Court File No.: CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TWO SHORES CAPITAL CORP.

Applicant

- and -

PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP and PRODUCTIVITY MEDIA LENDING CORP. I

Respondents

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

BOOK OF AUTHORITIES
(Motion for Directions under s. 60 of the *Trustee Act,* returnable March 6, 2025)

March 5, 2025

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COURT OF APPEAL FOR ONTARIO

CITATION: Bunker v. Veall, 2023 ONCA 501
DATE: 20230721
DOCKET: COA-22-CV-0380

Feldman, Benotto and Roberts JJ.A.

BETWEEN

Kenneth Bunker and Christy O'Donnell as Executors of
the Estate of Donald Harry Bunker

Applicants (Respondents)

and

Ian and Christine Veall, Attorney General of Canada, and
Attorney General of Ontario

Respondents (Appellants)[1]

Robert Frater, K.C. and Young Park, for the appellants

Aaron Kreaden and Hamza Mohamadhossen, for the respondents

Heard: July 5, 2023

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated October 28, 2022, with reasons reported at 2022 ONSC 6087.

By the Court:

[1] The order appealed from is a declaration that a proposed payment, if made by the respondent executors of the estate of Donald Harry Bunker ("the Executors") to Donald Harry Bunker Legal Consultants ("the Firm") in connection

[1] The Attorneys General of Canada and Ontario were named respondents and were given notice of the proceeding. However, they did not participate in the underlying proceeding or this appeal.

with a Dubai judgment obtained by Sorinet Aviation Ltd. and Sorinet General Trading LLC ("the Sorinet Entities") against the Firm, would violate s. 83.03(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 because the Sorinet Entities have an alleged connection to a terrorist group. The proposed payment by the Executors would be in satisfaction of an agreement with the Firm to pay 50% of the Dubai judgment.

[2] The Executors sought the declaration of illegality by way of application under r. 14.05(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the opinion, advice, direction or order of the court. The appellants, who now operate the Firm, appeal the declaration of illegality and also seek leave to appeal the costs order against them.

[3] At the opening of the oral argument, counsel were asked to address jurisdiction, and whether the application judge should have exercised her discretion to make the requested declaration. Counsel had also filed written submissions on the issue. Both sides took the position that it was appropriate for the application judge to do so.

[4] After hearing the oral submissions and considering the jurisdiction issue, the court advised the parties that it would not hear submissions on the merits of the illegality issue and that the order below would be set aside. The court's reasons would follow. These are the reasons.

Background Facts

[5] A detailed summary of the facts of this case is set out in the application judge's reasons reported at 2022 ONSC 6087. Below is a brief summary.

[6] The respondents, Dr. Bunker's children, are the Executors of Dr. Bunker's estate. Dr. Bunker was a lawyer and the founder of the Firm in Dubai, United Arab Emirates. The respondents reside in Canada and all funds belonging to the estate are held in a Scotiabank account in Toronto, Ontario. The appellants practiced law in Dubai with Dr. Bunker prior to his death and continue to operate the Firm in Dubai.

[7] After Dr. Bunker passed away, the Sorinet Entities brought a legal proceeding in Dubai against the Firm. Sorinet Aviation Ltd. had previously retained the Firm to purchase aircraft for travel demands in Iran. After Sorinet Aviation Ltd.'s principal and majority shareholder revealed that he intended to seize and operate the aircraft in Iran, contrary to international sanctions, the Firm terminated their relationship and retained a portion of the funds that had been provided by Sorinet Aviation Ltd. as an indemnity in the event that Sorinet Aviation Ltd. were to make any derogatory statements about the Firm. The Sorinet Entities brought the legal proceeding against the Firm when the Firm forfeited the indemnity amount.

[8] The Dubai Court of First Instance granted judgment to the Sorinet Entities against the Firm for damages exceeding US $1,000,000 for unlawfully retaining

the indemnity amount. The judgment was upheld on appeal by the Dubai Court of Appeal and the Dubai Court of Cassation.

[9] The parties disagree on the quantum, extent and basis of the estate's liability for the Dubai judgment and the jurisdiction of an Ontario court to determine that issue. The application judge held that the validity of any alleged agreement and the jurisdiction of an Ontario court over that issue would be scheduled for a separate hearing. That decision is not at issue on this appeal.

[10] The sole issue decided by the application judge was whether any payment by the Executors towards the Dubai judgment would be contrary to s. 83.03(b) of the *Criminal Code* due to possible connections between the Sorinet Entities and an alleged terrorist group. The application judge agreed that any such payment by the Executors would be illegal and made that declaration.

Analysis

[11] While procedurally an estate may seek the advice of the court including declarations of right under r. 14.05(3) of the *Rules of Civil Procedure*, that rule does not give the court jurisdiction. It is a procedural rule only. This court recently discussed these principles at para. 61 of *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363:

> Rule 14.05 is procedural in nature. It does not create jurisdiction, but assumes it, and provides a means by which to engage that jurisdiction: *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and*

> *Climate Change)*, 2016 ONCA 283, 130 O.R. (3d) 675, at paras. 17-18. A court must have jurisdiction independent of r. 14.05 before it can consider the appropriate vehicle for bringing the matter forward, whether by application or action: *J.N. v. Durham Regional Police Service*, 2012 ONCA 428, 294 O.A.C. 56, at para. 16.

[12] In addition, s. 60(1) of the *Trustee Act*, R.S.O. 1990, c. T.23 allows a trustee, guardian or personal representative to apply to the Superior Court of Justice "for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate."

[13] These types of applications are intended to assist, and in some cases provide legal protection to the trustee against the beneficiaries for actions to be taken by the trustee in the administration of the trust or estate. However, to the extent that such declarations or opinions relate to what steps a prosecutor may take or what findings a court may make in a criminal prosecution against the trustee, they do not provide protection to the trustee from the court or a prosecutor because they do not bind those decision makers.

