* at para. 38. There are three prerequisites that a party must establish when it is asking a court to exercise its discretion in a way that limits the open court principle:

a. Public disclosure would pose a serious risk to an important public interest;

b. No reasonable alternative means would prevent this risk; and

c. The benefits of the order outweigh any negative effects.

[8] The Supreme Court of Canada held that only when all of these prerequisites are met can a discretionary limit on openness be ordered. The test applies to all discretionary limits on court openness, such as publication bans, sealing orders, an order excluding the public from a hearing, or a redaction order, subject only to valid legislative enactments: *Sherman Estate*, at para. 38.

Would public disclosure of the alleged confidential information pose a serious risk to an important public interest in this case?

[9] This branch of the test requires that the interest the moving party seeks to protect be one that can be expressed in terms of a public interest in confidentiality: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 55.

[10] In *MediaTube Corp. v. Bell Canada*, 2018 FC 355, at para. 22 ("*MediaTube FC*"), Locke J. held that, where a party is compelled by the rules of discovery to divulge sensitive and confidential information, there is a strong public interest in that party being able to maintain the confidentiality of that information, or else no confidential information is safe.

[11] *MediaTube FC* was quoted recently with approval by Associate Justice Robinson in *MediaTube v. Bell Canada*, 2022 ONSC 342, at para. 32 ("*MediaTube SCJ*"). Associate Justice Robinson went on to conclude that "there is an important public interest in ensuring that parties

who are brought into litigation are able to maintain confidentiality over commercially sensitive and confidential information that they are compelled to divulge in order to defend themselves or comply with discovery obligations": see *MediaTube SCJ*, at para. 34.

[12] Defendants have no choice but to be joined in litigation. In class proceedings, defendants have no choice but to adduce their best evidence about the number of class members. To the extent that this requirement forces a defendant to divulge commercially sensitive information, I am satisfied that there is a strong public interest in keeping that information confidential, to promote the integrity and fairness of class proceedings.

[13] In this case, the evidence the defendants seek to protect includes data demonstrating the relative success of different types of promotional offers, which is data a competitor could use to its advantage, and to the defendants' disadvantage.

[14] I also note that the record establishes that the defendants take significant measures to maintain confidentiality over this information, including by maintaining technical and administrative controls to protect the information. These controls limit access to the data to only those employees who require it to do their work. They also require employees to sign confidentiality agreements to keep the data confidential both during and after their term of employment. They monitor access to the data and investigate violations of their data policy. Violations are cause for termination.

[15] The defendants also maintain physical security measures at their headquarters, including through the use of proximity cards, requiring visitors to sign in and taking their photographs, and requiring visitors to sign non-disclosure agreements.

[16] In my view, the first branch of the test is met, in that the principle of court openness poses a serious risk to the strong public interest in keeping confidential commercially sensitive information that the defendants are forced by statute to disclose. I am satisfied that the information at issue is commercially sensitive, and the commercial interests of the defendants could reasonably be harmed by disclosure of it.

Will reasonably available alternative measures prevent the risk?

[17] In my view, no other available alternative measures will prevent the risk in this case. The protective order proposed by the defendants is narrowly tailored to focus only on the commercially sensitive information. The information proposed to be redacted is not at the heart of the contest between the parties on the certification motion, and forms only a small part of the record. The second branch of the test is met.

Is the sealing order proportionate?

[18] At this stage in the analysis, the court asks whether the benefits of granting the sealing order outweigh any deleterious effects: *Sherman Estate*, at para. 106.

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[19] As I have already noted, the protective order posed is tailored to the confidential information only. The bulk of the record would remain available, and the ability of the public to understand the issues on the certification motion would not be hampered.

[20] On the other hand, failing to grant the protective order would expose the defendants to a serious risk of harm from their competitors.

[21] In these circumstances, I conclude that the third branch of the test has been met.

Conclusion

[22] I grant the defendants' motion for a protective order. The order shall go in accordance with the draft I have signed.

J.T. Akbarali J.

Date: September 12, 2023

2023 ONSC 5134 (CanLII)

Court of Queen's Bench of Alberta

Citation: 1635623 Alberta Ltd (Adrenaline Diesel and Bonnie's Equipment Services Ltd.) (Re), 2022 ABQB 361

2022 ABQB 361 (CanLII)

Date: 20220519
Docket: 24-2806908
Registry: Edmonton

In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended and in the matter of the Notice of Intention to make a proposal of 915245 Alberta Ltd. o/a Prairie Tech Oilfield Services

Between:

915245 Alberta Ltd o/a Prairie Tech Oilfield Services

Applicant

- and -

1635623 Alberta Inc o/a Adrenaline Diesel and Bonnie's Equipment Services Ltd.

Respondents

Corrected judgment: A corrigendum was issued on May 20, 2022; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] Is a notice-of-intention-filing debtor entitled to the return of property subject to possessory and garage-keeper liens?

[2] The debtor says that the notice-triggered stay of proceedings in ss. 69(1) of the *Bankruptcy and Insolvency Act* bars the continued possession of the property, that the "possession for the purpose of recovery" exception in ss. 69(2) does not apply, and that, as a result, the property must be returned to it.

[3] The lien holders argue that their continued possession of the property does not run afoul of ss. 69(1) and that, in any case, ss 69(2) shelters them.

[4] I find for the lien holders on the first ground.

B. Positions

[5] 915 acknowledged both lien holders as secured creditors, per the *BIA* definition:

> ***secured creditor*** means a person holding a mortgage, hypothec, pledge, charge, or **lien** on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor .... [part of s 2 *BIA*]

[6] Its argument is premised on the mere possession by the lien holders of the property in question being a "remedy" ... or any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy" per ss 69(1) (reproduced below).

[7] On that premise, 915 focused on whether the lien holders qualify for the exception in ss. 69(2) i.e., where possession of assets by secured creditors is "for the purpose of realization." In 915's view, neither lien holder held that property for that purpose, making the exception unavailable.

[8] Per 915, the net result was that the lien holders must surrender possession of the property to it.

[9] The lien holders engaged on 915's "purpose of possession" argument, asserting that their possession was for realization purposes.

[10] But they also made an alternative (upstream) argument that mere possession per their liens is not in fact the exercise of a "remedy" or an "action, execution or other proceedings" to recover claims i.e. that ss 69(1) did not apply in the first place.

[11] Per the lien holders, with ss. 69(1) not affecting such mere possession, no recourse to ss. 69(2)'s safe harbor was necessary.

[12] And, by extension, with their possession lawful, 915 could not call on replevin, which assumes an unlawful holding of property.

[13] In their view, 915 jumped into a series of arguments missing its linchpin – that the lien holders were pursuing "remedies" or an "action, execution or other proceedings" to recover their debt claims.

[14] The threshold issue is whether mere continued possession by the lien holders breaches the ss 69(1) stay.

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C. Analysis

Stay provision

[15] Here are the key parts of ss 69(1):

> **1)** Subject to [subsection] (2) ..., on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > **a)** no creditor has any **remedy against** the insolvent person or **the insolvent person's property, or shall commence or continue any action, execution, or other proceedings, for the recovery of a claim provable in bankruptcy,**
>
> until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.
>
> **2)** The stays provided by subsection (1) do not apply
>
> > **a)** to prevent a secured creditor **who took possession of secured assets of the insolvent person for the purpose of realization** before the notice of intention under section 50.4 was filed **from dealing with those assets**;
> >
> > **b)** to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, **from enforcing that security**, unless the secured creditor consents to the stay; [or]
> >
> > **c)** to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security **from enforcing the security** if the insolvent person has, under subsection 244(2), consented to the enforcement action ....

[16] The starting point is the interpretation of "remedy …, or action, execution, or other proceedings, for the recovery of a claim provable in bankruptcy."

[17] Does ss. 69(1) preclude a secured creditor from simply maintaining – i.e., not enforcing or realizing on -- its secured position? (In the case of a possessory or garage keeper's lien holder, that means simply maintaining possession.)

[18] I start by exploring the purpose of ss. 69(1) and the other *BIA* stay provisions.

Purpose of ss 69(1) and kindred BIA provisions

[19] The *BIA*'s stay provisions are aimed at maintaining the status quo.

[20] The Ontario Court of Appeal so confirmed in ***msi Spergel Inc v IF Propco Holdings (Ontario) 36 Ltd***, 2013 ONCA 550:

> **[Sections 69, 69.1, 69.2 and 69.3 *BIA*] promote the objects of the *BIA*** by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and **by preventing proceedings by a creditor that would give that creditor an advantage over others**: see *Cohen (Re)*, 1948 CanLII 282 (ON CA), [1948] O.J. No. 545, [1948] 4 D.L.R. 808 (C.A.), at para. 12.

Although the heading of these provisions refers to a "stay of proceedings", they accomplish this result by **preventing the exercise of the creditor's remedy** -- the cause of action.

By providing that the creditor has no "remedy" against the bankrupt, s. 69 prevents the exercise of the creditor's cause of action while the bankruptcy is in effect. This is entirely consistent with the purpose of the *BIA* of providing for the orderly and fair distribution of a bankrupt's property and **preventing any creditors from gaining an advantage**. The section does not suspend the limitation period. **It prohibits any action on a claim** that is provable in the bankruptcy. ... [paras 40, 42 and 44] [emphasis added]

[21] As that Court said further about s. 69 (in part):

... The goal of the **stay** and preference **provisions** under **ss. 69**, 95, 96 and 97 of the *BIA* is to **give the debtor some breathing room to reorganize**. ... [***1732427 Ontario Inc v 1787930 Ontario Inc***, 2019 ONCA 947 at para 13] [emphasis added]

[22] See also ***Re Emergency Door Service Inc***, 2016 ONSC 5284, where Newbould J. found similarly (approving Lederman J.'s analysis below):

...The remedial purpose in proposal proceedings is to save a debtor form the social and economic losses resulting from a bankruptcy. Interpreting the word "remedy" in s. 69(1) (*a*) to include injunctive relief sought against a debtor that has made a proposal would be a purposive interpretation that fulfills the aim of the legislation.

In *Golden Griddle Corp. v. Fort Erie Truck and Travel Plaza Inc*, 2005 CanLII 81263 (ONSC), the same arguments made in this case ... were made to Justice Lederman in a case in which **a franchisor sought an injunction to prevent a franchisee who had filed a notice of intention to make a proposal from post-filing breaches of provisions of the franchise agreement and a lease**. ... Lederman J. ...stated [at paras. 11 and 12]:

While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of L.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 -- Stays of proceedings, under the *Bankruptcy and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors** and hopefully put together a prospective financial restructuring which would meet their requirements."

A purposive definition of the word "remedy" in section 69(1)(a) would suggest that **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and **the remedy sought should be**

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considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent persons to put forth a proposal it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on the ability, it should not be stayed.

There is much to say in favour of this principle enunciated by Lederman J. in *Golden Griddle*. It gives effect to the **aim of the proposal provisions of the** ***BIA*** **to permit a debtor** who had filed a notice of intention to file a proposal **some space if needed to achieve a successful proposal.** [paras 29-31] [emphasis added]

[23] For a similar reading, see also ***Canadian Petcetera Partnership v 2867 R Holdings Ltd***, 2010 BCCA 469:

In my opinion, the purpose of s. 65.1 [*BIA*] [restriction on lease terminations] ... is similar to [that of] the provision in s. 69(1), which stays creditors from attempting to recover claims provable in bankruptcy while the debtor is endeavouring to reorganize its financial affairs with its creditors. **Both sections have the purpose of maintaining the status quo among creditors and preserving the debtor's assets during the reorganization process**. ... [para 20] [emphasis added]

[24] And ***Heritage Flooring BIA Proposal (Re)***, 2004 NBQB 168 (Glennie J.): "The purpose of the *BIA*'s stay provisions as incorporated in section 69 is to **maintain the status quo**." [part of para 57] [emphasis added]

[25] In a similar vein (in a bankruptcy context), see Elson J.'s comments in ***Bank of Nova Scotia v Avramenko***, 2020 SKQB 54:

... In my view, and construing s. 69.3(1) purposively, the **stay of proceedings does not apply to steps a judgment creditor takes to preserve a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, the reality is that **these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** ... [para 17] [emphasis added]

[26] This "stay" or "freeze" character of ss 69(1) is expressly reflected in ss. 69(2), which refers to "the **stays** provided by subsection (1)."

[27] As reflected in the decisions above, ss 69(1)'s purpose is a general ceasefire i.e., to prevent any creditor from gaining an edge over other creditors or otherwise improving or in any way changing its position (subject to certain exceptions, including secured creditors who are sufficiently advanced in their realization efforts that they are allowed to continue them).

[28] Hence the references to "breathing room" or "space" within which to assemble a proposal for the consideration of the creditors and the court.

[29] Accordingly, ss. 69(1)'s statement that "no creditor has any remedy ... against the insolvent person's property" cannot be read literally i.e., as *eliminating* every creditor's remedy.

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Every creditor – secured, preferred or unsecured – has some kind of remedy. For instance, a secured lender holding a general security agreement has a security interest in the debtor's personal property. Such an agreement provides a suite of remedies in case of default, including active steps like seizing and selling the property, seizing, and retaining the property, and appointing a receiver.

[30] But it also provides a passive remedy in the sense of limiting the debtor's powers over the property. The mere existence of a registered-at-PPR security interest may eliminate or restrict the debtor's power to sell or encumber the property, among other limitations.

[31] That "shadow" cast over the debtor's property is, in a sense, a "remedy", aimed at ensuring, or at least assisting in, recovery by the creditor.

[32] Read purposively as explained, and emphasizing its express "stay" nature, ss 69(1) is all about shutting down the exercise of remedies i.e., steps that would advance the creditor towards recovery.

[33] It is not about eliminating or even reversing any creditor's position, even if the creditor's position is itself a kind of remedy.

[34] Such would go beyond ss. 69(1) clear "stay" or "hold the line" focus.

[35] Creditors are not allowed to *advance* their position; they are allowed to *hold* them.

Notice-of-intention trustee's (limited) rights in respect of the debtor's property

[36] That (stay only) nature of ss 69(1) is reflected in the limited powers of a notice-of-intention trustee over the debtor's property.

[37] Per paragraph 50.4(7)(a) *BIA*:

> Subject to any direction of the court under paragraph 47.1(2)(a), the **trustee under a notice of intention** in respect of an insolvent person
>
> **a)** shall, for the **purpose of monitoring the insolvent person's business and financial affairs**, have **access to and examine the insolvent person's property**, including his premises, books, records, and other financial documents, **to the extent necessary to adequately assess the insolvent person's business and financial affairs**, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

[38] Nothing there about the trustee taking possession of the debtor's property or obliging any creditor with possession to turn it over.

[39] To the extent it would have made any difference, no interim receiver was appointed here, under s 47.1 *BIA*, to "take possession of all or any part of the debtor's property" and "exercise such control over that property ... as the court considers advisable" (paras 47.1(2)(b) and (c)).

[40] Even if we assume that ss 16(3) and 17(1) *BIA*, which apply where the debtor becomes bankrupt, apply in an NOI context (and I could find no case so finding), neither undercuts the position of a secured creditor having lawful possession of the debtor's property:

> **16(3) The trustee shall**, as soon as possible, **take possession of ... all property of the bankrupt** ... and make an inventory, **and for the purpose of making an inventory the trustee is entitled to enter,** subject to subsection (3.1), **on any**

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> **premises on which the** deeds, books, records, documents or **property of the bankrupt may be, even if they are in the possession** of an executing officer, a **secured creditor** or other claimant to them.
>
> **17 (1)** Where **a person has in his possession or power any property of the bankrupt that he is not by law entitled to retain as against the bankrupt or the trustee, that person shall deliver the property to the trustee.**

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[41] The former provision expressly recognizes that some or all the debtor's property may be in the possession of a secured creditor.

[42] The latter says that, where that possession is lawful, it may continue, even in the face of a bankruptcy trustee's demand to turn over the property.

[43] Nothing in the *BIA* undercuts the legality of possession by a possessory or garage-keeper's lien holder.

[44] As noted, the *BIA* expressly recognizes lien holders as secured creditors.

[45] By contrast, possession by or on behalf of an execution creditor (e.g., after seizing and removing property for an enforcement sale) is expressly undercut, in the event of a bankruptcy, by ss. 70 (bankruptcy trumps execution proceedings), 71 (bankrupt's property vests in trustee, subject to rights of secured creditors), and 73(2) (seized-and-removed property to be turned over to trustee in bankruptcy).

[46] No equivalent provisions provide a similar ("turn over possession") outcome for secured creditors, whether in an NOI or bankruptcy context.

[47] I note as well that, assuming they apply in a notice-of-intention setting, the *BIA*'s general "treatment of secured creditors" provisions (ss. 127 to 134) themselves do not contemplate a secured creditor (including a lien holder) having to yield possession (outside of such a creditor failing to prove a claim within the appointed period – ss 128(1.1)) unless the trustee redeems the security i.e. by paying out either the value of the property in question or the debt in question, whichever is less (ss 128(3).

Non-conflicting provincial law continues to operate

[48] With no *BIA* provision undercutting a lien holder's continued possession in the NOI context here, the provincial statutes undergirding the lien holders' possession here – the *Possessory Lien Act* and the *Garage Keepers' Lien Act* – continue to operate in full force, per ss 72(1) *BIA*:

> The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act …

NOI stay provision not eclipsing downstream rights of secured creditors

[49] Per s. 69.3, if a bankruptcy occurs, secured creditors are (subject to identified limitations, under s 79, 127-134 – other) able to enforce their security.

[50] Nothing guarantees that a party filing a notice of intention will (1) end up filing a proposal; (2) getting creditor and Court approval for the proposal; and (3) performing the

proposal in full. Instead, the proposal plan may fall off the rails at various points and for various reasons, leading to bankruptcy in various ways.

[51] For the protection for secured creditors in bankruptcy to have meaning, a notice of intention cannot effectively unplug a secured creditor's security. Otherwise, the "safe haven" for secured creditors in bankruptcy would be illusory.

[52] For confirmation of a possession-based lien holder's secured position in bankruptcy, see ***Bankruptcy of Gerald Thomas King***, 2004 NSSC 84 (Registrar Cregan) at paras 11-18 and ***1064521 Ontario Ltd (Re)***, 1998 CanLII 14641 (Cameron J.) (five paragraphs from "The *Municipal Act* provides ..." to "... clear priority over other liens and charges") (municipal lien for unpaid taxes).

[53] Same if the notice-of-intention efforts lead to a proposal: the proposal may or may not be made to them. If it is, or at least to a subset of secured creditors including these lien claimants (or perhaps only them), they will have an opportunity vote on the proposal. A possible outcome is that the proposal is voted down by the secured creditors, or at least the relevant subclass of such creditors.

[54] The possible survival of secured creditors' claims even where a proposal is made also confirms the over-reading of ss 69(1) by 915 i.e., with such claims not being effectively undone at the NOI stage.

Lien holders not attempting to enforce (instead only hold) their secured position

[55] Subsection 69(1) would have been engaged if the lien holders had had been attempting to enforce their claims (i.e., arranging for sale of the liened property) when the notice of intention was filed.

[56] See, for example, ***Winroc Supplies Ltd v Willows Golf Corp***, (1993) 112 Sask R 54, where Wedge J. (in obiter, since the then-new ss 69(1) was found not to apply) found that ss. 69(1) (if it had applied) "stayed **any further action or proceedings by ... lienholders**", with that provision "[making] it clear that a secured creditor cannot **enforce** its security pending a proposal." [He] found that the lienholders' actions (there, to **enforce an order for sale**) were "clearly a continuation of **proceedings** by creditors with claims provable in bankruptcy **for the recovery of their claims** provable in bankruptcy" and that they "[fell] within s. 69(1)."

Role of ss 69(2) (exception for secured creditors en route to realization)

[57] Subsection 69(2) creates exceptions where such activity by security creditors is sufficiently advanced i.e., where they have taken possession "for the purpose of realization" (69(2)(a)), or at least where they have raised the realization flag and the debtor has allowed the ten-day freeze period to expire (para 69(2)(b)) or, in any case, where that flag has been raised and the debtor has surrendered (para 69(2)(c)).

[58] Secured creditors who have so advanced, are permitted to continue with their realization efforts.

[59] But the lienholders here are not on a realization or recovery march at all.

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[60] The barring of realization efforts, and the exempting of a subset of those efforts, is irrelevant where the creditor is upstream of realization efforts, as the merely-holding-property lienholders here.

[61] In other words, ss 69(1) stays the pursuit of realization or enforcement efforts; ss 69(2) permits a subset of such efforts to continue; and neither have any thing to do with a lien holder simply maintaining possession of liened property.

Application of these principles on the ground

[62] In the case of Adrenaline, it acknowledges being in a strictly "hold" position with its lien at the date of 915's notice of intention (February 22, 2022) i.e., not taking any realization steps before that date: Adrenaline brief, paras 1-5.

[63] It purported to take realization steps about a month later, but as explained above, through the combined effect of ss 69(1) and (2), those efforts were necessarily futile, with all remedial and realization steps barred.

[64] But the key is that, even with its enforcement steps barred, Adrenaline was able to continue its mere holding of the property i.e., continue to rely on the *existence* of its secured position i.e., all aside from *enforcing* that position i.e., taking the kinds of realization or enforcement steps barred by ss 69(1).

[65] As for Bonnie's Equipment, it was not even able to take realization steps, all aside from the *BIA* stay, with the intent-to-enforce-via-sale trigger in ss 10(1) of the *Possessory Liens Act* not engaged, since (in the case of apparently non-motor-vehicle property, such as the trailers here) the necessary notice cannot be issued until the debt and storage charges have been outstanding for at least six months (not satisfied here).

[66] Bonnie's Equipment was necessarily in a hold-and-wait position, with no realization even possible, when the *BIA* notice of intention came down. (If the trailers are "motor vehicles", the *Garage Keepers' Lien Act* would apply, but the analysis would be the same, with Bonnie's Equipment having not moved into "realization", versus holding, mode.)

[67] Expressed differently, a lienholder's holding, or detention, of liened property is not, in and of itself, the exercise of a "remedy" or the taking of an "action, execution, or other proceedings" for the recovery of the underlying debt – it is simply the maintenance of a possession-based lien.

[68] Such liens are undoubtedly the platform for *enforcement steps* e.g., the sale process envisaged by s. 10 *PLA* or, in the case of a garage keeper's lien, by the combined effect of ss 6, 8, and 9 of the *Garage Keepers' Lien Act* and the Part 5 of the *Civil Enforcement Act* ("Seizure of Personal Property), which includes s. 48 ("Sale of [seized] property, etc.").

[69] But neither lien holder here had moved into the enforcement or realization zone here.

[70] As explained, that does not mean that they lose the safe harbour of ss 69(2): it means they were not off-side ss 69(1) in the first place.

D. Conclusion

[71] 915 seeks to convert ss. 69(1)'s stay of proceedings into the elimination of the lien holder's secured position.

[72] That reading is not supported by the provision's clear (status-quo-preserving) purpose.

[73] 915 did not cite any cases where ss 69(1) or any of the *BIA* stay provisions (69(1), 69.1(1), 69.2(1) or 69.3(1) were interpreted as requiring possession-based security – arising from a lien, pledge, pawn, perfection-by-possession *PPSA* security, or otherwise – to be surrendered because of the stay.

[74] The lien holders here are blocked by ss 69(1) from taking steps to enforce their lien (e.g., to have the liened property sold).

[75] But the provision does not undercut their right to *maintain* their secured-via-possession position.

[76] With that continued possession lawful, by definition a replevin order (anchored in "unlawful detention" of property) is unavailable.

E. Closing note

[77] I thank all counsel for their helpful written and oral submissions.

Heard on April 6, 2022.
Dated at Edmonton, Alberta on May 19, 2022.

M. J. Lema
J.C.Q.B.A.

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Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice M. J. Lema

Corrected the citation line to 1635623
Fixed wording in para 72
Fixed wording in para 76

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Court of King's Bench of Alberta

Citation: Blade Energy Services Corp (Re), 2024 ABKB 100

Date: 20240221
Dockets: B301 037330; B301 037334
B301 037338; B301 037340
Registry: Calgary

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037330

Between:

FTI Consulting Canada Inc

Applicant

- and -

Blade Energy Services Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037334

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Energy Corp

Respondent

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In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037338

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Holdings GP Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037340

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Royalties Limited Partnership

Respondent

Reasons for Judgment
of
Honourable Justice M. J. Lema

I. Introduction

[1] Is the arrears-triggered disconnection (or lockout) of a gas producer by a gas-plant operator a continuing remedy and accordingly one stayed under the producer's notice-of-intention proceedings under the *Bankruptcy and Insolvency Act*?

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[2] The producer seeks an order declaring that the stay applies and directing reconnection to the gas-gathering system and processing of its production on certain payment terms.

[3] The operator characterizes the lockout as a completed step and thus, not offside the *BIA* stay. Alternatively, if the stay applies and reconnection follows, the operator seeks going-forward terms including immediate payment, a critical-supplier's charge, and payment of some of the existing arrears.

[4] I find that the lockout was a continuing remedy, that it was stayed when the *BIA* notice of intention was filed, that reconnection is required, and that, with the stay not applying to any post-NOI arrears that may accrue, the parties' existing agreements will govern future services and payments for them i.e., without the Court setting such terms.

II. Background

[5] Razor and Conifer are oil and gas producers. Conifer is also the operator of a gas plant in the South Swan Hills area in which both are producing natural gas.

[6] Per Conifer, Razor owes approximately $8 million to it, relating in part to processing-charge and capital-cost shortfalls. Razor disputes that figure.

[7] After long-running attempts to negotiate the clearance of those arrears, Conifer notified Razor that, relying on a right in their operating-procedure agreement, it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a satisfactory payment arrangement.

[8] Neither happened, eventually leading to Conifer disconnecting Razor from the system, Razor shortly afterwards filing a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*, and the current debate over the scope of the resulting stay and its impact (if any) on the lockout.

III. Issues

[9] The first issue is whether the lockout constitutes a continuing debt-collection remedy. If so, it is stayed by the *BIA* stay. The second is the appropriate remedy in such case. Assuming it includes reconnection, the third is on what term(s) should future services be provided by Conifer.

IV. Analysis

A. Stay provision

[10] Here is the applicable *BIA* provision (para 69(1)(a)):

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6 [none of which apply here, at least not currently], on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has **any remedy** against the insolvent person or the insolvent person's property, or shall commence or continue **any** action, execution or **other proceedings**, for the recovery of a claim provable in bankruptcy[.] [emphasis added]

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[11] Conifer did not argue, and it could not plausibly have argued, that Razor is not an insolvent person, that a notice of intention has not been filed, or that its claim for contractual amounts owing by Razor through to the lockout is not a claim provable in bankruptcy i.e. would not fall within the scope of s 121 *BIA* if a bankruptcy had occurred on the NOI filing date.

[12] Leaving the questions of whether the lockout constitutes a remedy or other proceeding (or both) and, if so, whether the stay captures the lockout when it occurred before the NOI was filed.

[13] I start by examining the scope of the key terms here.

B. Broad scope of "remedy" and "other proceedings"

[14] The scope of "remedy" and "other proceedings" is broad, including both judicial and extrajudicial debt-collection steps. Per ***Vachon v Canada Employment and Immigration Commission***, [1985] 2 SCR 417:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", **giving to it and to the words "*autres procédures*" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
>> The **means by which a right is enforced** or the violation of a right is prevented, redressed, or compensated.
>
> and below:
>
>> Remedy means **any remedial right** to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
>> **the means by which the violation of a right is prevented, redressed, or compensated**. Remedies are of four kinds: (1) by act of the party injured . . .; (2) by operation of law . . .; (3) **by agreement between the parties** ...; (4) by judicial remedy, *e.g.* action or suit. **The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.**
>
> The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* **very broadly**.
>
> [discussion of cases involving distress for unpaid municipal taxes, incomplete seizures, and bids to cut off utilities].
>
> This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion **the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.**

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As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:

> **An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.**

The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that **the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.**

Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent [unemployment-insurance] benefits, such as the recovery at issue here. [paras 21-31] [emphasis added]

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[15] Recall as well that para 69(1)(a) refers to "**any** remedy" and "**any** … other proceedings", without any limitation to legal remedies or proceedings.

[16] Further examples of extrajudicial steps found to constitute "remedies" or "proceedings" include:

- **setting off** current payments (for coal deliveries) against pre-existing arrears: ***Quintette Coal Ltd v Nippon Steel Corp***, 1990 CanLII 430 (BCCA), found to fall within the scope of a s 11 *CCAA* stay of "proceedings" (see paragraph beginning "Quintette continued to make coal deliveries …" and paragraphs from that beginning with "It is evident from the above that …" .. up to and including that beginning with "As Thackray, J. has not been shown to have erred …"]
- "**sweeping [the debtor's] operating account** and **[capping]** the amount available to [the debtor] [under a **revolving credit facility**]: ***Heritage Flooring BIA Proposal (Re)***, 2004 NBQB 168 (para 82);
- **distraining** for unpaid rent: ***Ford Credit Canada Ltd v Crosbie Realty Ltd***, 1992 CanLII 7132 (NLCA) (paras 21-26) and ***Durham Sports Barn Inc (bankruptcy proposal)***, 2020 ONSC 5938 (42-49);
- **registering a caveat** as a prelude to enforcing a condominium levy: ***Condominium Plan No 78R15349 v Fayad***, 2001 SKQB 104 (paras 23 and 24); and
- seeking an **injunction to enforce continued business operations** in leased premises: ***Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc***, 2005 CanLII 81263 (ONSC) (paras 11-15).

[17] The focus of such steps is collection or attempted collection of existing indebtedness i.e. "remedies" or "other proceedings" for the "recovery of claims provable in bankruptcy."

[18] By contrast, **terminating an agreement** was found to fall outside the scope of s. 69: ***Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd***, 2010 BCCA 469 (paras 20, 28

and 29). For the same (outside scope of s 69) treatment of **contract termination**, see also ***Hutchingame Growth Capital Corporation v Independent Electricity System Operator***, 2020 ONCA 430 (paras 32-26) (leave denied: 2021 CanLII 2823 (SCC)). Examples of the same treatment in a landlord-tenant context include ***Peel Housing Corp v Siewnarine***, 2008 CanLII 31815 (ONSC DC) (paras 12-26) and ***BCIMC Realty Corporation v Fernandes***, 2021 CanLII 140640 (ON LTB) (determinations 1-7).

[19] The distinction with termination is the focus on ending the commercial relationship, not on recovery of outstanding arrears.

[20] I note that Conifer does not argue that the agreement in question has terminated, whether because of Razor's defaults or otherwise.