[14] Because in this context the court on the application cannot make a binding declaration of legality, courts have held that they will not give a declaration that is intended by the parties to interfere with prosecutorial discretion or to provide immunity from prosecution: see e.g., *London Health Science Centre v. R.K.* (1997), 152 D.L.R. (4th) 724 (Ont. S.C), at paras. 14-16; *Bentley v. Maplewood Seniors*

Care Society, 2014 BCSC 165, at paras. 151-152, aff'd on other grounds, 2015 BCCA 91. For example, the Superior Court at para. 16 of *London Health* stated:

> [T]he declaration sought either confers immunity upon the applicants, in which case it improperly interferes with the exercise of prosecutorial discretion, or, if the Attorney General is free to disregard it, then it is merely an unenforceable judicial opinion, in which case it ought not to be given.

[15] That is what is being requested in this application.[2] The relevant *Criminal Code* section is s. 83.03(b), which makes it an offence for any person to "directly or indirectly…provide[s]…or make[s] available property or financial or other related services…(b) knowing that, in whole or part, they will be used by or will benefit a terrorist group."

[16] The Dubai judgment that is owed by the Firm is to entities that are alleged to have connections to a purported terrorist group. When the respondents began to prepare to pay what they acknowledged was their 50% share of the judgment, they became concerned that by doing so, they may run afoul of s. 83.03(b). The respondents then sought a declaration from the Superior Court that the payment would be illegal and in breach of the section.

[2] While the applicant sought a declaration that the proposed payment would be illegal, the respondents wanted the court to declare that the payment would be legal.

[17] The appellants took the position that the payment would not contravene the section and would be legal. The application judge agreed with the respondents. She found, based on the evidence in the record before her, that the payment would contravene the relevant section of the *Criminal Code* and would therefore be illegal.

[18] One of the main arguments the appellants raise on the appeal is that the evidence on the application was not sufficient to make a finding of illegality, as it consists in large part of newspaper articles and other hearsay regarding the alleged terrorist connections of the judgment creditors. This argument demonstrates another reason why the court will not make the requested declaration: it would be based only on the record before the court. However, a prosecutor would base any prosecution decision on the evidence available to the prosecution which could be entirely different.

[19] Therefore, a declaration, if made, could offer no true protection to the respondents, and would not serve the purpose contemplated by s. 60(1) of the *Trustee Act* or r. 14.05(3) of the *Rules of Civil Procedure*.

[20] Although part of the issue sought to be resolved through the application is the interpretation of s. 83.03(b) of the *Criminal Code*, the other part is findings of fact based on the record and, in particular, whether the money will in fact be used by, or give benefit to, a terrorist group. This is not a situation where an offence can

be easily discerned because significant facts are not in dispute, such as where an agreement contains a criminal rate of interest: see *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249, at p. 290, *per* Fish J. (dissenting, but not on this point).

[21] Where the court is asked to assess facts on a contested record and determine whether the facts as found would constitute an offence, what is requested is not an opinion but rather findings of fact based on evidence that may or may not form part of the record at a trial. In this case, where fear of a criminal prosecution under the *Criminal Code* is at issue, that trial would be a criminal trial based on charges laid.

[22] This court recently discussed and described the discretionary nature of declaratory relief in *Bryton Capital Corp. GP Ltd.* At para. 64, van Rensburg J.A. quoted with approval a non-exhaustive list of reasons why a court may deny declaratory relief, from *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407, 73 R.P.R. (4th) 241, at para 10:

> [S]tanding, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility.

[23] In this case, a declaration would have no utility: it would not be binding on a prosecutor; and, being based on a specific evidentiary record, it could not even

have persuasive effect where a prosecutor had different evidence as the basis to indict.

[24] Finally, the parties argue that the legality issue will have to be determined by an Ontario court in a civil proceeding such as an action to enforce the agreement by the estate to pay 50% of the Dubai judgment. Therefore this court should proceed to decide the issue on this appeal. We do not accept that submission, either factually or legally. The issue for the parties is whether there is a procedure, which there may well be, that will allow them to effect payment on the contract without risking the engagement of s. 83.03(b) of the *Criminal Code*.

Disposition

[25] In the result, the declaration of illegality is set aside. In the circumstances of this case, the court below erred in law by exercising its discretion to decide whether a payment would constitute an offence under the *Criminal Code*, requiring a determination both of disputed facts, including facts going to *mens rea*, the interpretation of s. 83.03(b) of the *Criminal Code*, and the application of the facts in the context of proof beyond a reasonable doubt.

[26] The parties requested the opportunity to provide written submissions regarding the costs of the application and of the appeal. If they cannot agree on the costs, they may provide written submissions, not exceeding three pages each,

the appellants within 15 days of the release of these reasons, and the respondents within 10 days thereafter.

Released: July 21, 2023 “K.F.”

“K. Feldman J.A.”
“M.L. Benotto J.A.”
“L.B. Roberts J.A.”

TAB 2

Benson, executor and trustee of the estate of Elsie Hannah McKay v. Love, Eleanor Irene McKay, Kenneth McKay and Ontario (Minister of Government Services)*

[Indexed as: McKay Estate v. Love]

6 O.R. (3d) 511
[1991] O.J. No. 1972
Action No. RE 1657/91
6 O.R. (3d) 519 (Ont. C.A.)

ONTARIO
Ontario Court (General Division)
Steele J.
November 8, 1991

*The Court of Appeal for Ontario (Griffiths, Catzman and Galligan JJ.A.) dismissed an appeal from the judgment of Steele J. in an oral judgment delivered November 29, 1991 and released December 4, 1991. The C.A. judgment is reported post, p. 519 [appended to this document].

Wills and estates -- Estate administration -- Application for approval of sale -- Court will not interfere with executor's decision if within authority, bona fide and fair as between beneficiaries -- Trustee Act, R.S.O. 1980, c. 512, s. 60.

Courts -- Jurisdiction -- Applications -- Material facts in dispute -- Court has authority to hear application under rule 14.05(3) of Rules of Civil Procedure even if material facts in dispute -- Executors may apply for approval of sale decision -- Court to consider only whether there was authority to make decision, good faith and fair treatment between beneficiaries -- Rules of Civil Procedure, O. Reg. 560/84, rule 14.05(3) -- Trustee Act, R.S.O. 1980, c. 512, s. 60.

Civil procedure -- Commencement of proceedings -- Application

-- Court has authority to hear application under rule 14.05(3) of Rules of Civil Procedure even if material facts in dispute -- Executors may apply for approval of sale decision -- Court to consider only whether there was authority to make decision, good faith and fair treatment between beneficiaries -- Rules of Civil Procedure, O. Reg. 560/84, rule 14.05(3).