[21] Other "outside scope" examples noted in ***Canadian Petcetera*** are seeking *Criminal Code* **compensation orders**, pursuing a **contempt order**, or **enforcing post-bankruptcy indebtedness** (paras 30 and 31), all found not to involve claims provable in the insolvency proceeding. (I discuss the latter aspect later, with "post-bankruptcy" translated to "post-NOI".)

C. Purpose of stay

[22] ***Golden Griddle*** (cited above) accurately describes the purpose of staying such remedies and proceedings in a proposal setting:

> While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, **giving**, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act,* June 1, 1995 – Stays of Proceedings, under the *Bankruptcy and Insolvency Act"* (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."**
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the **impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed**, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.
>
> The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a **mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's**. To operate as a Golden Griddle restaurant

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requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.

To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.

I, therefore find that the **nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed**. [paras 11-15] [emphasis added]

D. Nature of lockout per Conifer

[23] Conifer itself recognizes the remedial nature of its lockout step. Per the February 15, 2024 Affidavit of its deponent (Heather Wilkins – Conifer's VP Finance):

On or around December 23, 2023, **after multiple attempts to get Razor to address its arrears**, Conifer exercised its rights under section 602(b)(ii) of the [Construction, Ownership and Operation Agreement], and **stopped receiving and processing Razor's gas by physically closing and locking valves** at 16 separate points within the South Swan Hills Gas Gathering System **on the basis of close to $8 million in unpaid arrears**. [para 8]

Conifer has not received any payments and **no further enforcement steps** were taken following the disconnecting of services. [para 9]

Due to Razor's unwillingness to address its obligations, on or about November 2, 2023, conifer notified Razor that Conifer would **revoke Razor's privileges and disconnect services** at the Judy Creek Gas Plant in seven days … **if Razor failed to remedy its arrears and bring its account into good standing.** … [para 28]

… Conifer reiterated that **it would disconnect Razor's Services within seven days if Razor did not implement a monthly payment plan to bring its account into good standing**. [para 31]

On December 20, 2023, Conifer wrote … to Razor that [a certain] proposal was not acceptable, and that **Conifer would follow through with Service Disconnection if Conifer did not receive at least $2.5 million to pay towards Razor's arrears** by December 22, 2023. … [para 34]

On December 29, 2023 …, Conifer completed the Fuel Disconnection. At that time, **service to Razor's South Swan Hills Unit assets was completely disconnected from the fuel supply at the Judy Creek Gas Plant** with the exception of one generator running for building heat and pipeline tracers to preserve infrastructure integrity. [para 42]

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> I confirm that **Conifer has taken no further steps to enforce payment of Razor's arrears since the Fuel Disconnection** on December 29, 2023. [emphasis added]

[24] Conifer did not argue that its exercise of the described disconnection step, one its contractual rights under the agreement in question with Razor (and other parties), was not a "remedy" or "other proceeding" within the meaning of para 69(1)(a).

[25] Nor could it plausibly have done so, given the above-described breadth of the provision and the clearly acknowledged use of the lockout right to recover, or try to recover, Razor's arrears. Per ***Vachon***, this was undoubtedly "[a] kind of attempt at recovery, judicial or extrajudicial" of amounts qualifying as a "provable claim in bankruptcy."

[26] By invoking the lockout provision of its agreement with Razor (and others), Conifer was attempting to extract payment from Razor of the approximately $8 million in arrears claimed by Conifer (not all of which are acknowledged by Razor) or some subset satisfactory to Conifer and accompanied by a satisfactory payment arrangement for the balance.

[27] As was acknowledged by Conifer's counsel in the bolded passages below:

> … Conifer is preserving the *status quo*, which as of the date of Disconnection means **no further Services will be provided without the substantial past accounts being paid or satisfactory arrangements being reached.**
>
> The key question in determining this [legitimacy-of-disconnection] issue is whether or not Conifer **already exercised its rights** prior to Razor filing its NOI. If it has, the issue is moot; **Conifer cannot breach the stay for an action taken prior to the existence of the Stay**, which was only triggered by the filing of the NOI.
>
> Conifer agrees that the Stay was created pursuant to section 69(1)(a) of the *BIA*; however, Razor's submissions fail to acknowledge two key points: (1) **the remedy, in this case the Disconnection and cessation of the Services, was exercised on notice and prior to January 30, 2024 when Razor filed the NOI**; and (2) the Disconnection was implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. …
>
> Conifer reasonably exercised its rights by ceasing to provide Services at a loss through implementing the Disconnection when Razor failed to provide a viable plan to address its arrears. **The Disconnection was not a continuing action as characterized by Razor but rather a one-time permanent step** taken in December 2023 resulting from the disconnection at 16 separate points within the South Swan Hills Gas Gathering System. [Conifer brief, paras 12-15] [emphasis added]

[28] As seen here, Conifer is not arguing that its lockout step was not a remedy or other proceeding per para 69(1)(a), instead that the remedy was taken *and completed* before the NOI was filed and, having no ongoing effect, is thus beyond the reach of the NOI-triggered stay. (It also anchors the lockout in the anticipated avoidance of further losses, which I discuss later.)

[29] It is common ground that the lockout occurred, or at least began, before the NOI was filed.

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[30] It is also common ground that the para 69(1)(a) stay does not have retroactive effect, in the sense of undoing completed steps. For instance, the stay did not reach back to undo Conifer's accomplished set-offs (pre-NOI) of amounts owing to Razor against the latter's debts to Conifer. Same if Conifer had obtained a judgment against Razor, obtained proceeds from execution, and applied them to Razor's debts. Or Conifer had otherwise taken and completed a collection step before the NOI was filed.

[31] It is also common ground, or at least cannot be disputed, that para 69(1)(a) captures, and stays, both the commencement *and continuation* of proceedings to recover provable claims. (Per ***Vachon***, "remedies" and "other proceedings" are effectively synonymous, at least in the case of extrajudicial recovery steps i.e. the bar on commencing or continuing "other remedies" is equally a bar on commencing or continuing extrajudicial "remedies" generally.)

[32] Was the lockout here a completed remedy?

E. Lockout a continuing remedy

[33] The answer is no: it was an ongoing (i.e. continuing) remedy.

[34] Despite Conifer's characterization of the lockout as a "one-time permanent step", it was anything but. Per Conifer's counsel's February 6, 2024 letter to Razor:

> **Should Razor desire access** to the Judy Creek Facility, **Razor must make acceptable provisions to address its arrears** and provide pre-payment for all costs associated with obtaining access to the facility, fuel gas and processing costs going forward. We have been advised by Conifer that **should an acceptable arrangement be met, … it would take approximately 3 business days for its to reinstate production for Razor**. [emphasis added]

[35] That paragraph reflects the true nature of the lockout: a reversible step designed to stay in place until Razor cleared or otherwise addressed its pre-NOI debt to Conifer's satisfaction.

[36] It was the very ongoing effect of the lockout – daily preventing Razor from producing from the field(s) in question – that constituted Conifer's (contractually-permitted) leverage here.

[37] This was not a completed step i.e. a *former* remedy no longer providing leverage or pressure to pay.

[38] It was a continuing step, creating ongoing leverage and resulting in or contributing to Razor's decision to pursue a *BIA* proposal, starting with filing a NOI and triggering the para 69(1)(a) stay of proceedings.

[39] How can the lockout fairly be regarded as a completed remedy, having no ongoing effect, when its express purpose – clearance of Razor's arrears or at least some portion (with a satisfactory payment arrangement for the balance) – was not achieved to any degree? And when (per the quoted letter) Conifer stood ready to reverse the lockout i.e. following a hoped-for clearance of Razor's arrears or a subset with a satisfactory payment arrangement for the balance? And until that happened, Conifer continued the lockout?

[40] The lockout is functionally equivalent to a judgment creditor seizing and removing the judgment debtor's key equipment and advising that will restore the equipment if the judgment debt is cleared in full or satisfactory payment arrangements are made.

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[41] The common feature is a creditor step interrupting the debtor's business operations, designed to pressure the debtor to clear or arrange to clear the debt.

[42] In both cases the genesis of the pressure is a legal right i.e. a contractual right in the first case and a judgment-enforcement right in the second.

[43] The question is not whether the creditor has the given right or whether it was appropriate to exercise it.

[44] It is whether the remedy pursued was completed (in which case the stay does not reach it) versus being an ongoing step (in which case it does), with the *BIA* aiming to quell such creditor actions pending (at minimum) preparation and circulation of a proposal.

[45] I return to this point after examining two other arguments from Conifer defending its lockout step.

F. Continuing lockout not a permissible status quo

[46] Conifer argued that continuing the lockout after post-NOI simply maintained the pre-NOI status quo.

[47] But that ignores para 69(1)(a)'s bar on commencing *or continuing* debt-collection steps. Given that bar, an in-progress collection action cannot be the status quo to be preserved. Otherwise, the only question would be whether the collection action had started pre-NOI. If that were right, any already-started collection action would be permitted to continue e.g. an ongoing effort to seize the debtor's property via writ, an in-progress auction to sell seized property, a garnishment continuing to attach a periodic receivable, and so on.

[48] But (as explained earlier) para 69(1)(a) shuts down in-progress collection actions, leaving no room for preservation of a "continuing action status quo."

[49] For an example of status-quo-maintaining step not breaching a *BIA* stay, see ***BNS v Avramenko***, 2020 SKQB 54 (Elson J.), where an unsecured creditor sought to renew its judgment despite the bankruptcy of the debtor:

> I am compelled to add, perhaps in *obiter*, that I would have granted the renewal [of the unsecured creditor's judgment under SKQB rules], even if the trustee had not been discharged. In my view, and construing s. 69.3(1) purposively**, the stay of proceedings does not apply to steps a judgment creditor takes to <u>preserve</u> a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, **the reality is that these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** To conclude otherwise would be to force a judgment creditor to stand aside while its judgment expires through circumstances that may well be beyond its control. [para 17] [bold emphasis added]

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[50] The renewal step so authorized allowed the judgment creditor to continue as such; it did not extend to enforcing the judgment, which would have offended the stay.

[51] Conifer did not point to this kind of status-quo-maintaining step here, only to its ongoing collection action via the lockout.

G. Conifer not a secured creditor in this context

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[52] At the application, Conifer's counsel argued that Conifer is a secured creditor of Razor, pointing to a lien and charge provision (s 602(a)) in the operating agreement.

[53] Per that provision, Conifer indeed has a lien and charge "with respect to the **Functional Unit Participation** of each Owner in the **Facility** and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by the Operator for the Joint Account."

[54] "**Functional Unit Participation**" means "with respect to any **Functional Unit**, the percentage interest ownership of each Owner in such Functional Unit as set forth opposite such Owner's name under the Appendix entitled "FACILITY AND FUNCTIONAL UNIT PARTICIPATION"[.]

[55] "**Functional Unit**" means a separate component of the Facility described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC", and all real and personal property of every nature and kind attached to, forming part of or used in connection with the operation thereof"[.]

[56] "**Facility**" means "all real and personal property of every nature and kind attached to, forming part of or use in connection with Joint Operations, maintained and held by Operator in accordance with this Agreement and as described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC"[.]

[57] The lien and charge, focused on Razor's ownership stake in the described oil and gas assets, is not the root of Conifer's lockout right. The latter arises under a separate provision (s 602(b)(ii)) and focuses on denial of one of Razor's "privileges" under the operating agreement.

[58] In any case, Conifer did not argue that its lockout right arises from or is otherwise a feature of the lien and charge.

H. No difference if Conifer secured

[59] Instead, Conifer appeared to argue that its status as a secured creditor (arising from the lien and charge) conferred general immunity from the stay i.e. even if the lockout right is not security-based itself.

[60] However, the stay analysis would remain the same, whether Conifer is a secured creditor "at large" or even if the lockout right itself should be characterized as or stemming from security.

[61] Paragraph 69(1)(a) applies to "creditor[s]" generally, whether secured, preferred, or unsecured.

[62] Subsection 69(2) contains an exception to the stay in para 69(1)(a) for secured creditors; however, it is limited to the following circumstances:

> **(2)** The stays provided by subsection (1) do not apply
>
> > (a) to prevent a **secured creditor who took possession of secured assets of the insolvent person for the purpose of realization** before the notice of intention under section 50.4 was filed from dealing with those assets;
> >
> > (b) to prevent a **secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person** more than ten days before the notice of intention under section 50.4 was filed, **from enforcing that security**, unless the secured creditor consents to the stay; [or]
> >
> > (c) to prevent a **secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security** if the insolvent person has, under subsection 244(2), **consented to the enforcement action**[.]

[63] Conifer did not "[take] possession of secured assets of [Razor]" here or, if it did, did not do so "for the purpose of realization" of such assets. Conifer was exercising its lockout right, not attempting to somehow dispose of that right to others for proceeds.

[64] Neither did Conifer issue a prescribed form notice under ss 244(1) *BIA*. (See *BIA* General Rule 124 and Form 88 for the prescribed form.)

[65] Accordingly, even if characterized as a secured creditor for the purposes of para 69(1)(a), Conifer still falls within its scope, with no ss 69(2) or other secured-creditor exception applying.

I. Conclusion on stay and lockout

[66] For these reasons, I find that the lockout step was a continuing remedy or "other proceeding", that it accordingly fell within the scope of the para 69(1)(a) stay, that continuing that remedy was not a defensible status quo, and that Conifer's actual or possible secured-creditor status makes no difference here.

[67] The net result is that Conifer's lockout step, commenced before the NOI stay began, was a continuing collection remedy and was thus stayed when the NOI was filed.

[68] Conifer's continuation of the lockout since then has been in breach of the stay.

[69] The question becomes: what can and should be done in response?

J. Parties' positions on appropriate response

[70] Per Razor:

> … the appropriate relief , in the circumstances is to cure the breach of the Stay by ordering Conifer to: (i) **permit Razor … to access the Judy Creek Gas Plant**; and (ii) **resume providing Services on terms** that include Conifer continuing its practice of marketing [Razor's] production, setting off the revenue against post-filing amounts, and calling upon $200,000 security if there is a shortfall [as particularized in Razor's counsel's February 1, 2024 letter]

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[71] Per Conifer (making alternative submissions i.e. "if Conifer must supply"):

> If this Court holds that Razor's rights under the Ownership Agreement compel Conifer to continue processing and selling their products, then Razor must **pay for those Services up front and in advance.** The *BIA* is clear that a party providing post-filing services may **require immediate payment for those services** and that service providers are not required to advance further money or credit. Specifically, section 65.4(1) states:
>
> > … Nothing in subsections (1) to (3) shall be construed
> >
> > (a) as prohibiting a person from **requiring immediate payment for** goods, **services**, use of leased or licensed property or other valuable consideration provided after the filing of
> >
> > (i) the notice of intention, if one was filed … or
> >
> > (b) as requiring the further advance of money or credit ….
>
> … Forcing Conifer to provide the Services without guaranteeing payment up front is equivalent to forcing Conifer to provide the Services on credit, a requirement that is expressly prohibited under [para] 65.1(4)(b).
>
> As Razor is seeking a declaration [that the stay applies], which is an equitable remedy, this Court must consider the equities of both parties. [bold emphasis added]

[72] Conifer also seeks a "critical suppliers" charge and repayment of some "cure costs" (i.e. some of the pre-NOI arrears, as detailed in paras 29-42 of its brief.