The deceased died in 1974. In 1986, as a result of ongoing disagreements between the three residuary beneficiaries, the court removed them as executors and appointed the applicant. The estate consisted of lands which had been subject to numerous expropriations over the years. A number of compensation claims in respect to these expropriations were outstanding. In 1990, the applicant executor entered into an agreement to sell the remaining lands to the Ministry of Government Services on the conditions that all compensation claims be withdrawn and that the court approve the sale. Two of the respondent beneficiaries, LAL and EIM, supported the sale and the third respondent beneficiary, KM, opposed it. KM alleged that the proposed sale undervalued the lands and that the estate should pursue its compensation claims. The applicant alleged that on the advice of an appraiser and economist, who had been retained with the consent of the three beneficiary respondents, he had decided to forgo the compensation claims and to enter into an agreement to sell the lands outright for a lump sum. The applicant sought approval of the sale pursuant to rule 14.05(3)(a), (d) and (f) of the Rules of Civil Procedure and s. 60(1) of the Trustee Act. KM alleged that the court had no jurisdiction to hear the application as material facts were in dispute and the court has no authority to make business decisions for executors of estates.

Held, the application should be allowed.

Although rule 14.05(3)(h) authorizes the court to hear an application on any matter where there are no material facts in dispute, this paragraph cannot be imposed as a precondition to hear the matters set out in the preceding paragraphs of the rule. The Trustee Act authorizes an application to the court for the opinion, advice or direction of the court. In turn, rule 14.05(3)(f) authorizes the approval of a purchase, sale,

mortgage, lease or variation of trust. Although the court will not make business decisions for the executors of an estate, once a decision has been made, the executor can apply for approval of the decision so that subsequent litigation may be avoided.

In seeking approval, if the executor has exercised discretionary power conferred under the will, the court will not interfere with that decision if the executor has acted bona fide and fairly as between the beneficiaries. It is not within the court's discretion to interject its opinion or to decide whether or not the sale is the most advantageous available. However, the court should look at the evidence before it to determine whether the sale is bona fide and fair as between the beneficiaries.

Nelson v. Bell (1900), 32 O.R. 118 (C.A.); Robinson (Re); Pickard v. Wheater (1885), 31 Ch. D. 247, 55 L.J. Ch. 307, 53 L.T. 865, consd

Boukydis (Re) (1927), 32 O.W.N. 238, [1927] 3 D.L.R. 558 (C.A.); Wright (Re) (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.), distd

Haasz (Re), [1959] O.W.N. 395, 21 D.L.R. (2d) 12 (C.A.), folld

Statutes referred to

Trustee Act, R.S.O. 1980, c. 512 [now R.S.O. 1990, c. T-23], s. 60, 60(1), (2)

Rules and Regulations referred to

Rules of Civil Procedure, rule 14.05(3) [am. O. Reg. 711/89, s. 15], 14.05(3)(a)-(g), (3)(a), (b), (c), (d), (e), (f), (g), (h)

APPLICATION under the Trustee Act for approval of a sale of

estate assets.

B.A. Percival, Q.C., for applicant.
Donald S. Mills, Q.C., and Edward R. Mills, for respondent, Kenneth McKay.
Melville O'Donohue, Q.C., for respondent, Louise Addell Love.
J. Fitch, for respondent, Eleanor Irene McKay.
T.C. Marshall, Q.C., for respondent, Ministry of Government Services.

STEELE J.:--This is an application under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 [now R.S.O. 1990, c. T-23] (the Act) and rule 14.05(3)(a), (d) and (f) of the Rules of Civil Procedure, O. Reg. 560/84, for approval of a sale by the applicant, Philip W. Benson (Benson) to the Ministry of Government Services (the province) as set out in an accepted agreement of purchase and sale. The sale agreement provides that it is conditional upon Benson obtaining the approval of the court. The agreement relates to the sale of lands that are substantially all of the remaining assets of the estate, and provides for the release of all claims by the estate for compensation, arising out of certain prior expropriations of parts of the lands by the Province.

The application is supported by two of the three residuary beneficiaries and the province, and is opposed by the third residuary beneficiary (Kenneth McKay).

Counsel for Kenneth McKay took a preliminary objection that there was no power in the court to hear the application. I dismissed this objection for reasons endorsed on the record, which are substantially the same as embodied in these reasons. I then adjourned the matter to permit cross-examination before continuing the hearing.

Section 60(1) of the Act provides as follows:

> 60.(1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Ontario

Court of Justice (General Division) for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate. Section 60(2) of the Act basically gives protection to the trustee if he acts in accordance with the court decision.

Rule 14.05(3) [am. O. Reg. 711/89, s. 15] provides in part as follows:

> (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
>
> . . . . .
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> . . . . .
>
> (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
>
> . . . . .
>
> (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

On the jurisdictional issue, counsel for Kenneth McKay argued that the power given under all of the paragraphs in rule 14.05(3) should not be exercised where there were material facts in dispute. In my opinion, that would impose para. (h) as a condition to hear any matter under the preceding paragraphs. This would be clearly contrary to the disjunctive wording of

subs. (3). I believe that the court has power to hear an application under paras. (a) to (g) inclusive, even if there are material facts in dispute. This does not mean that in an appropriate case the court may decide to direct the trial of an issue, or otherwise deal with the application.

I agree with counsel for Kenneth McKay that the court will not interfere with the details of the management of trust estates. The court will not make business decisions for the executors or trustees of an estate, because that is the responsibility of the executor or trustee. (See Re Boukydis (1927), 32 O.W.N. 238, [1927] 3 D.L.R. 558 (C.A.), at p. 240 O.W.N., p. 560 D.L.R., which was an application under what is now s. 60 of the Trustee Act, and what is now rule 14.05(3)(a).) This basic reasoning was also followed more recently in Re Wright (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.), p. 707 O.R., p. 512 D.L.R. Neither of those cases were applications under rule 14.05(3)(f).

Section 60 of the Trustee Act authorizes an application to the court for the opinion, advice or direction of the court, and this brings the applicant within rule 14.05(3). In my opinion, para. (f) is relief that the trustee may seek on such an application, in addition to the broad relief under para. (a). If it were not, it is hard to visualize the purpose of para. (f).