K. Remedies for stay breach

1. Court's power to remedy breach of stay

[73] The *BIA* does not expressly endow the Court with powers to remedy a stay breach.

[74] However, many examples exist of courts granting orders undoing or reversing a stay-breaching action or pulling the proceeds of such actions into the proposal or bankruptcy estate (as applicable): see the cases summarized in 5:289 – Proceedings Taken Without Leave in Bankruptcy and Insolvency Law of Canada, 4th Edition (online edition), which feature remedial orders such as reversing a property seizure, barring further proceeding in offside actions, and turning over garnishment recoveries,

[75] I find that para 69(1)(a) implies a power for the Court to grant such orders i.e. to enforce the stay and, as much as possible, restore the parties to their pre-breach position.

2. Remedy appropriate here

[76] In this case, the stay breach did not generate any proceeds.

[77] The clear remedy for the breach here – continuing an arrears-collection lockout in the face of the stay – is an order directing Conifer to discontinue the lockout i.e. restoring the system connections Razor had before the lockout.

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[78] Given Conifer's estimate of "approximately 3 business days" to reconnect Razor, I direct Conifer to perform the reconnection work by 6 pm on Friday, February 23, 2024 or such other deadline as the parties may agree on.

3. Payment terms for future services

[79] The other relief suggested by the parties (alternatively, in Conifer's case) goes to the **terms on which future services are to be provided by Conifer**.

[80] As noted, Razor suggested continuation of the pre-lockout set-off arrangement or situation, bolstered by a $200,000 deposit. Conifer argued in favour of immediate payments, a critical-supplier charge, and payments towards arrears.

[81] I do not see any role for the Court when it comes to the parties' going-forward arrangements.

[82] Paragraph 69(1)(a) focuses on shutting down collection steps on pre-NOI arrears, as reflected in the above order reversing the lockout.

[83] It says nothing about the terms on which services must, should or may be provided going forward.

4. Section 65.1 inapplicable

[84] As noted, Conifer invokes s. 65.1. However, that section does not apply here. Per ss 65.1(1), it only applies where a person "terminate[s] or amend[s] any agreement … with the insolvent person, or claim[s] an accelerated payment, or a forfeiture of the term, under any agreement … with the insolvent person", limiting the moving party's rights to take any such steps in certain circumstances.

[85] In invoking its lockout right, Conifer did not engage in any of the noted activities.

[86] As a result, nothing in s. 65.1 applies here.

[87] That includes ss. 65.1(4) (quoted above). The purpose of that provision is to shelter a creditor's immediate-payment right (if it exists) from limitations imposed by one or more of ss. 65.1(1), (2) and (3). As noted, ss. 65.1(1) does not apply here. And neither does ss. 65.1(2) (leases and licensing agreements) or 65.1(3) (public utilities).

[88] If (for example) we were dealing with a public utility, and the utility had the right under its contract with its customer to require immediate payment (versus extending credit) for services provided, ss. 65.1(4) tells us that that right survives the imposition of no-discontinuance-for-arrears limitation imposed under ss. 65.1(3).

[89] In other words, while the utility cannot discontinue service for arrears, it can rely on its immediate-payment-required term for ongoing utility services.

[90] In yet other words, ss. 65.1(4) does not create a freestanding right in a creditor to insist on immediate payment post-NOI.

[91] It depends on whether the creditor has that right under its contract with the debtor.

[92] I cannot tell from the materials filed whether Conifer has the right to require immediate payment for future services, whether under the Accounting Procedure described in s 902 of the Ownership and Operation Agreement, Article VI of the Operating Procedure (Accounting Measures), or otherwise.

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5. Conifer's enforcement rights not stayed re debts for future services

[93] The critical point here is that Conifer's use and enforcement of its timing-of-payment and enforcement-of-payment rights, relating to future services, are not subject to the para 69(1)(a) stay.

[94] The reason is simple: the NOI filing created two distinct eras, the period leading up to the filing and the period after. Claims existing in the first era are subject to the stay; claims arising in the second are not.

[95] Here see ***Canadian Petcetera Limited Partnership*** (cited above):

> [An earlier-described] interpretation of s. 69(1) is also demonstrated by the jurisprudence dealing with **new indebtedness incurred by a debtor after he or she has gone bankrupt**. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the **new indebtedness is not a claim provable in the bankruptcy**. (See *Richardson & Co. v. Storey* (1941), 1941 CanLII 334 (ON SC), 23 C.B.R. 145, [1942] 1 D.L.R. 182 (Ont. S.C.); *Re Bolf* (1945), 26 C.B.R. 149 (Que. S.C.); *Venneri v. Bomasuit* (1950), 31 C.B.R. 150 (Ont. S.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), 12 C.B.R. (N.S.) 115 (Que. S.C.). Also see *Wescraft Manufacturing Co. (Re)* (1994), 1994 CanLII 2883 (BC SC), 27 C.B.R. (3d) 28 (B.C.S.C.), which appears to have held, correctly in my view, that **s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal** ….[para 31] [emphasis added]

[96] And ***Schendel Mechanical Contracting (Re)***, 2021 ABQB 893 (Mah J.):

> … it is known that Hatch **supplied goods** to various Schendel projects **during the post-NOI period** to the tune of $34,476.75. Hatch advised the Receiver of which specific invoices to which the $40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.
>
> **The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy"** per section 69(1): ***Wosk's Ltd Re***, 1985 CanLII 624 (BC SC), 1985 Carswell BC 807 (SC), 58 CBR 312; ***728835 Ontario Ltd., Re***, 1998 CanLII 2019 (ON CA), 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and ***Jones, Re***, 2003 CanLII 21196 (ON CA), 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258. [paras 25 and 26] [emphasis added]

[97] Accordingly, when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings.

[98] It may be that Conifer will choose to proceed on the basis suggested by Razor (setoffs accompanied by deposit). Conifer might choose to rely on other payment-enforcement rights it

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has under the agreements i.e. as they may be triggered by Razor's payment performance or non-performance. The parties may end up agreeing to new or varied payment arrangements.

[99] It is not the Court's role, in a stay-enforcement context, to get involved in those going-forward business decisions.

6. Critical-supplier charge and "cure" payments

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[100] While Conifer requested a critical-supplier charge, it did not apply for such relief. I recognize that the application heard last Friday (February 16th) was brought forward with very tight timing and that Conifer was already dealing with accelerated timelines.

[101] I simply note that I did not have the benefit of any written submissions from Razor on the critical-supplier aspect, with none required i.e. with no application for such cross-relief.

[102] As well, I am not convinced that every gap or difference between the *BIA* (which does not provide for critical-supplier charges, at least expressly) and the *CCAA* (which does) is necessarily answered by filling in the gap i.e. by finding that a feature or aspect in one is necessarily to be read into the other. I would (ideally) have more fulsome submissions from each side on this point before considering such a charge further.

[103] Same for Conifer's request for payment of a portion of Razor's pre-NOI arrears. This is at odds with the equality-of-unsecured-creditors approach under the *BIA*. It too would benefit from an application and more fulsome submissions from both sides.

[104] If Conifer continues to seek either or both forms of relief, I invite its counsel to so advise, following which I will provide procedural directions for a follow-up application (with which I am seizing myself), on accelerated timelines, if necessary.

7. Lockout to avoid anticipated future arrears

[105] As noted, Conifer attempted to explain its lockout decision in part by a wish to avoid or pre-empt anticipated future arrears. Per its brief (para 14):

> … the Discontinuance was [also] implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. [I added "also" given the clear evidence, recited earlier, that Conifer was also seeking, via the lockout, to enforce collection of all or at least some of the pre-NOI arrears.]

[106] I do not see anything in the agreements here authorizing a lockout for *anticipated* arrears, even with Razor's arrears history.

[107] As explained above, the parties are effectively back to square one when it comes to future services. If Razor allows new arrears to accrue, it faces the prospect of Conifer taking any, some or all of the enforcement steps available to it under the agreements, without any impediment from the para. 69(1)(a) stay.

[108] Absent further defaults, I do not see Conifer having any lockout power.

V. Closing note

[109] I thank the parties for their excellent written materials and oral submissions.

[110] On costs, if either side seeks a ruling other than "bear own costs", on which ***Goldenkey Oil Inc (Re)***, 2023 ABKB 365 may provide some guidance, I invite counsel to contact my

assistant to arrange for a phone conference to discuss and set procedural directions for costs submissions.

Heard via Webex in Edmonton, Alberta the 16th day of February, 2024.
Dated at the City of Calgary, Alberta this 21st day of February, 2024.

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M.J. Lema
J.C.K.B.A.

Appearances:

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si Spergel Inc., as Trustee of the Estate of Dilollo, a Bankrupt v. I.F. Propco Holdings (Ontario) 36 Ltd.

[Indexed as: Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Feldman, Sharpe and Strathy JJ.A.

October 2, 2013

117 O.R. (3d) 81 | 2013 ONCA 550

2013 ONCA 550 (CanLII)

Case Summary

Bankruptcy and insolvency — Limitations — Limitation period applicable to motion by trustee to set aside preferential payment by bankrupt not suspended by stay under s. 195 of Bankruptcy and Insolvency Act upon filing of appeal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195.

Limitations — Extension of limitation period — Limitation period applicable to motion by trustee to set aside preferential payment by bankrupt not suspended by stay under s. 195 of Bankruptcy and Insolvency Act upon filing of appeal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 195.

After a bankruptcy order was made and a trustee appointed, the bankrupt filed an appeal from the bankruptcy order. Under s. 195 of the *Bankruptcy and Insolvency Act* ("*BIA*"), the bankruptcy order was stayed upon the filing of the appeal. The trustee brought a motion under s. 95 of the *BIA* for a declaration that a pre-bankruptcy payment by the bankrupt to the respondent constituted a preference. The respondent brought a motion for an order that the trustee's claim was time-barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The motion judge granted the motion, holding that the limitation period applicable to a motion by a trustee to set aside a preferential payment by a bankrupt under s. 95 of the *BIA* is not suspended by the stay under s. 195 of the *BIA*. The trustee appealed.

Held, the appeal should be dismissed.

While the motion judge was correct in his ultimate conclusion, he erred in holding that before s. 20 of the *Limitations Act* can apply to extend, suspend or vary a limitation period, there must be a limitation period in another statute and that other statute must provide for the extension, suspension or other variation of that limitation period. Section 20 speaks to two situations: (a) where a statute contains a limitation period or time limit to which the *Limitations Act* does not apply and a provision for the extension, suspension or variation of that period or time limit; and (b) where a statue simply contains a provision for the extension, suspension or variation of a

limitation period or other time limit imposed "by or under" another statute. An "extension, suspension or other variation" contained in the *BIA* would be capable of suspending the operation of the limitation period in the *Limitations Act*. However, s. 195 did not have that effect.

Guillemette v. Doucet (2007), 88 O.R. (3d) 90, [2007] O.J. No. 4172, 2007 ONCA 743, 48 C.P.C. (6th) 17, 287 D.L.R. (4th) 522; *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29, 166 A.C.W.S. (3d) 762; *Sally Creek Environs Corp. (Re)*, [2013] O.J. No. 2288, 2013 ONCA 329, **consd** [page82]

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Other cases referred to

Canada (Attorney General) v. Fekete, [1999] A.J. No. 384, 1999 ABQB 262, 242 A.R. 193, 10 C.B.R. (4th) 102, 87 A.C.W.S. (3d) 374; *Cohen (Re)*, [1948] O.J. 545, [1948] 4 D.L.R. 808 (C.A.); *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108, 16 C.P.C. (7th) 1, 288 O.A.C. 355; *Crosley (Re); Munns v. Burn* (1887), 35 Ch. D. 266 (C.A.); *Dilollo v. Es-Lea Holdings Ltd.*, [2010] O.J. No. 4060, 2010 ONCA 624, 69 C.B.R. (5th) 207, affg [2010] O.J. No. 93, 2010 ONSC 129, 62 C.B.R. (5th) 223 (S.C.J.); *Edwards Estate (Trustee of) v. Food Family Credit Union*, [2011] O.J. No. 3205, 2011 ONCA 497, 79 C.B.R. (5th) 264, 336 D.L.R. (4th) 719, 204 A.C.W.S. (3d) 912; *Employers Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; *Fimax Investments Group Ltd. v. Grossman*, [2012] O.J. No. 1821, 2012 ONSC 2436 (S.C.J.); *Gingras v. General Motors Products of Canada Ltd.*, [1976] 1 S.C.R. 426, [1974] S.C.J. No. 152, 57 D.L.R. (3d) 705, 13 N.R. 361; *Goorbarry v. Bank of Nova Scotia* (2011), 109 O.R. (3d) 92, [2011] O.J. No. 5770, 2011 ONCA 793, 286 O.A.C. 282, 345 D.L.R. (4th) 624, 210 A.C.W.S. (3d) 514; *In re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.); *July v. Neal* (1986), 57 O.R. (2d) 129, [1986] O.J. No. 1101, 32 D.L.R. (4th) 463 (C.A.); *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd.*, [2001] O.J. No. 3717, 155 O.A.C. 328, 28 C.B.R. (4th) 53, 113 A.C.W.S. (3d) 384 (C.A.), varg [2001] O.J. No. 1, 23 C.B.R. (4th) 170, 102 A.C.W.S. (3d) 274 (S.C.J.); *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.); *Mawji (Re)*, [2012] O.J. No. 1048, 2012 ONCA 152, 94 C.B.R. (5th) 135 (C.A.), affg [2011] O.J. No. 6535, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (S.C.J.); *Toronto-Dominion Bank v. Barry-Kays*, [2010] O.J. No. 2667, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (S.C.J.); *Westby ex p. Lancaster Banking Corp. (Re)* (1879), 10 Ch. D. 776 (Ch. Div.); *Wilson Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127, [1996] O.J. No. 3735, 140 D.L.R. (4th) 530, 94 O.A.C. 321, 38 C.C.L.I. (2d) 159, [1997] I.L.R. 1-3402, 22 M.V.R. (3d) 216, 66 A.C.W.S. (3d) 754 (C.A.), supp. reasons (1997), 33 O.R. (3d) 37, [1997] O.J. No. 1182, 147 D.L.R. (4th) 242, 98 O.A.C. 329, [1997] I.L.R. I-3447, 70 A.C.W.S. (3d) 150 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 69 [as am.], 69.1 [as am.], 69.2 [as am.], 69.3 [as am.], (1) [as am.], (1.1), (2), 69.4 [as am.], 69.5 [as am.], 95 [as am.], (1)(*a*), 178(1) [as am.], (2), 195 [as am.], 215

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 28

Courts of Justice Act, R.S.O. 1990, c. C.43 [as am.]

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.], ss. 4, 19 [as am.], 20

Solicitors Act, R.S.O. 1990, c. S.15 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 63.01

Authorities referred to

Houlden, L.W., G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, looseleaf (Toronto: Carswell, 2013)

APPEAL from the order of D.M. Brown J., [2013] O.J. No. 373, 2013 ONSC 578 (S.C.J.) that the claim by the trustee in bankruptcy was statute-barred. [page83]

Mervyn D. Abramowitz and *Philip Cho*, for appellant.

Harvey Chaiton and *Douglas A. Bourassa*, for respondent.

The judgment of the court was delivered by

[1] **STRATHY J.A.**: — Under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"), a bankruptcy order is stayed upon the filing of an appeal. This appeal raises the issue of whether that stay suspends the limitation period applicable to a motion by a trustee to set aside a preferential payment by a bankrupt under s. 95 of the *BIA*.

[2] The motion judge found that the limitation period was not suspended by the stay and dismissed the preference motion as time-barred. For the reasons that follow, although I do not agree entirely with the motion judge's analysis, I agree with his conclusion and would dismiss the trustee's appeal.

A. *The Facts*

[3] On July 6, 2006, the respondent, I.F. Propco Holdings (Ontario) 36 Ltd. ("Propco"), obtained a default judgment against the bankrupt, Cosimo Dilollo ("Dilollo"), for $22,031,787.67.

[4] On December 15, 2006, Propco brought a bankruptcy application against Dilollo. Ultimately, Propco and Dilollo agreed to compromise Propco's judgment for $1.2 million. They

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agreed that if this sum was paid, both parties would consent to the dismissal of Propco's bankruptcy application and would exchange releases.

[5] Between August and December 2007, Dilollo paid $1,136,500, which, although less than the agreed amount, Propco accepted in satisfaction of the settlement. As matters transpired, the bankruptcy application was not dismissed and releases were not exchanged. By early 2008, Propco's bankruptcy application remained outstanding and by order dated May 22, 2008, three other creditors were added as applicants to it.

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[6] On June 5, 2009, the bankruptcy application was heard by Morawetz J. Dilollo admitted at the hearing that he had settled Propco's claim for "something around" $1.185 million. A bankruptcy order was made on January 11, 2010 [[2010] O.J. No. 93, 2010 ONSC 129 (S.C.J.)], and a trustee was appointed. In his endorsement granting the application, Morawetz J. referred to the settlement of the debt between Propco and Dilollo for $1.185 million.

[7] On January 20, 2010, Dilollo filed an appeal from the bankruptcy order. This court dismissed that appeal on September 27, 2010 [[2010] O.J. No. 4060, 2010 ONCA 624]. [page84]

[8] At the first meeting of creditors on May 31, 2011, the appellant, msi Spergel Inc. (the "Trustee"), was appointed in place of the original trustee.

[9] On August 24, 2012, the Trustee brought a motion under s. 95 of the *BIA* for a declaration that the $1.1365 million paid by Dilollo to Propco under the settlement constituted a preference and sought an order that Propco repay that amount to the Trustee.

[10] Propco, for its part, brought a motion for an order that the Trustee's claim was time-barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "*Limitations Act*"). Alternatively, it sought an order that if the Trustee's claim was not time-barred, it was entitled to file a proof of claim in Dilollo's estate for the full amount of its $22,031,787.67 judgment. Propco said that if the preferential payment was set aside, the settlement agreement under which the payment had been made should also be set aside, with the result that the full amount of its claim was outstanding and provable in the bankruptcy. The difference was important, because if Propco could file a claim for the full amount of the judgment, it would account for about 90 per cent of the value of proven claims.

B. *Statutory Provisions*

[11] The Trustee brought its motion to set aside the payment to Propco as a preference under s. 95(1)(*a*) of the *BIA*:

> 95(1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> *(a)* in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against -- or, in Quebec, may not be set up against -- the trustee if it is made, incurred, taken or suffered, as the case may be, during

the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

[12] There is no limitation period in the *BIA* applicable to the time within which the trustee is required to bring a motion to set aside a preference. In *Edwards Estate (Trustee of) v. Food Family Credit Union*, [2011] O.J. No. 3205, 2011 ONCA 497, 336 D.L.R. (4th) 719, at para. 4, this court applied the proposition that "general limitation periods in provincial statutes apply to bankruptcy proceedings", referring to *Gingras v. General Motors Products of Canada Ltd.*, [1976] 1 S.C.R. 426, [1974] S.C.J. No. 152 and *Employers Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114. [page85]

[13] Both parties, therefore, agreed that the general two-year limitation period in s. 4 of the *Limitations Act* applied to the motion to set aside the preference. That section provides:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[14] The Trustee acknowledged that it was aware of the potential preference claim on January 11, 2010, the date of release of the reasons of Morawetz J. granting the bankruptcy order. It also conceded that the limitation period began on the date of the bankruptcy order, but argued that Dilollo's appeal to this court suspended the running of the limitation period pending the disposition of the appeal. It relied in this regard on the combined operation of s. 20 of the *Limitations Act* and s. 195 of the *BIA.*

[15] Section 19 of the *Limitations Act* has the effect of invalidating any limitation period not specifically referred to in the schedule to that Act, unless it was in effect on January 1, 2004, and incorporates by reference a statutory provision listed in the schedule. It states:

19(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(*b*) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

[16] However, s 20 of the *Limitations Act* provides:
20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

[17] The Trustee argued that s. 195 of the *BIA* operated as a "suspension" of the limitation period pending the appeal to this court. That section provides:

195. 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

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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.

[18] Returning to the time periods at issue here, the key dates are as follows: [page86]

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January 11, 2010	Bankruptcy order
January 20, 2010	Appeal filed by Dilollo
September 27, 2010	Appeal dismissed by Court of Appeal
January 11, 2012	Two-year limitation period expired
August 24, 2012	Preference motion commenced

[19] If the stay of proceedings pursuant to s. 195 of the *BIA* during the appeal of the bankruptcy order had the effect of suspending the limitation period for the preference motion, the limitation period would have expired on September 18, 2012, and the Trustee's preference motion would have been brought in time. If the stay did not suspend the limitation period, it would have expired two years after the date of the bankruptcy order -- that is, on January 11, 2012 -- and the preference motion, which was brought about 30 months after the bankruptcy order, would have been time-barred.

C. *The Motion Judge's Reasons*

[20] There were two issues before the motion judge. The first was whether the limitation period for the Trustee's preference motion was "suspended" by the stay of proceedings in s. 195 of the *BIA* during the pendency of the appeal from the bankruptcy order.

[21] The second issue was whether, if the motion was not time-barred, and if the Trustee was ultimately successful in voiding the preferential payment under s. 95 of the *BIA*, Propco was entitled to file a claim for the full amount of its judgment (in excess of $22 million), or was confined to claiming the settlement amount of $1,136,500.

[22] The motion judge found that before s. 20 can apply to extend, suspend or vary a limitation period, there must be a limitation period in another statute and that other statue must provide for the extension, suspension or other variation of *that limitation period*. Since there was no limitation period in s. 195 of the *BIA*, and that provision did not purport to suspend or extend a limitation period in the *BIA*, the ordinary limitation period applied. He expressed this conclusion as follows, at para. 16:

> To engage section 20 of the *Limitations Act, 2002* requires that some other statute provides for a limitation period and also provides for the "extension, suspension or other variation of a

> limitation period or other time limit by or under another Act". Section 195 of the *BIA* does not contain any limitation period or provide for the "extension, suspension or other variation" of a limitation period. Since *BIA* s. 195 does not purport to extend, suspend or vary a [page87]limitation period contained in the *BIA*, section 20 of the *Limitations Act, 2002* does not apply. Since no other suspension provision contained in the *Limitations Act, 2002* would apply in the circumstances of this case, the basic two year limitation period set out in section 4 governs. The parties agreed that time started to run on the day the Bankruptcy Order was made, so the basic two-year limitation period expired on January 11, 2012, well before the Trustee initiated the Preference Motion. That motion, therefore, is statute-barred.

(Citations omitted)

[23] The motion judge also concluded that the stay pending appeal under s. 195 of the *BIA* was not functionally equivalent to a limitation period, and it was open to the Trustee to move to lift the stay if so advised. He stated, at para. 17 of his reasons:

> That a stay pending appeal might prevent a person from taking some step does not alter that conclusion. A stay of proceedings pending the hearing of an appeal is not the functional equivalent of a limitation period. Limitation periods set deadlines by which a person must initiate legal process in respect of a cause of action. Stays pending appeal are engaged following the initial disposition of the legal process in which the cause of action was asserted. Limitation periods and stays pending appeal conceptually are quite different creatures. If a stay might operate to prejudice a person's legal rights, recourse generally is available to seek a lifting of the stay from the court. Section 195 of the *BIA* specifically provides that "the Court of Appeal or a judge thereof may vary or cancel the stay . . . for such other reason as the Court of Appeal or judge thereof may deem proper". In the present case it was always open to the Trustee to seek a lifting of the stay from the Court of Appeal if the Trustee thought that its ability to initiate a preference motion might be prejudiced by the appeal. As matters transpired, the Trustee was left with ample time following the dismissal of the appeal to commence its Preference Motion.

[24] In the result, he found that the Trustee's motion was time-barred. Although not necessary to do so in the circumstances, the motion judge went on to consider whether, if the claim under s. 95(1)(*a*) of the *BIA* was not statute-barred, and if the payment under the settlement was found void as a preference, Propco was entitled to claim for the full amount of its judgment or was restricted to the compromised amount. He concluded that the Trustee could file a claim for the full amount of the judgment.

D. *The Parties' Submissions*

[25] The Trustee's position, both before the motion judge and in this court, was that pursuant to s. 195 of the *BIA*, the appeal of the bankruptcy order resulted in an automatic stay of proceedings and suspended the limitation period applicable to the s. 95 preference motion. In that case, the preference motion [page88]would not be statute-barred until two years less nine days[1] after the appeal of the bankruptcy order was dismissed by this court on September 27, 2010. Under this theory, the preference motion was brought about a month before the expiry of the two-year limitation period.

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[26] The Trustee submits that the motion judge failed to follow "established jurisprudence" concerning the effect of a stay under the *BIA* on the running of limitation periods. It refers to case law under s. 69 of the *BIA* which holds that the limitation period ceases to run for creditors' claims against the bankrupt while the bankruptcy is in effect.

[27] The Trustee also submits that the motion judge erred in holding that the absence of a limitation period in the *BIA* for bringing a preference motion meant that s. 20 of the *Limitations Act* was inapplicable. In this regard, the Trustee argues that the motion judge failed to properly consider and apply this court's decision in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469.

[28] Propco submits that the motion judge was correct in finding that s. 195 of the *BIA* does not extend, suspend or vary the basic two-year limitation period, because it does not contain a limitation period or provide for the "extension, suspension or other variation" of a limitation period. It relies on this court's decision in *Guillemette v. Doucet* (2007), 88 O.R. (3d) 90, [2007] O.J. No. 4172, 2007 ONCA 743, which it submits makes it clear that s. 20 of the *Limitations Act* only applies where the other statute contains *both* a limitation period *and* a provision extending, suspending or varying that limitation period. Propco also relies on *Joseph* for the proposition that a common law extension of the limitation period is not available under s. 20.

[29] Finally, Propco distinguishes the authorities under s. 69 of the *BIA* relied upon by the Trustee, none of which involved s. 20 of the *Limitations Act* and which, it says, are based on English authority inapplicable to Ontario's comprehensive limitations regime.

E. *Analysis*

[30] The appropriate starting point for the analysis of the issues is the language of the statutory provision relied upon by the Trustee to suspend the limitation period. Section 195 of the *BIA* states that "all proceedings under an order or judgment [page89]appealed from shall be stayed" until the disposition of the appeal. It provides, however, that this court or a judge of this court may vary or cancel the stay if the appeal is not being prosecuted diligently, "or for such other reason as the Court of Appeal or a judge thereof may deem proper".

[31] The section contains no limitation period and makes no express reference to the extension, suspension or variation of any limitation period. For this reason, the motion judge found that s. 20 of the *Limitations Act* was inapplicable and the basic two-year limitation period applied.

[32] I agree within this conclusion, but do not agree with the portion of the motion judge's reasons dealing with the interpretation of s. 20 of the *Limitations Act*. In my view, read together, this court's decisions in *Guillemette* and *Joseph* establish that s. 20 speaks to two situations: (a) where a statute contains a limitation period or time limit to which the *Limitations Act* does not apply and a provision for the extension, suspension or variation of that period or time limit; and (b) where a statute simply contains a provision for the extension, suspension or variation of a limitation period or other time limit imposed "by or under" another statute.

[33] In *Joseph*, Feldman J.A. adopted this interpretation, but found that the "special circumstances" doctrine was a creature of the common law, and could not be considered an extension *under* the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It is apparent from her reasons

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that, had she found it to be a statutory extension, she would have applied it to the limitation period under the *Limitations Act*.

[34] While there is language in *Guillemette* that could be taken to suggest, as Propco argues and as the motion judge held, that the operation of s. 20 is limited to statutes that contain their own limitation periods, that was not, in fact, the result in *Guillemette.* In that case, the limitation period in the *Solicitors Act*, R.S.O. 1990, c. S.15 was found to be of no effect by virtue of s. 19 of the *Limitations Act*, because it was not listed in Schedule A of the statute, but its "suspension" provision nevertheless applied to extend the limitation period in the *Limitations Act*.

[35] Section 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 is a well-recognized example of such a statutory extension. It suspends the operation of the applicable limitation period in favour of class members when a class proceeding is commenced. There is no limitation period in the statute itself that is suspended, but the statute operates to suspend another statutory limitation period applicable to the cause of action: see, for [page90]example, *Coulson v. Citigroup Global Markets Canada Inc.*, [2012] O.J. No. 717, 2012 ONCA 108, 16 C.P.C. (7th) 1.

[36] I therefore agree with the Trustee's submission that an "extension, suspension or other variation" contained in the *BIA* would be capable of suspending the operation of the limitation period in the *Limitations Act*. The question is whether s. 195 of the *BIA* has that effect. I agree with the motion judge's conclusion that it does not.

[37] The Trustee acknowledges that there is no direct authority that a stay under s. 195 of the *BIA* suspends the limitation period. It submits, however, that there is a long line of authority holding that the statutory stay of creditors' claims under s. 69 of the *BIA* has the effect of suspending the limitation period. It submits that the principles contained in the case law under s. 69 apply equally to s. 195.

[38] Section 69 of the *BIA* and several sections that follow -- s. 69.1 (Division I proposals), s. 69.2 (consumer proposals) and s. 69.3 (bankruptcies) -- provide for a stay of proceedings against an insolvent person or debtor, as the case may be, after the filing of a notice of intention, after filing a proposal or after a bankruptcy order. The wording of s. 69.3(1), dealing with bankruptcies, is typical:

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[39] Subsection (1.1) provides that the stay ceases to apply on the day the trustee is discharged. Subsection (2) deals with the claims of secured creditors, who are permitted to realize their security unless the court orders otherwise. Section 69.4 provides that a creditor may apply to the court to have the stay lifted, and s. 69.5 permits the collection of withholdings or deductions under provincial tax laws.

[40] These provisions promote the objects of the *BIA* by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and by preventing proceedings

by a creditor that would give that creditor an advantage over others: see *Cohen (Re)*, [1948] O.J. No. 545, [1948] 4 D.L.R. 808 (C.A.), at para. 12.

[41] These provisions stipulate that on the happening of the particular act, "no creditor has any *remedy* against the debtor or the debtor's property" (emphasis added).

[42] Although the heading of these provisions refers to a "stay of proceedings", they accomplish this result by preventing the exercise of the creditor's remedy -- the cause of action. [page91]

[43] This court has, on a number of occasions, adopted the definition of "cause of action" propounded by Morden J.A. in *July v. Neal* (1986), 57 O.R. (2d) 129, [1986] O.J. No. 1101 (C.A.), at p. 137 O.R., adopting the words of Lord Diplock in *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43 Q.B.: "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". For other examples, see *Wilson Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127, [1996] O.J. No. 3735 (C.A.), supp. reasons (1997), 33 O.R. (3d) 37, [1997] O.J. No. 1182 (C.A.); *Goorbarry v. Bank of Nova Scotia* (2011), 109 O.R. (3d) 92, [2011] O.J. No. 5770, 2011 ONCA 793.