In Nelson v. Bell (1900), 32 O.R. 118 (C.A.), the court gave approval to the sale by executors under the predecessor of what is now para. (f), relying on the decision in Re Robinson; Pickard v. Wheater (1885), 31 Ch. D. 247, 55 L.J. Ch. 307. At p. 249 Ch. D. of Robinson, the court stated:

> . . . the Court is asked to approve of a contract for sale which has been entered into by the executor, and sub-sect. (f) of rule 3 is relied upon as giving the Court jurisdiction. [His Lordship read rule 3.] The matters dealt with in the first five sub-sections (a) to (e) are all of them matters properly arising in the administration of the trusts of the deed or will to which the summons relates. I apprehend, therefore, that sub-sect. (f) refers to the

approval of any sale which could be made by the executors or trustees of a will or deed, and which, but for this order, the executors or trustees might have been obliged to make at their own discretion, or for which they could have obtained the direction of the Court only in a proper administration action. I do not think that the rule gives the Court any power to direct a sale in a case in which it had no power to do so previously.

In my opinion, an executor cannot apply to the court in advance to ask for business advice relating to a sale. However, once the executor has made a decision to sell, he can apply to the court under rule 14.05(3)(f) for approval of such sale if the executor has the power under the will to make such a sale.

If the executor exercises his discretionary power, conferred upon him by the will, the court will not interfere with or overrule that decision, so long as he acted bona fide and fairly as between the beneficiaries. (See Re Haasz, [1959] O.W.N. 395, 21 D.L.R. (2d) 12 (C.A.), and the references in Re Wright at p. 707 O.R., p. 512 D.L.R.)

If an executor makes and acts upon his own decision, he is subject to attack by a beneficiary on the grounds of lack of bona fides or unfairness. In my opinion, rule 14.05(3)(f) allows the executor to apply to the court for approval of his decision before it has been acted upon, so that subsequent litigation may be avoided. Counsel were unable to refer me to any decided case which sets out the principles upon which a court should act in considering an application under para. (f). I see no reason why the considerations should not be the same as those where his decision is attacked after the fact. In other words, the issues to be looked at are: (1) has the executor the power to make the sale; (2) has he acted in good faith; and (3) has he acted fairly as between the beneficiaries?

The court should not look at whether or not the sale is the most advantageous sale. If it did so, it would be interjecting its view into the decision-making process. However, the court should look at the evidence before it to determine whether the

sale is so improper that it infringes on the issue of good faith or fairness.

In the present case, the will gives broad powers of sale or retention to the executors named therein. I am satisfied that Benson has the power to exercise his discretion to sell, as he has decided, rather than retain the property for a further period of time.

The testatrix died on June 9, 1974, and letters probate of her will were granted to her three children (the personal respondents herein) on January 7, 1975. They were also named as the sole, equal, residuary beneficiaries. In 1986, the administration of the estate had become stalemated as serious disagreements had arisen between the two daughters and the son. These disagreements, basically, arose from the desire of the daughters to sell and realize the estate expeditiously, and the desire of the son to pursue compensation claims arising out of expropriations of interests in the lands before selling. Unsuccessful applications to the court were brought by both sides for the removal of the others as executors. Ultimately, on February 27, 1986, the three executors were removed and Benson was appointed by the court as sole executor.

The lands in question are in the City of Vaughan and consist of approximately 60.618 acres that lie entirely within the provincially designated Parkway Belt Plan Area (the plan). The plan was approved on July 19, 1978, but the concept was under consideration and well known to the general public several years prior to that. The plan contemplates a major transportation and utilities corridor. The transportation corridor contemplated was that which has now culminated in the acquisitions for Highway 407. The lands have been subject to a number of easement and land expropriations over the years. On June 16, 1967, and April 5, 1978, easements for sewers and erosion control were taken. On March 18, 1980, two major easements for Hydro-Electric transmission lines were expropriated. On December 16, 1981, a further sewer easement was expropriated. On July 27, 1990, after the launching of this application, the province served notice of application for approval to expropriate a major portion of the lands for

Highway 407 purposes. In addition, there have been expropriations by bodies other than the province.

After his appointment, Benson, with the concurrence of all three beneficiaries, retained the services of a real estate appraiser and economist, W.R. Kellough, to provide an opinion as to the value of the lands, and provide advice relating to the various expropriations. Based on this advice, Benson decided not to proceed to arbitration on the compensation claims, but to negotiate with the province to settle all outstanding claims and the outright sale of the entire lands for a lump sum, with a view to saving time and money if litigation were pursued. In this manner, he expected to convert all assets into money and divide it equally among the beneficiaries. Kenneth McKay has consistently opposed this approach. Benson also inquired about outright sale of the entire lands to other potential purchasers, without success. He rejected the idea of selling parts of the lands.

Part of the reason for not proceeding to arbitration was the complexity of the law and, thus, the values to be attributed to various headings of compensation, as a result of the lands being within the plan. The leading case involved in this determination of law was the claim of the Salvation Army which resulted from the same Hydro expropriation in 1980. That case proceeded through various levels of the Ontario Municipal Board and the courts. After those hearings and appeals, the issue was finally settled by the Ontario Municipal Board on November 8, 1990.

In my comments, I wish to make it clear that I am not to be taken as approving or disapproving the actions of Benson over the years, or the conduct of the estate by the prior executors, except to the extent necessary to determine the issue of whether or not there has been bona fides and fairness in connection with the proposed sale before me. I am also not attempting to determine the actual value of the lands or the amount of compensation that might have been payable on the expropriations, except for the purpose of the same issues.

In 1990, the province indicated that it was prepared to

tender an offer for the entire remaining lands. Kellough prepared an appraisal report showing that the total value of the lands, including the settlement of the compensation, was $20,549,922. After deducting amounts already received on account of expropriations, he believed that the fair value was $19,075,509. After negotiations on various points, the province agreed to pay $18,326,929 and entered into the agreement before the court for this amount.

I find that Benson kept all three beneficiaries informed of the appraisals and proceedings. Kenneth McKay opposed the sale before Benson entered into the contract, and has continued to do so on the grounds that a higher amount could probably be obtained from the province if the compensation claims were pursued.

Kenneth McKay personally owns an adjacent parcel of land to the subject lands which is also within the plan, and is subject to expropriation proceedings for Highway 407. He has retained competent planning consultants and an appraiser to advise him as to the value of the subject estate lands, presumably as well as his own lands.