[44] By providing that the creditor has no "remedy" against the bankrupt, s. 69 prevents the exercise of the creditor's cause of action while the bankruptcy is in effect. This is entirely consistent with the purpose of the *BIA* of providing for the orderly and fair distribution of a bankrupt's property and preventing any creditors from gaining an advantage. The section does not suspend the limitation period. It prohibits any action on a claim that is provable in the bankruptcy. In most cases, the limitation period becomes irrelevant because, by s. 178(2) of the *BIA*, on discharge the bankrupt is released of all claims provable in the bankruptcy other than those set out in s. 178(1).

[45] The Trustee relies, however, on a line of cases under s. 69, which are summarized by the following quote from L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, looseleaf (Toronto: Carswell, 2013), at p. 5-99:

> When a bankruptcy occurs, the *Statute of Limitations* ceases to run against claims . . . The creditor's ability to take proceedings against the debtor is stayed by the *Act*, and the stay of proceedings suspends the operation of the limitation period . . . . The suspension ends when the trustee is discharged (s. 69.3(1)), and the *Statute of Limitations* commences to run again at that time.

(Citations omitted)

Cases that follow this principle include *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd.*, [2001] O.J. No. 1, 23 C.B.R. (4th) 170 (S.C.J.), vard [2001] O.J. No. 3717, 155 O.A.C. 328 (C.A.); *Canada (Attorney General) v. Fekete*, [1999] A.J. No. 384, 1999 ABQB 262, 242 A.R. 193; *Toronto-Dominion Bank v. Barry-Kays*, [2010] O.J. No. 2667, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (S.C.J.); *Mawji (Re)*, [2011] O.J. No. 6535, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (S.C.J.), affd [2012] O.J. No. 1048, 2012 ONCA 152, 94 C.B.R. (5th) 135; *Fimax Investments Group Ltd. v. Grossman*, [2012] O.J. No. 1821, 2012 ONSC 2436 (S.C.J.). [page92]

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[46] The common root of these authorities runs deep -- an 1887 decision of the English Chancery Division, *Crosley (Re); Munns v. Burn* (1887), 35 Ch. D. 266 (C.A.). In that case, Crosley, a broker, was adjudged bankrupt in February 1874. It was discovered that he had misappropriated securities that he had held for a customer, Captain Ayscough. Ayscough made a claim in the bankruptcy and received a small dividend. The administration of the bankrupt estate was completed in 1880, and an order was made annulling Crosley's bankruptcy.

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[47] Crosley died in 1885 and in May 1896 an order was made for the administration of his estate. Captain Ayscough made a claim for the balance of what he was owed, on the basis that the debt was incurred by Crosley's fraud and therefore survived the bankruptcy.

[48] It was argued, however, that the claim was barred by the six-year statute of limitations. Lord Justice Cotton said this, at p. 270 Ch. D.:

> Then it is said that the claim is barred by the Statute of Limitations. But the fraud was not discovered till after the adjudication in bankruptcy. While the bankruptcy was in force no action could be brought, so the statute could not begin to run till the annulling of the bankruptcy, and within six years from that time an order for administration was made. The Statute of Limitations is therefore no defence, and the appeal must be dismissed.

[49] Lindley J. agreed, at p. 271 Ch. D., stating:

> The short answer to the argument founded on the Statute of Limitations is that the statute did not begin to run till the bankruptcy had been annulled.

[50] While the respondent argues that the court referred to no authority in support of the proposition that the statute of limitations did not run during the bankruptcy, the proposition was not new. In *Westby ex p. Lancaster Banking Corp. (Re)* (1879), 10 Ch. D. 776 (Ch. Div.), at p. 784 Ch. D., the bankruptcy commenced in 1870. After the estate had been realized, and the trustees determined that nothing more could be brought in, the bankruptcy was deemed to be closed. The bankrupt failed to pay his creditors the requisite ten shillings on the pound, which would have entitled him to a discharge, and he never obtained a discharge. Subsequently, in 1878, the bankrupt inherited a large amount of money. A creditor, whose debt had appeared on the statement of affairs, but who had not proven his debt before the close of the bankruptcy, sent a proof of claim to the receiver, who had taken over as trustee.

[51] It was held that the creditor was entitled to apply for leave to enforce his debt as a judgment debt against the debtor's property. In answer to the argument that the creditor's claim [page93]was time-barred, Sir James Bacon, the chief judge in bankruptcy, abruptly dismissed the assertion, at p. 272:

> The argument founded on the *Statute of Limitations* as an answer to this claim is not tenable for a moment. *The Statute of Limitations has nothing to do with the bankruptcy laws*. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed.

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(Emphasis added)

[52] In my view, this proposition remains valid. Section 69 of the *BIA* is not, as such, a provision that extends, suspends or varies a limitation period. It takes away creditors' civil remedies and requires them to submit their claims through the bankruptcy process. The bar on commencing or continuing proceedings serves this end and preserves the integrity of the bankruptcy process. In most cases, the limitation period is of no further significance because creditors' claims are dealt with in the bankruptcy. In the rare case, where the bankrupt is not discharged or the claim survives bankruptcy, the limitation period may resume running. It also continues to run against a creditor who seeks to recover a debt in proceedings unconnected to the bankruptcy: see Houlden, Morawetz and Sarra, at 5-99, referring to *In re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.).

[53] The stay under s. 195 of the *BIA* serves a very different purpose. It simply provides that on the appeal of any order or judgment made in the course of a bankruptcy, the *status quo* will be preserved, unless the court orders otherwise. This is not dissimilar to the automatic stay of a judgment for the payment of money, under rule 63.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Its purpose is to ensure that no steps are taken that cannot be unwound if the appeal succeeds.

[54] The Trustee also argued that the motion judge failed to appreciate that a trustee is incapable of acting where the very order from which it derives its authority is under appeal. It submits that during the stay under s. 195, a trustee is unable to hold a first meeting of creditors, hold a meeting with the inspectors, investigate potential claims and obtain legal opinions about such claims. This, said the Trustee, would put a trustee and creditors at risk, because the limitation period could slip away before the trustee had an opportunity to investigate potential claims or to take action. It argued that a trustee must have a full two years after its appointment to be able to investigate the situation and make decisions, with the advice of the creditors and the inspectors, before deciding whether to commence proceedings. [page94]

[55] The motion judge addressed this issue, at para. 17 of his reasons, referred to above at para. 23, where he noted that it was open to the Trustee to apply to lift the stay if it interfered with its ability to initiate the preference motion. As the motion judge also noted, the Trustee had ample time to commence the preference motion.

[56] Accordingly, I regard s. 69 of the *BIA*, and the line of cases under it, to be entirely distinguishable from s. 195 and from the case before this court. Both provisions are also distinguishable from s. 20 of the *Limitations Act*, which is concerned with provisions in other acts for the extension, suspension or other variation of limitation periods contained in those other acts.

[57] To conclude, this is not a case in which a statute other than the *Limitations Act* contains either a limitation period or an express extension, suspension or other variation of the limitation period. The Trustee relies, in effect, on an implicit or implied statutory extension of the limitation period. This court considered a somewhat similar argument in *Sally Creek Environs Corp. (Re)*, [2013] O.J. No. 2288, 2013 ONCA 329. In that case, certain creditors of the bankrupt brought a motion for leave pursuant to s. 215 of the *BIA* to commence an action for negligence against the

Office of the Superintendent of Bankruptcy and two of its employees. They alleged that the OSB was negligent in supervising the trustee in bankruptcy, with the result that the dividend paid to creditors was less than it would otherwise have been.

[58] In a taxation hearing, the registrar in bankruptcy made findings of serious misconduct on the part of the trustee. It was acknowledged that the limitation period for an action against the OSB began to run when the registrar's decision was released on June 23, 2008, because the creditors were aware on that date of the material facts with respect to their cause of action.

[59] In response to the motion for leave, the OSB argued that the motion was time-barred because it had been brought more than two years after the registrar's decision. The creditors responded, however, that the registrar's decision had been appealed, first to the Superior Court of Justice and then to this court. They argued that the appeal had the effect of "suspending" the limitation period. The motion judge found that all material facts were known by June 23, 2008, and the running of the limitation period was unaffected by the appeals.

[60] This court affirmed the decision of the motion judge. It noted, at para. 11, that the appellants had provided no authority for the proposition that the limitation period, [page95]having begun to run, was tolled by an appeal or as a result of the outcome of the appeal.

[61] The decision of this court in *Sally Creek*, like *Guillemette* and *Joseph*, is consistent with the purpose of the *Limitations Act* of promoting certainty and clarity in the law of limitation periods. That purpose is not accomplished by extending, suspending or varying a limitation period unless expressly authorized by statute. In my view, this is not such a case.

F. *Conclusion*

[62] For these reasons, I would dismiss the appeal. As a result, the payment to Propco could not be impeached and it is unnecessary to consider the second issue before the motion judge.

[63] In default of agreement as to costs, I would direct the parties to file brief written submissions, no more than three pages in length, exclusive of the costs outline. I would order that Propco's submissions be delivered within 20 days and the Trustee's submissions within 20 days thereafter.

Appeal dismissed.

Notes

1 Nine days being the time between the bankruptcy order and the filing of the appeal.

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Court No. 147 | Estate No. 020470

IN THE COURT OF QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON
IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF
SAVANT INDUSTRIES INC.

BETWEEN:

COOPERS & LYBRAND LIMITED, TRUSTEE IN
THE PROPOSAL OF SAVANT INDUSTRIES INC.

APPLICANT

- and -

SASKWEST TELEVISION INC.

RESPONDENT

W. Matkowski — for the applicant (the "Trustee" for Savant Industries Ltd., "Savant")

S. Khan — for the respondent ("Saskwest")

JUDGMENT — BAYNTON J.

February 18, 1994

The Trustee applies under Bankruptcy Rule 89 and ss. 60(2) and 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, S.C. 1992, (the "Act") for a declaration that the Trustee has title to the sum of $7,651.93,

(made up of the sums of $880.51 and $6,771.42), paid out of court to Saskwest after Savant had filed a notice of intention under s. 50.4 of the Act to make a proposal. The funds had been paid into court pursuant to garnishee action taken by Saskwest to enforce a judgment it had obtained against Savant. The Trustee also applies for a judgment against Saskwest for this amount, plus pre-judgment interest and solicitor and client costs, and for an order that Saskwest pay this amount into court.

The Trustee alternatively applies for an order setting aside the two previous orders of this court authorizing payment out of the funds in court to Saskwest. The Trustee contends that the court had no jurisdiction to make the orders. I find no merit in this ground. Proceedings taken when a stay is in place although irregular, are not null and void. *Amanda Designs Boutique Limited v. Charisma Fashions Limited* (1972), 17 C.B.R. 16 (Ont. C.A.), *Trusts & Guarantee Co. Ltd. et al v. Brenner et al*, [1933] S.C.R. 656.

Issues

1. Does the stay under s. 69.(1)(a) of the Act apply to a creditor who is not sent a notice of an intention to make a proposal and who is thereby denied the opportunity to attend the meeting of creditors called to consider and vote on the proposal?

2. Does a payment out of court constitute an "other proceeding" within the meaning of s. 69.(1)(a) of the Act?

3. Should a declaration be granted *nunc pro tunc* under s. 69.4 of the *Act* to the

effect that the stay does not operate in respect of Saskwest?

4. Should the Trustee be awarded pre-judgment interest and solicitor and client costs in a case where a creditor was not given proper notice?

Facts

On March 26, 1993, Saskwest issued a statement of claim against Savant Industries Ltd. and through pre-judgment garnishment action, amounts in excess of $4,000 were paid into court on April 14th and 20th, 1993 respectively. Default judgment for $11,671.82 was obtained by Saskwest on April 23, 1993. On April 30th, 1993 these funds were paid out by order to Saskwest. On May 19, 1993, a further sum of $880.51 was paid into court pursuant to yet another garnishee.

On May 21, 1993, Savant, pursuant to s. 50.4 of the Act, filed a notice of intention to make a proposal. This notice listed in excess of one hundred names as creditors of Savant, but it did not disclose Saskwest as a creditor. Accordingly, none of the statutory notices, including the notice of the creditors meeting to vote on the proposal, although sent to other creditors of Savant as required by the Act, were sent to Saskwest. The proposal was filed in June 21, 1993, and was approved by the creditors on July 13, 1993 and by the Registrar on July 30, 1993.

In the meantime, having no notice of Savant's intention to file a proposal, Saskwest continued with garnishee action to enforce its judgment. The following events all took place after the May 21, 1993 notice of intention filing date. On June 2nd, 1993, Saskwest obtained an order for payment out to it of the $880.51

paid into court on May 19, 1993. On June 28, 1993, the sum of $6,762.32 was paid into court pursuant to a garnishee issued June 1, 1993 against Macdonald's Consolidated. This amount with interest was paid out to Saskwest on July 12, 1993.

Saskwest did not receive notice of the proceedings undertaken by Savant until August 17, 1993. This is unusual in that copies of the various garnishee summonses had been properly served throughout by Saskwest on Savant. On August 13, 1993, just prior to the receipt of the notice of the proceedings respecting the proposal, an additional amount in excess of $4,000 was paid into court pursuant to a further garnishee. Saskwest did not object to payment out of these funds to the Trustee on August 31, 1993.

1. The Stay

Under the Act, the stay applicable in this case is triggered by the filing of a notice of intention, not by the service of it on the respondent creditor. Section 69.(1) provides as follows:

> 69.(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

Upon the filing of a proposal, a further similar stay is triggered under s. 69.1(1)(a), and in the event of bankruptcy or deemed bankruptcy, a further similar stay is triggered by s. 69.3(1)(a).

Saskwest contends that inherent in the "notice" of intention is the requirement that actual notice must be given to a creditor before that creditor is bound by the stay. Section 50.4(6) requires that the Trustee send a copy of the notice to every known creditor within five days after the filing of the notice.

I can find no authority for the contention that the failure to serve a creditor prevents the stay from operating against that creditor. Had this been the intention of the Act, surely it would clearly have been so stated. The use of the words "known creditor" in s. 50.4(6), however, indicates a contrary intention. In any event, the pertinent sections must be interpreted within the whole framework of the Act. The interpretation suggested by the respondent is contrary to the objective of the Act to provide a fair and orderly distribution of a bankrupt's property among creditors on a *pari passu* basis, and to prevent any single unsecured creditor from obtaining priority over other unsecured creditors by bringing or continuing on with an action or execution. *R. v. Fitzgibbon* (1990), 78 C.B.R. 193 at 200 (S.C.C.). See also ss. 60(2) and 141 of the Act.

Although the *Fitzgibbon* case dealt with a provision in the Act prior to its revision, the principle still applies. Under the former s. 69.(1) that dealt with the filing of a proposal, the automatic stay applied unless the court granted the creditor leave to proceed. The automatic stay in the new provisions applies unless the court makes a declaration under s. 69.4 that the stay no longer operates in respect of that creditor.

In my view the stay applies to Saskwest even though it was not properly served with the notices and had no notice of the proceedings respecting the proposal.

2. Payment out of Court

I am not convinced that the actual payment of funds out of court constitutes "other proceedings" within the meaning of s. 69.1(1)(a). The objective of this section is to bar the remedy of a creditor against the property of the insolvent person. To this end, an action cannot be commenced or continued, nor can execution or other proceedings be taken for the recovery of a claim.