Counsel for Kenneth McKay concedes that at the time Benson signed the sale agreement there was no bad faith on Benson's part, and that he was entitled to act upon the advice of Kellough. However, he submits that Benson should have obtained a second opinion and that the court should not approve the sale because R.M. Robson, the appraiser for Kenneth McKay, has filed a preliminary report that, in his opinion, the property is worth somewhere between $23 million and $28 million, plus additional undetermined amounts for claims for injurious affection and interest if the matter were taken to arbitration on the claims for compensation. These numbers compare to the roughly $20 million valuation by Kellough. The basic difference in value between Kellough and Robson is their belief as to what the probable appropriate land use would have been over the years for the portions of the lands not required for public use from time to time. They also differ as to whether or not lands could have been removed from the ancillary use designation within the plan. Robson believes that at all times they should

have been considered residential until the Highway 407 expropriation, when they should be considered industrial. He assumes that they could have been removed from the ancillary use designation and been designated residential until the Highway 407 expropriation. Kellough believes throughout that the lands should be considered industrial and that there was no possibility of their being removed from the ancillary use category for residential use. If there were not this difference of opinion, then the values of Robson and Kellough would not be substantially different.

The evidence relied upon by Robson that the lands could be removed from the ancillary use for residential use was general in nature and did not direct itself to these specific lands. The evidence of Kellough was specific to these lands. An arbitration award would depend upon the view of the arbitrator of opinion evidence. There is no assurance that the estate would be successful.

It is not for the court to interject its opinion as to who is right, but only to look at bad faith or unfairness. Counsel for Kenneth McKay concedes that to proceed to arbitration on the expropriation claims would involve a time delay which he estimates at two years, and that it would be costly. No amount is specifically mentioned, but in view of the evidence that Kenneth McKay has already spent $80,000 for his current incomplete reports, it is obvious that the cost would be in the hundreds of thousands of dollars.

The respondent daughters are aged 74 and 66 years old. The son is 72 years old. It has been 17 years since their mother died. While the daughters may have been responsible for some delays prior to the appointment of Benson, there has been a long wait for the sale and distribution of the estate. All residual beneficiaries have received substantial sums from time to time, as part payments of compensation on the expropriations, but this only goes to the weight of the time delay issue.

I find that Benson believes that if he does not obtain court approval of the sale, Kenneth McKay will likely take action

against him. I also find that he made the decision to sell and that the cross-examination relating to this decision has not altered my finding.

I am of the opinion that Benson decided to sell in good faith, and in so doing that he would treat all beneficiaries fairly. I find that the subsequent evidence adduced by the respondent, Kenneth McKay, is not sufficient to show that Benson acted, or continues to act, so rashly as to be deemed to be in bad faith. For these reasons, the sale is approved. All parties other than the province are entitled to their costs out of the capital of the estate on a solicitor-and-client basis. There will be no costs to the province.

Application allowed.

* * * * *

6 O.R. (3d) 519

Ontario Court of Appeal

The Court of Appeal for Ontario (Griffiths, Catzman and Galligan JJ.A.) dismissed an appeal from the judgment of Steele J., reported ante, p. 511, in an oral judgment delivered November 29, 1991 and released December 4, 1991.

Cases referred to

Fulford (Re) (1913), 14 D.L.R. 844, 29 O.L.R. 375 (S.C.); Marley v. Mutual Security Merchant Bank & Trust Co. Ltd., [1991] 3 All E.R. 198 (P.C.); Wright (Re) (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.)

Authorities referred to

Waters, D.M.W., The Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), p. 897

APPEAL from a judgment of the General Division approving a

sale of land by the trustee of an estate.

Brian G. Morgan and Larry P. Lowenstein, for Kenneth McKay, appellant.
Barry A. Percival, Q.C., for executor.
Melville O'Donohue, Q.C., for Louise Love.
J. Fitch, for Eleanor McKay.
Thomas C. Marshall, Q.C., for the province.

The judgment of the court was delivered by

GALLIGAN J.A. (orally):--This is an appeal from the order of Steele J. dated October 29, 1991 whereby he approved a sale of lands proposed by the executor. The sale is to the government of Ontario. The offer to purchase envisages an all cash transaction.

It is our view that, generally speaking, a court should decline to intervene and give an executor advice as to how he should exercise his discretion respecting a proposed sale. See Re Fulford (1913), 14 D.L.R. 844, 29 O.L.R. 375 (S.C.); Re Wright (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.) and D.M.W. Waters, The Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), p. 897. In the present case, however, neither the appellant nor any other party takes that objection. Therefore, although with some reservations, we are prepared to accede to the position put forward by counsel that the appeal be addressed upon its merits. In doing so, we are not to be taken as encouraging the bringing of applications for approval by the court of dispositions of property which clearly fall within the discretion of the trustee.

We will consider the merits of the appeal in accordance with the duty laid down by the Judicial Committee of the Privy Council in Marley v. Mutual Security Merchant Bank & Trust Co. Ltd., [1991] 3 All E.R. 198. That duty is to ensure that the sale is in the best interests of the beneficiaries. The performance of that duty requires the court to be satisfied that the sale price is the best which can be obtained.

In this case, the cash offer is very substantial one. It borders upon the range of reasonable values suggested by a highly qualified appraiser retained by the executor. The appellant's appraiser has suggested a substantially higher value, but that value is contingent upon favourable results being obtained in expropriation proceedings respecting parts of the land. It is also contingent upon there being a favourable market for the rest of the land, some time in the future. What is significant, in this case, is that at this time the executor has no other outstanding offer for the land. Indeed, it is not even seriously suggested that there is a reasonable hope of getting one in the foreseeable future.

Put bluntly, this is a case where there is a very substantial bird in the hand. The appellant suggests that the possibility of finding a bigger bird in the bush, or more birds in the bush, demonstrates that the offer which the executor now has in hand is not the best which can be obtained. We disagree. In our view, the circumstances in this case demonstrate overwhelmingly that the price which the executor has obtained is the best price which can be obtained.

The appeal is accordingly dismissed.