It seems to me that execution or recovery is complete once funds have been paid into court pursuant to a garnishee. The funds in court are not the property of the insolvent person. A default judgment had been obtained and Savant had no claim to the funds in court at the time the notice of intention was filed. Accordingly, unless a third party made a claim against the debt attached and caused proceedings to be taken under s. 15 of *The Attachment of Debts Act*, R.S.S. 1978, c. A-32, or unless Savant took proceedings to set aside the garnishee summons on the basis it was defective, payment of garnisheed funds out of court was a formality. All Saskwest had to establish was that it had complied with the proper garnishee procedure.

I accordingly hold that the stay effective on May 21, 1993, does not apply to the $880.51 paid out of court on June 2, 1993, as this amount was paid into court and judgment obtained against Savant prior to the stay. I make no comment on what effect s. 70 of the Act, as interpreted by the case law, might have respecting a

potential claim to these funds by the Trustee in the event that Savant becomes bankrupt.

3. Declaratory Relief

As I indicated previously, the former provisions in the Act enabled the court to grant leave to a specific creditor to pursue a claim or execution despite the automatic stay. The new provisions do not provide for leave, but instead provide for a declaration that the stay does not apply to the specific creditor. Such relief may be conditional. It can only be made if the court is satisfied that a declaration is required to avoid material prejudice to the creditor, or that it is equitable on other grounds to make such a declaration.

I can think of no valid reason why the principles on which the court previously exercised its discretion in granting a stay should not apply to the exercise of the discretion of the court respecting the granting of a declaration under section 69.4. This section provides as follows:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

Matheson J. in *Re Angelstad* (1991), 4 C.B.R. (3d) 235 at 237-8 (Sask. Q.B.), confirms that in appropriate circumstances, leave to proceed with an action can be granted *nunc pro tunc*. He also concisely reviews the circumstances in which the court can exercise its discretion to grant leave to proceed. None of those circumstances apply in this case. Although leave was granted *nunc pro tunc* in *Trusts & Guarantee Co. Ltd. et al v. Brenner et al, supra*, it was conditional on the plaintiff not using any judgment obtained for any purpose except to establish the amount of the claim against the bankrupt. In this fashion the plaintiff was prevented from obtaining a preference over other unsecured creditors.

The *Amanda Designs* case, *supra*, is instructive as well on this issue. In that case judgment was obtained by a creditor on the same day that the judgment debtor filed a proposal under the Act. The creditor as well on that same day issued a writ of *fi.fa*. Four days later the sheriff recovered funds from the judgment debtor's bank account and released them to the creditor. The creditor's application for leave *nunc pro tunc* was refused. The court held that the creditor's ignorance of the filing of the proposal and the resultant automatic stay, was not a reason to grant leave. To do so would permit the creditor, in violation of the Act, to obtain a priority over other creditors.

Although I have considerable sympathy with the respondent's predicament, I am not satisfied that it is materially prejudiced by the stay, or that it is equitable on other grounds to grant the declaration. Through its aggressive collection action taken prior to the stay, Saskwest has recovered almost half of its total claim. It is obvious from the list of other creditors, that many are not as fortunate. Saskwest will still be entitled to its *pari passu* share in the proposal for the balance of its

judgment along with the other unsecured creditors.

The only real prejudice suffered by the respondent is the thrown away costs it incurred respecting two garnishments and one application for payment of funds out of court. Although the Trustee could have or should have ascertained that Saskwest was taking garnishment action against Savant and was accordingly a creditor, Saskwest could have determined at any given time whether Savant was involved in any proceedings under the Act. It chose to proceed, as it was entitled to do, without taking this precaution.

It is also significant that Saskwest has not formally applied for this relief. It was aware of the problem in August, 1993, yet it chose not to bring an application, but to force the Trustee to bring an application for an order that the funds be repaid into court. Delay in bringing an application was a factor taken into consideration in the *Anglestad* case, *supra*. From an equitable perspective, Saskwest is not in an equivalent position to that of a good faith purchaser for value without notice who is protected by s. 97 of the Act.

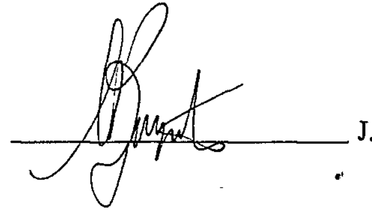
In the circumstances of this application, Saskwest is not entitled to the declaration it seeks. Accordingly the stay applies to it with respect to the sum of $6,771.42 it realized through garnishment taken after May 21, 1993, the effective date of the stay.

4. Pre-judgment Interest and Costs

This is not an appropriate case in which to grant pre-judgment interest or solicitor and client costs. Not only has there been some mixed success in this application, but Savant and the Trustee must take some responsibility for the necessity of this application and the garnishee costs that were needlessly incurred by the respondent. Each party will bear its own costs. In my view it is more expedient to resolve this issue in this manner than to direct that the amount to be repaid be reduced by the taxable garnishee costs incurred needlessly by the respondent.

Conclusion

The sum of $6,771.42 paid out of court to the respondent is declared to be the property of the Trustee and I direct that judgment in favor of the Trustee may be entered against the respondent for this amount. The respondent is ordered to pay this sum into court in payment of the judgment within two weeks of the date of this order.



J.

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Court File No.: NB17916
Estate No.: 51-1588758

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF MONCTON

IN THE MATTER OF: The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF: Chaulk Air Inc. a body corporate under the laws of the Province of Newfoundland.

DECISION

BEFORE: Mr. Justice Stephen J. McNally

AT: Moncton, New Brunswick

DATE OF HEARING: February 28, 2012

DATE OF DECISION: March 1, 2012

APPEARANCES:

Carl A. Holm, Q.C., solicitor for Chaulk Air Inc.

Mel K. Norton, solicitor for Canada Steamship Lines

Xstrata Canada Corporation did not appear

MCNALLY, J.

(1) This is an application brought by Chaulk Air Inc. under the provisions of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (the ***BIA***) in which it seeks a declaration that following the filing of its Notice of Intention to make a proposal to its creditors under the provisions of the act, all the actions of its secured and unsecured creditors are stayed pursuant to section 69(1) of the ***BIA*** including a Garnishment Order issued out of the Federal Court on December 21, 2011.

(2) Chaulk Air Inc. provides global logistics and shipping services with its principal office located in Moncton, New Brunswick. Canada Steam Ship Lines (CSL) is a shipping company with headquarters in Montreal. On December 21, 2011, CSL obtained a garnishment order in the Federal Court of Canada, requiring Xstrata Canada Corporation (XCC) to pay any amounts due to Chaulk to CSL. XCC owed Chaulk $160,401.65 at the time of the garnishment order. XCC acknowledges that the debt is owed and has funds available to pay that amount to Chaulk.

(3) To date none of the garnisheed funds have been paid by XCC to CSL pursuant to the garnishment order and the funds are still being held by XCC. On February 8, 2012, Chaulk filed a Notice of Intention to make a Proposal (NOI) with the Official Receiver under the provisions of the ***BIA***. XCC refuses to release the garnisheed funds to Chaulk without a court order despite the stay imposed on the garnishment order pursuant to section 69(1) of the ***BIA***.

(4) By the present motion, Chaulk seeks an order of this court sitting in bankruptcy and insolvency, for an order:

a. [Abridging the time for service ... – already granted]
b. Declaring that pursuant to s. 69(1) of the *Bankruptcy and Insolvency Act*, all actions of secured and unsecured creditors of Chaulk Air Inc. are stayed, including actions under the Garnishment Order issued December. 21, 2011 by Richard Morneau, Protonotary in the Federal Court in Montreal Quebec;
c. Declaring that there is no impediment to Xstrata Canada Corporation paying amounts due to Chaulk Air Inc. notwithstanding the Garnishment

order or the claims of any other secured or unsecured creditors of Chaulk Air Inc.; and

d. Ordering Xstrata Canada Corporation to pay $160,401. 65 to Chaulk Air Inc.

(5) CSL opposes the granting of the requested order. CSL concedes that as a result of the filing of the notice of intention to file a proposal by Chaulk that CSL's remedies under the garnishment order issued out of the Federal Court are stayed pursuant to the provisions of section 69(1) of the ***BIA*** (see also ***Lindholm v. Hy-Wave Inc.***, [1996] B.C.W.L.D. 2514 (B.C.S.C.)) CSL submits, however, that the requested order should not be issued as to do so would result in this Court exceeding its jurisdiction and improperly interfering with a valid order of the Federal Court.

(6) Counsel for CSL relies on the decision of the Supreme Court of Canada in ***Antwerp Bulkcarriers, N.V. (Re)***, [2001] S.C.R. 951. In my view, that decision does not apply to the circumstances of this case. In ***Antwerp*** the action was an action *in rem* where a Belgian registered ship had been seized and ordered sold by the Federal Court. In effect, the ship was the defendant in that case. The ship's owner was adjudged a bankrupt by the Belgian bankruptcy court and its trustee obtained an order out of the Quebec Superior Court recognizing the Belgian bankruptcy order. Notwithstanding this order, the Federal Court granted default judgment and proceeded to exercise its maritime jurisdiction to have the ship appraised and sold. The Supreme Court of Canada ruled that the Quebec Superior Court (the bankruptcy court) had no jurisdiction to enjoin the Federal Court in exercising its maritime law jurisdiction with respect to the ship.

(7) In the case at bar, the Federal Court's garnishment order is unenforceable and cannot be acted upon by CSL pursuant to the provisions of section 69(1) of the ***BIA*** upon the filing of the NOI by Chaulk. The issuance by this court of the requested order would not result in differing and competing orders from two different jurisdictions. Subsection 69(1)(a) of the ***BIA*** provides:

> 69. Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
[...]

(8) By virtue of this section, all actions of creditors of Chaulk, both secured and unsecured, are stayed. This would include actions under the garnishment order issued out of the Federal Court in favour of CSL. This state of affairs is due to the filing of the NOI and the staying provisions of section 69(1). The stay of the actions of creditors, including actions under a previously obtained but unexecuted garnishment order, is not instituted by any order or by the exercise of any discretion of this Court. The stay comes into effect by virtue of the statutory provisions that Parliament included in section 69(1) of the ***BIA*** which were triggered with the filing of the NOI by Chaulk. Consequently, the issuance of the order requested by Chaulk in this instance would not interfere in any way with the enforceability of or the effect of the Federal Court's garnishment order in favour of CSL.

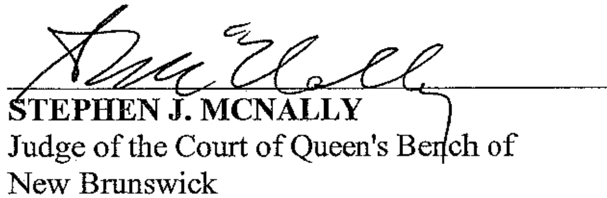
(9) In such circumstances I am satisfied that the order requested by Chaulk can and should be issued. Again, there is no issue that the effect of Chaulk's filing the NOI together with the provisions of section 69 of the ***BIA*** stays all actions of CSL against Chaulk or its property, including any actions under the garnishment order. There is no disagreement on this point. Nor is there any issue as I understand it, that CSL is an unsecured creditor and is now in no better position than any other unsecured creditor of Chaulk. Normally with such circumstances one would expect that a declaratory order of the nature being sought by Chaulk would be neither necessary nor sought.

(10) In the particular circumstances of this case, however, CSL opposes the release of the funds from Xstrata to Chaulk and Xstrata is apparently unwilling to release the funds without some court acknowledgement of the staying provisions of section 69 of the ***BIA***. The purpose of the proposal sections of the ***BIA*** are to allow insolvent businesses to avoid bankruptcy by reorganizing their affairs such that payments may be made to creditors and the business can remain as a going concern. Obviously, there is a

significant amount of money at stake and without it Chaulk will likely be unable to effectively pursue the proposal process it adopted under the ***BIA***. This may be not only significantly detrimental to Chaulk but to other unsecured creditors as well. On the other hand CSL will be in no worse position as an unsecured creditor than it presently is if the requested order is granted.

(11) Accordingly, Chaulk's motion is granted and the requested order will issue.

DATED at Moncton, New Brunswick this 1st day of March, 2012.



STEPHEN J. MCNALLY
Judge of the Court of Queen's Bench of
New Brunswick

2012

Court No.: 17916
Estate No.: 51 - 1588758

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION IN BANKRUPTCY AND INSOLVENCY
JUDICIAL DISTRICT OF MONCTON

IN THE MATTER OF: The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF: Chaulk Air Inc. body corporate under the laws of the Province of Newfoundland

ORDER

Before the Honourable Justice Stephen McNally. ~~in Chambers~~

On the motion of Chaulk Air Inc., the following is ordered:

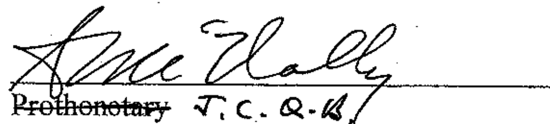
1) The time for service of the notice of motion and motion record is hereby abridged so that the motion is returnable on February 28, 2012, and further service hereof is hereby dispensed with;

2) It is declared that pursuant to s.69(1) of the *Bankruptcy and Insolvency Act*, all actions of secured and unsecured creditors of Chaulk Air Inc. are stayed, including actions under the Garnishment Order issued December 21, 2011by Richard Morneau, Prothonotary in the Federal Court in Montreal Quebec;

3) It is declared that there is no impediment to Xstrata Canada Corporation paying amounts due to Chaulk Air Inc. notwithstanding the Garnishment Order or the claims of any other secured or unsecured creditors of Chaulk Air Inc.; and

4) It is ordered that Xstrata Canada Corporation to pay $160,401.65 to Chaulk Air Inc.

Issued March 1, 2012



~~Prothonotary~~ J.C.Q.B.

Re Hover (Bankrupt), 2000 ABQB 938

Date: 20001213
Action No. 069083

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

IN THE MATTER OF THE PROPOSAL OF
JOHN VINCENT HOVER

2000 ABQB 938 (CanLII)

REASONS FOR JUDGMENT
of the
K. R. LAYCOCK, Registrar

APPEARANCES:

Susan Robinson-Burns & James R. Farrington
for trustee/KPMG

Frank Llewellyn
for the Bankrupt/James Hover

Jill Medhurst-Tivador
for the Superintendent of Bankruptcy

Richard A. Low
for Pleasure Pool Sales Ltd.

Barry Schurr
Office of the Official Receiver

[1] On November 12th, 1999, the debtor filed a Notice of Intention to file a proposal under the Bankruptcy & Insolvency Act, Part III. Sandy D. Lyons, a licensed trustee, of KPMG Inc. in Lethbridge consented to act as trustee under the proposal.

[2] On November 21st, 1999, KPMG filed with the Official Receiver in Calgary a cash flow statement, the insolvent persons report on the cash flow statement and the trustee's report on the cash flow statement. Subsequently 3 orders were granted extending the time for the debtor and the trustee to file the proposal with the Official Receiver. The proposal was filed

with the Official Receiver on April 25th, 2000 and the following day, documents including a notice of a meeting of creditors were mailed out to the debtor, the Official Receiver, and every known creditor. The meeting originally called for May 16th, 2000 was subsequently adjourned and proceeded on June 22nd 2000.