Appeal dismissed.
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TAB 3

Court File No. CV-14-10695-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR. JUSTICE	)	MONDAY, THE 4TH
	)	
WILTON-SIEGEL	)	DAY OF JUNE, 2018

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U. S. STEEL CANADA INC.

O R D E R

THIS MOTION, made by Representative Counsel to the non-USW active employees and retirees of U.S. Steel Canada Inc. ("**USSC**"), pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, (the "**CCAA**"), for an order for opinion, direction, and advice under section 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, (the "**Trustee Act**") was heard on June 4, 2018 at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of David McBride sworn June 3, 2018, and the exhibits thereto (the "**McBride Affidavit**"), the Affidavit of Gerald Goddard sworn on May 23, 2018, the

Affidavit of Gordon Graham sworn May 23, 2018, the 47th Report of the Monitor, and on hearing the submissions of Representative Counsel, counsel to USSC and counsel to the Monitor:

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

2. **THIS COURT ORDERS** that the Trustees of the non-USW ELHT, namely Gerald Goddard, David McBride, and Gordon Graham, shall be deemed so far as regards that person's responsibility, in accordance with section 60 of the *Trustee Act*, to have discharged their duties in assessing, reviewing, and agreeing to the Land Transaction (as defined in paragraph 3(d) of the Monitor's 47th Report), as described in their activities set out at paragraphs 21-24 of the McBride Affidavit, and shall have the protections set out in section 60(2) of the *Trustee Act* in connection therewith.

W. Hainey J.

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

JUN - 4 2018

NB

PER / PAR:

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO U.S. STEEL CANADA INC.

Court File No. CV-14-10695-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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Representative Counsel to Non-USW Retirees and Employees of U.S. Steel Canada Inc.

TAB 4

CITATION: Re InnVest REIT, 2011 ONSC 7693
COURT FILE NO.: CV-11-9517-00CL
DATE: 20111223

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: InnVest Real Estate Investment Trust, InnVest Hotels GP Ltd., InnVest Properties London Ltd., InnVest Properties Truro Inc., IOT Trustee Corp., InnVest Hotels Trustee Corp. and InnVest Operations Trust, Applicants

BEFORE: D. M. Brown J.

COUNSEL: J. Bunting and B. McLeese, for the Applicants

HEARD: December 23, 2011

REASONS FOR DECISION

I. *Ex parte* motion for an Interim Order involving a *CBCA* plan of arrangement and opinion, advice or directions under the *Trustee Act*

[1] On August 4, 2010, Hoy J., as she then was, in her decision in *Re InnVest Real Estate Investment Trust*[1] approved, under section 192 of the *Canada Business Corporations Act*[2] and section 60(1) of the *Trustee Act*,[3] a plan of arrangement under which the applicant, InnVest Real Estate Investment Trust ("REIT"), split off some of its holdings into a second trust, the co-applicant, InnVest Operations Trust ("IOT"). Those transactions were prompted by amendments to the *Income Tax Act of Canada* regarding the taxation of "specified investment flow-through entities", the so-called SIFT Rules.

[2] Now, a little over a year later, REIT and IOT wish, in effect, to reverse those transactions. Again, the driver is a change to the tax regime which, when enacted, will impose a

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[1] 2010 ONSC 4292, 72 B.L.R. (4th) 98.
[2] R.S.C. 1985, c. C-44.
[3] R.S.O. 1990, c. T.23: "A trustee…may…apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property…"

materially less beneficial tax regime on real estate investment trusts, like InnVest, that have issued "stapled securities". The applicants are proposing a reorganization which ultimately would result in the unwinding of the stapled unit structure of InnVest and the transfer of substantially all of the assets and liabilities of IOT to the REIT, with IOT becoming a wholly-owned subsidiary of the REIT. The reorganization would involve, in part, the reorganization of certain *CBCA* subsidiary corporations.

[3] The draft Plan of Arrangement identifies 11 events, or steps, which would occur within the Plan. Of those, four are defined as "Corporate Steps", and section 2.1(a) provides that such steps would constitute an arrangement within the meaning of section 192 of the *CBCA.* The remaining steps involve the REIT and IOT trusts, or associated entities. Accordingly, the plan of arrangement for which this Interim Order is sought is a hybrid plan – or dare I say a "stapled plan" - involving both trust and corporate transactions.

[4] At the hearing this morning I granted the order sought, but stated I would release brief reasons explaining my decision. These are those reasons.

II. Analysis

[5] In seeking the Interim Order the applicants rely on two sources of the court's jurisdiction – the jurisdiction under the *CBCA* s. 192 plan of arrangement regime and the jurisdiction of the court to provide opinion, advice or directions to trustees pursuant to section 60(1) of the *Trustee Act*.

A. *CBCA* s. 192

[6] The jurisprudence recognizes that the statutory plan of arrangement mechanisms afford a "flexible and broad concept of reorganization and arrangement between a corporation and its shareholders",[4] and, as put by Pepall J. in *Re Acadian Timber Income Fund*, the word "arrangement":

> is to be given its widest character, limited only by the corporation's own by-laws or general legislation. The purpose of an arrangement is to provide a flexible mechanism that can be adapted to the needs of a particular case. As Farley J. stated in *Re Fairmont Hotels & Resorts*: "... I think it is an error to forget that the very flexibility of the arrangement provision was designed to allow the solution of difficult and awkward situations." In the Policy Statement of the Director, the Director endorses the position that the arrangement provisions of the Act are intended to be facilitative, should not be

[4] *Re Olympia & York Developments Ltd.* (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.), p. 163b.

> construed narrowly, and further recognizes that the term arrangement is not exhaustively defined.[5]

[7] In recent years the courts have utilized statutory plan of arrangement regimes to deal with arrangements involving tax-driven moves to convert income trusts into corporations. Most of those cases involved transactions in which the end-products were dividend-paying corporations. The decision of Pepall J. in *Acadian Timber* provided the most detailed discussion about the availability of statutory plans of arrangements to effect such results:

> In my view, the arrangement provisions should be available to all of the Applicants in this case. It seems to me that the current income trust conundrum is the sort of exceptional situation contemplated by the dicta in *Re Fairmont*. Assuming that there is compliance with the provisions of the trust deed (a fact that should be addressed at the approval hearing), there is no apparent prejudice to anyone. I also note that a number of income funds that have recently converted into corporate structures have proceeded by way of an arrangement under the CBCA or other comparable provincial statutes. Lastly, while the Director did raise the issue of the ability of the Fund, AT Trust and Acadian Timber LP to be applicants, the Director advised in writing that no position was being taken on this issue for the purposes of this transaction.[6]

[8] Justice Hoy's decision in *InnVest* authorized resort to section 192 of the *CBCA*, in conjunction with resort to section 60(1) of the *Trustee Act*, for a hybrid plan of arrangement involving both corporations and trusts whose end product was not a corporation, but a trust. The applicants, which are a combination of trusts and corporations, rely on that precedent for their proposed course of action in the present case.