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[3] On June 22nd, 2000, the required number of proven creditors accepted the proposal subject to an amendment made during the meeting. An application for court approval of the proposal was scheduled for August 31st, 2000 and rescheduled and heard on September 28th, 2000.

[4] Prior to filing the notice of intention, the debtor had an ongoing dispute with Canada Customs and Revenue Agency (CCRA) regarding a debtor's ability to claim farm losses on an unrestricted basis. The debtor and CCRA entered into a compromise agreement prior to the meetings of creditors and CCRA voted in favour of the proposal.

[5] Four issues emerged from the various applications and cross-applications:

1. Should the proposal be accepted?
2. Should KPMG Inc., have obtained permission from the court pursuant to the Bankruptcy & Insolvency Act, section 13.3 before acting as trustee?
3. Should KPMG be removed as trustee for alleged misconduct?
4. Should vehicles seized by an execution creditor on November 12, 1999 be returned to the debtor?

A short oral decision was given covering all of the issues on November 11th, 2000 and costs were dealt with. These written reasons were to follow.

ONE

[6] The statement of affairs filed by the debtor lists secured creditors totalling $711,112.00 and unsecured creditors totalling $1,509,506.40. His statement of assets estimate the gross value at $1,859,000.00. The trustee has prepared a statement of estimated realization under a proposal and a bankruptcy. In a bankruptcy the unsecured creditors would receive approximately $743,000.00 before trustee's fees, legal expenses, levies, commissions, holding and liquidation costs. Under the proposal the unsecured creditors would receive $1,220,240.00.

[7] The required number of creditors representing the required portion of debts have approved the proposal. Several small creditors who voted against the proposal opposed the granting of approval by the court.

[8] The Bankruptcy & Insolvency Act, section 59(2) states:

> Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the

> court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

[9] No argument was made to establish that the debtor had committed any of the offences mentioned in sections 198 to 200, therefore the court must consider whether the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors. The trustee argues that the proposal is reasonable having been accepted by the required number of creditors; it provides for greater benefits then the alternative i.e. bankruptcy; and the proposal has a reasonable possibility of being successfully completed having regard to the debtor's assets and ability to earn an income.

[10] The objecting creditors do not trust the debtor and would prefer that he was in bankruptcy so that his assets would be controlled and sold by the trustee. Other than the objecting creditors being suspicious of the debtor, there is no evidence to support their concerns. In the alternative, the objecting creditors ask that the vehicles under seizure be delivered over to a car lot in Lethbridge and sold in order to help fund the proposal. Holden & Morawetz 2001 Annotated Bankruptcy & Insolvency Act at page 209 states:

> The power to make alterations and amendments at the meeting of creditors is very wide; the power of the court to make alterations and amendments, on the other hand, is very limited.

[11] The court's authority to approve or refuse a proposal is set out in section 60(5) and rule 92. The court can refuse to approve the proposal, approve a proposal or in making an approval may correct any error or admission that does not constitute an alteration of substance. The change recommended by the objecting creditor is not a correction of a clerical error or omission, it is a change in substance. On an acceptance of a proposal the debtor has control of all of his assets. To take over control of any of his assets of the debtor would be to make a substantial alternation in the proposal.

[12] In reviewing all of the material and arguments made by the parties, it appears that the proposal is reasonable and is calculated for the benefit for the general bodies of creditors. The proposal was therefore approved.

TWO:

[13] The Bankruptcy & Insolvency Act section 13.3(1) states:

> Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor
> (a) where the trustee is, or at any time during the two preceding years was,
> (i) a director or officer of the debtor,

2000 ABQB 938 (CanLII)

(ii) an employer or employee of the debtor or of a director or officer of the debtor,
(iii) related to the debtor or to any director or officer of the debtor, or
(iv) the auditor, accountant or solicitor, or a partner or employee of the auditor, accountant or solicitor, of the debtor; or......

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[14] The Official Receiver argues that KPMG should not have acted as trustee of the proposal since they were the accountant of the debtor during the preceding two years. KPMG Inc., argues that they were not the debtor's accountant during the two preceding years and, in the alternative, if they were the accountant they seek leave of the court to act as trustee of the estate of the debtor.

[15] KPMG LLP is a firm of chartered accountants with an office in Lethbridge who prepared financial statements for the debtor's professional corporation from its incorporation in May 1976 until the last review engagement report was completed January 30th, 1996. Before the1996, 1997 and 1998 year ends KPMG LLP complied data provided by the debtor, made journal entries, obtained bank confirmations and generated some of the financial statements on the firms computer system. The firm's name did not appear on the financial statements, accordingly the firm argues that they did not do a notice to reader, perform a review engagement, or audit the statements. The firm's address was used as a mailing address on the corporate tax returns but the firm did not sign the returns on behalf of the corporation nor does their name appear as the preparer of the tax return. The firm prepared the T4 payroll returns for the professional corporation based on information received from the Toronto Dominion Bank for the employees of the professional corporation other than the debtor and his wife.

[16] KPMG LLP complied personal tax returns for the debtor from 1995 to the present using information supplied by the debtor. No financial statements for the debtor were prepared. The debtor provided his synoptic for his farm affairs and the firm would make journal entries without independent verification and insert the information in the farm income statement for filing.

[17] KPMG Inc., is a corporate trustee controlled by KPMG LLP. Sandy Lyons is licensed trustee in bankruptcy who works for KPMG Inc.

[18] The official receiver argues that based on these facts KPMG Inc., though not an auditor for the debtor was certainly his accountant. Accountant is not a defined term in the Bankruptcy & Insolvency Act nor have counsel found any cases where the courts have interpreted that term.

[19] The solicitors for KPMG Inc. have provided copies of the Canadian Insolvency Practitioners Association Rules of Professional Conduct and Interpretations. In dealing with section 13.3 the association rule 4(4) states:

> The term "accountant" means anyone who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

[20] The Institute of Chartered Accountants Association of Alberta in their code of ethics in guideline G204.73 states in part:

> For the purpose of this guideline the term accountant means any member who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

[21] Section 8200 of the Canadian Institute of Chartered Accountants (CICA) Handbook deals with review engagement reports issued after January 1st, 1989. That section excludes from its operation any engagements in which the accountant compiles but does not review an unaudited financial statements. KPMG Inc., states that it is the practice and understanding in the Insolvency practice that the restriction on a trustee acting for the debtor as provided in the Bankruptcy Act section 13.3 only applies if the firm prepares a review engagement report for the debtor. All other work for a client is excluded by definition.

[22] Firstly, this definition could only apply to business entities which have financial statements. It could not have been intended to define accountants who do work for individuals who do not need a financial statement.

[23] Secondly, statutory interpretation requires the term accountant be given its usual, normal and generally accepted meaning. The views of the professional associations in their rules and guidelines which provide a restrictive interpretation to the word "accountant" are not supportable. The function of accountants have expanded over time and the services of accounting firms continue to expand. Before Canada had an Income Tax Act, accountants would prepare and maintain books and records for businesses and individuals. They have expanded into the area of preparation of income tax returns for individuals, corporations and other business entities. The preparation of a review engagement financial statement is but a small part of work performed by accountants. While the work of KPMG LLP for the debtor and his professional corporation was somewhat restricted after 1995, the firm continued to do accounting work for both the professional corporation and the debtor. No doubt the debtor continued to view KPMG as his accounting firm not as his bookkeeping or data entry clerk. I am equally certain that KPMG continued to charge fees commensurate with their duties as accountants and not as bookkeepers and data entry clerks.

[24] The first document filed in a Division I proposal is the notice of intention to make a proposal pursuant to section 50.4(1). The notice of intention names the licensed trustee who has consented to being the trustee under the proposal and the form of consent is attached to the notice. On the filing of the notice of intention on November 12, 1999, KPMG was the trustee of the proposal. Section 13.3 prohibits KPMG Inc. from acting as trustee in relation to the estate of the debtor because the trustees employer KPMG Inc., through its controlling corporation, KPMG LLP, acted as the debtor's accountant. Section 13.3 requires court

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approval before KPMG could act as a trustee of the estate of the debtor. KPMG Inc. and Sandy Lyons therefore acted contrary to section 13.3.

[25] The trustee advises that in accepting the appointment as trustee he was following the practice in the industry as mandated by the professional associations. There is no Canadian authority which interprets the term accountant. Until the official receiver's office raised the issue the trustee had no idea that he might be in breach of section 13.3. The debtor, having been satisfied with the accounting services provided by KMPG LLP, choose Sandy Lyons of KPMG Inc. to be his trustee in the proposal. Prior to the appointment of Mr. Lyons, he had no dealings with the debtor. From the time the debtor approached Mr. Lyons until the date of the hearing Mr. Lyons has expended considerable time and effort in putting together the financial information necessary to complete the proposal to the creditors, has conducted numerous meetings with the creditors and has a intimate knowledge of the issues raised in the proposal.

[26] The purpose of section 13.3 is to prevent a conflict of interest, to protect the debtor from an accountant who may have information that could be used to the prejudice of the debtor and to insure that the trustee who may have a close relationship with the debtor does not work to the prejudice of the creditors. There is no evidence that the trustee has or will act in a way that would prejudice the creditors. The debtor and the majority of creditors support the continuation of Mr. Lyons as his trustee.

[27] Although the trustee should have obtained court approval before his appointment, his acts done in good faith since his appointment, are not invalid.(BIA s.14.07)

[28] In ***Re Planta Dei Pharma Inc.*** 1999 Carswell NB 540, 212 N.B.R. (2nd) 143, 541 A.P.R. 143, 14 C.B.R. (4th) 256 the New Brunswick Court of Queen's Bench found the trustee offended s. 13.3 and allowed them to continue as trustee where there were allegations of prejudice but no evidence of real prejudice.

[29] Although Mr. Lyons acting as trustee offends s.13.3, I exercised my discretion and gave him leave to continue as trustee. If Mr. Lyons accepted the appointment knowing he was in breach of s. 13.3, approval would not be granted. However when he accepted the appointment he felt that the professional association rules and s.13.3 had been complied with. Additionally he has now spent a considerable amount of time on a difficult proposal which has been accepted by creditors and the court. His future actions will be subject to scrutiny of the inspectors. There is little chance for his future acts to be prejudicial to the creditors or to the debtor. The court should be vigilant to prevent the possibility of prejudice and conflict of interest and ensure that the trustee's Code of Ethics in rules 34 to 53 are not going to be breached.

THREE:

[30] The objecting creditor, Pleasure Pool Sales Ltd., applies pursuant to section 14.4 for an order to remove the trustee for cause and appoint another licenced trustee in his place. In

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Alzeer Holdings Ltd. v. Browning Smith Inc. [1994] 38 C.B.R. (3rd) 199, Master Quinn held that "for cause" meant improper conduct by the trustee. Other cases allow for substitution of trustees where there is a conflict of interest or a perceived conflict of interest (***Tannis Trading Inc. v. Camco Foods Services Ltd.*** (1988) 67 C.B.R. (M.S.)) 1, 63 O.R. (2nd) 775, 49 D.L.R. (4th) 128). The court has allowed the trustee to continue where a change would cause delay in the administration in estates and cause additional expense to the estate in changing the trustee (***R.J. Nicol Homes Ltd***) (1995) 30 C.D.R. (3rd) 90. The Ontario Court of Justice in ***Re Ethier*** (1991) 7 C.B.R. (3rd) 268 stated at page 273:

> In my view, the fact the inspectors themselves have approved of the trustee's performance thus far suggests not only that the trustee is acting without interest or bias, but is also perceived to be acting in the proper manner. Although the test to be applied is an objective one, it is usual for the courts to defer to the creditors'and inspectors' view on that point as was seen in ***Re Terrace Sporting Goods Ltd.*** (1979), 31 C.B.R. (N.S.) 68 (Ont. S.C.) And ***Re Bryant Isard & Co.*** (1923), 4 C.B.R. 317, 25 O.W.N. 382, [1924] 1 D.L.R. 217 (S.C.) (emphasis added).

[31] Other factors for the court to consider include, whether the trustee is guilty of impropriety or misconduct or whether they lack qualifications to discharge their function as trustee. The satisfaction or dissatisfaction of the majority of creditors is also material (***Re United Fuel Investments Ltd. and Dencon et al v. Union Gas Company of Canada*** [1966] 1 O.R. 165.

[32] Allegations of conflict of interest and misconduct by the trustee are set out in the affidavit of Michael Benison. To the extent that complaints are made about the debtor and not linked to activities of the trustee, the complaints are ignored.

[33] The complaints about Mr. Lyon's conduct and potential conflict of interest are more than adequately responded to by Mr. Lyons. In the end I am satisfied that there is no conflict of interest and that Mr. Lyons has acted properly since his appointment as trustee. To replace Mr. Lyons would delay the administration of the proposal and increase the costs of supervising the proposal. The application to have Mr. Lyons removed was therefore dismissed.

FOUR:

[34] On instructions from Pleasure Pools, four of the debtors motor vehicles were seized by a civil enforcement agency on February 2nd, 1998 and left with the debtor on a bailee's undertaking. Because of various court ordered stays, the vehicles could not be removed and sold until after noon on November 12th, 1999. The execution debtor instructed the civil enforcement agency to go and remove the four seized vehicles from the debtor's lands. At the same time Mr. Lyons was filing a notice of intention to make a proposal by fax to the Office of the Superintendent of Bankruptcy. Believing that the notice of intention had been faxed and received by the Superintendent's office, Mr. Lyons attended the debtor's premises. There is a

dispute between the parties on the exact location of the vehicles when Mr. Lyons attended on the debtor's property. The civil enforcement agent states that one vehicle had already been removed from the property and was going down the road when Mr. Lyons intervened. Mr. Lyons indicates that none of the vehicles had left the debtor's property.

[35] The exact location of the one vehicle attached to the tow truck is not relevant. Mr Lyons advised the civil enforcement agency that a stay of proceedings was in effect as a result of a filing of notice of intention. Since Mr. Lyons did not have a copy of notice of intention with a filed stamp, the civil enforcement agency declined to follow the instructions of Mr. Lyons and completed the removal of all four vehicles which remained in storage until this hearing.

[36] Section 69(1) creates a stay of all enforcement proceedings on the filing of a notice of intention. Pleasure Pool can not continue the execution on it's judgment for the recovery of a claim provable in Bankruptcy. When Mr. Lyons and the civil enforcement agency were standing toe to toe fighting over the possession of the motor vehicles, Pleasure Pools had no right to continue the execution. Pleasure Pools argues that they can continue the execution until they have satisfactory proof of the filing of the notice of intention. The act does not contain any such wording. The stay does not come into effect when proof of the filing of the notice of intention is provided to the execution creditor. The act states that the stay comes into effect on the filing of the notice of intention.

[37] Even if Mr. Lyons had not advised the civil enforcement agent of the filing of the notice of intention, the removal of the vehicles at that precise time was improper as the notice of intention had been received by fax at the office of the superintendent. The importance of the civil enforcement agency being advised of the filing goes to the issue of costs of the removal of the vehicles and possibly damages arising from the wrongful removal of the vehicles. Since the removal of the vehicles was a continuation of the execution which is prohibited by section 69, the vehicles were ordered to be forthwith returned to the debtor. Because the creditor and the civil enforcement agent had knowledge at the time of the removal that a stay was in effect, they must be responsible for all of the costs of the removal, the return of the vehicles and storage of the vehicles in the interim.

HEARD on the 11th day of November, 2000.
DATED at Calgary, Alberta this 13th day of December, 2000.

Registrar

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