[9] As has been stated in previous cases, the purpose of an interim order is simply to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute.[7] In order to grant such preliminary directions a court need only satisfy itself that reasonable grounds exist to regard the proposed transaction as an "arrangement"; it will be at the final hearing that the court examines whether the applicant has met the applicable statutory criteria, including whether the proposal constitutes an "arrangement", and whether the plan of arrangement is fair and reasonable.

[10] In the present case Corporate Steps 3, 4 and 5 in the applicants' proposed plan of arrangement involve either an exchange of securities of a corporation for money or an

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[5] *Re Acadian Timber Income Fund*, [2009] O.J. No. 5517 (S.C.J.), para. 8.
[6] *Ibid.*, para. 11. See also the April 12, 2010 endorsement of Hoy J. in *Re Futuremed Healthcare Income Fund*, SCJ CV-10-8659-00CL; the August 15, 2008 Interim Order of Horner J. in *H&R Real Estate Investment Trust*, Alberta Queen's Bench, 0801-09491; *Re BFI Canada Income Fund*, [2009] O.J. No. 74 (S.C.J.); December 22, 2008 endorsement of Pepall J. in *Re CI Financial Income Fund*, SCJ CV-08-7843-00CL.
[7] *Re First Marathon Inc.*, [1999] O.J. No. 2805 (S.C.J.), para. 9; *Acadian Timber, supra.*, para. 6.

amalgamation and, on their face, fall within categories of arrangement recognized by section 192 of the *CBCA* as the proper subject-matter of a plan of arrangement proceeding before the court. Although the Director under the *CBCA*, in a letter to the applicants dated December 22, 2011, took the position that the trusts could not be co-applicants under section 192 since only *CBCA* corporations can make such an application, the proposed plan involves trust-related transactions for which the applicant trusts certainly enjoy standing and can be joined as co-applicants in this hybrid proceeding.[8]

B. *Trustee Act*, s. 60(1)

[11] What is singular about the present motion is not the substance of the Corporate Steps, but the fact that the Interim Order sought by the applicants contains no directions in respect of the Corporate Steps. The applicants do not seek directions under section 192 of the *CBCA* regarding the calling of any meeting involving persons with an interest in the affected corporations. What the applicants seek are directions involving the affairs of the two trusts, such as the calling of a meeting of unit holders.

[12] At the hearing it became evident that the trustees of the REIT and IOT Trusts possess the necessary powers under the respective trust declarations to call and hold meetings of unit holders to consider the proposed transaction. I therefore asked whether it was necessary, given those powers, to seek the assistance of the court under section 60(1) of the *Trustee Act*. I raised that question in light of the case law referenced in my decision in *Re Kaptyn Estate*[9] which indicated that the proper resort to section 60(1) is to seek "advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern." From what I can see, in the present case no uncertainty exists about the powers of the trustees to call the meeting they propose.

[13] Applicants' counsel submitted that the Court's opinion, advice or directions were required for two reasons: (i) a court order would sanction, in effect, the sequence of the complex steps which will be required to complete the proposed transaction, and (ii) a final order hearing would consider whether the trust-aspects of the proposed transaction were fair and reasonable, a finding the applicants require in order to obtain an exemption under the *U.S. Securities Act*.[10] Counsel pointed out that in the *InnVest* decision Hoy J. applied, under section 60(1) of the *Trustee Act*, "a test analogous to that applicable in approving an arrangement in approving the non-Corporate Steps in the Plan of Arrangement".[11]

[14] On reflection I concur with Hoy J. that an inquiry into the fairness and reasonableness of the trust-related steps in the proposed plan of arrangement falls within the Court's jurisdiction

[8] Joinder is proper under a combination of Rules 14.05(2) and 14.05(3)(a) of the *Rules of Civil Procedure*.
[9] [2009] O.J. No. 1685; 48 E.T.R. (3d) 278 (S.C.J.), paras. 26 to 31.
[10] *United States Securities Act of 1933*, s. 3(a)(10).
[11] *InnVest, supra*., para. 41.

under section 60(1) of the *Trustee Act*. The hesitation I expressed at the hearing related to the danger of the Court opening its door to applications by trustees for orders approving that which arguably they possess the power to do in any event. However, on a review of the evidence filed, I appreciate that the present case is exceptional in its nature, given the overall complexity of the proposed transaction.

[15] Moreover, as I stated at the beginning of these Reasons, what the applicants propose is in large part to reverse that which they did just over a year ago. In *InnVest* this Court sanctioned a process by which such a complex transaction could proceed. It is important for the health of our economy that participants can expect a reasonably consistent application by the courts of processes involving financial and commercial transactions.

III. Conclusion

[16] I therefore was satisfied that it was a proper exercise of this Court's jurisdiction under section 60(1) of the *Trustee Act* and section 192 of the *CBCA* to grant the Interim Order sought for this hybrid plan of arrangement.

(original signed by)
D. M. Brown J.

Date: December 23, 2011

TAB 5

CITATION: Gonder v. Gonder Estate, 2010 ONCA 172
DATE: 20100308
DOCKET: C51009

COURT OF APPEAL FOR ONTARIO

Sharpe, Rouleau and Epstein JJ.A.

BETWEEN

Allan Edward Gonder

Plaintiff (Appellant)

and

Margaret Rose Evans and Graeme Leslie Evans, Estate Trustees for the Estate of the late Pearl Louise Gonder

Defendants (Respondents)

Marc Munro for the appellant, Allan Edward Gonder

Sean M. Sullivan for the respondents, Margaret Rose Evans and Graeme Leslie Evans

Heard: February 8, 2010

On appeal from the order of Justice James A. Ramsey of the Superior Court of Justice dated June 12, 2009, with reasons reported at [2009] 49 E.T.R. (3d) 152.

Rouleau and Epstein JJ.A.:

[1] This is an appeal from an order removing the respondents, Margaret and Graeme Evans, as trustees and executors of an estate without taking any steps to ensure the

orderly administration of this estate. The key issue raised in this appeal is whether that is a proper order.

[2] For the reasons that follow, we would allow the appeal.

FACTS

[3] Pearl Gonder died on January 23, 2008, leaving an estate consisting of about $25,000 in cash or cash equivalent, and a modest house in Hamilton, Ontario.

[4] The named beneficiaries are the testatrix's sister, Margaret Evans, her mother, Katherine Gonder, and her brother, the appellant, Allan Gonder. The testatrix left a life estate in the Hamilton property to her mother, who is still living but no longer able to stay in the house. The will further directed that the residue of the estate was to be divided equally among the testatrix's mother, sister and brother.

[5] In February 2008, the appellant commenced an action against the estate, claiming that he is the beneficial owner of the Hamilton property. He claims that, in 1974, he transferred title to the property to Pearl Gonder in trust for himself and for his children.

[6] The testatrix named the respondents, Margaret and her husband Graeme, as estate trustees. In the event they were unwilling or unable to act, she appointed her niece, Tanya Evans.

[7] The respondents, who live in British Columbia, agreed to undertake the role of estate trustees. A "Certificate of Appointment of Estate Trustees with a Will" was issued to them on September 10, 2008.

[8] In March 2009, Tanya Evans formally renounced any right to a "Certificate of Appointment of Estate Trustee or Succeeding Estate Trustee with a Will."

[9] A 2008 market appraisal of the property valued it at between $135,000 and $145,000. Canada Revenue Agency has registered a lien against it in the amount of approximately $32,000 for tax arrears owed by the deceased.

[10] The respondents have been unable to sell the property or to distribute the residue of the estate because of the appellant's certificate of pending litigation registered on title. The respondents say that, as a result, they have been required to spend some $40,000 of their own money to defend the appellant's lawsuit against the estate.

[11] Without prior court approval or beneficiary consent, the respondents registered a $100,000 mortgage against the property to secure the expenses they claim to have incurred in the administration of the estate. The appellant disputes the validity of this mortgage.

[12] The respondents brought a motion[1] under s. 37 of the *Trustee Act*, R.S.O. 1990, c. T.23 for an order removing them as estate trustees of the deceased's estate on the basis of

[1] While s. 37 of the *Trustee Act* refers to bringing an application, the respondents brought a motion.

their personal circumstances, location, other responsibilities and financial stress. Ms. Evans is in ill health and Mr. Evans has considerable obligations in caring for her and their household. In addition, they say they are in a conflict of interest situation as, due to the mortgage, they have become creditors of the estate.

[13] At the time of the removal motion, the respondents moved for directions seeking, among other forms of relief, an order that the house be sold and the proceeds of the sale be paid into court pending the resolution of the competing interests.

[14] Prior to the motion, the Public Guardian and Trustee of Ontario indicated, in response to an inquiry from respondents' counsel, that it does not intend to become involved in the Gonder estate. While respondents' counsel also asked an institutional trustee whether it would be willing to act, the respondents did not file an affidavit suggesting a replacement trustee or file a written consent.

REASONS OF THE MOTION JUDGE

[15] The motion judge found that continued service as estate trustees would work substantial hardship on the respondents, both physically and financially, and that through no fault of their own, they now have a conflict of interest with the heirs because they have become creditors of the estate.

[16] The motion judge held that there was nothing preventing him from ordering that the respondents be removed as executors of the estate. He concluded that s. 37 of the

Trustee Act does not require a trustee to provide a replacement before applying to be removed. While s. 37(4) "gave [him] pause", he concluded that the provision "is aimed at the situation in which one of several trustees is removed. Such a trustee need not be replaced, because the remaining trustees can act. *That is not the same thing as saying that the last remaining trustee cannot be removed until a replacement is available*" (emphasis added).

[17] The motion judge also relied on *Mitchell v. Richey*, [1867] 13 Gr. 445 (U.C. Ch.), for the proposition that no person can be compelled to remain a trustee.

[18] He observed that what is left to be administered is a vacant house that is subject to a tax lien and a certificate of pending litigation. He justified discharging both of the respondents on the basis that they are not in a position to do anything meaningful since the litigation by the appellant prevents them from selling the house and the tax lien prevents them from settling the litigation. In his view, little was lost by discharging them. The motion judge further noted that a litigation administrator could be appointed to deal with the litigation over the Hamilton property. He did not explain how it would be possible to find a litigation guardian to act, and not a replacement estate trustee.

[19] Having concluded that in these circumstances the respondents had made out a case for removal, the motion judge ordered that the respondents' certificate of appointment as executors be revoked under r. 75.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and that they be removed as trustees pursuant to s. 37 of the *Trustee Act*.

ISSUES

[20] The appellants raise the following issues on appeal:

(i) Did the motion judge err in removing the respondents as estate trustees, thereby leaving the estate without a personal representative?

(ii) If so, what was the appropriate disposition?

(iii) If not, did the motion judge err in failing to require the estate trustees to pass their accounts?

(iv) Did the motion judge err in ordering the appellant to pay costs on the motion?

ANALYSIS

I. Governing principles

[21] The law of trusts is a creature of equity and the Courts of Chancery. In exercising its equitable jurisdiction, a court must ensure that fairness is done for all parties. Equity is "the soul and spirit of all law ... equity is synonymous with justice": William Blackstone, 2 *Commentaries on the Laws of England*, 2d ed. (Chicago: Callaghan & Co., 1879), at p. 429.

[22] The role of trustee is a difficult one. A trustee must act in the best interests of the beneficiary, even at personal hardship. However, if such obligations were unlimited, and if no relief were available, "no one would undertake the task of trusteeship": see Donovan W.M. Waters, *Waters Law of Trusts in Canada* 3d ed. (Toronto: Carswell, 2005), at p. 841.

[23] In the specific circumstances of this case there were three objectives that ought to have been considered and addressed by the motion judge: (1) ensuring the orderly administration of the estate in the interests of the beneficiaries; (2) recognizing the plight of the respondents; and (3) providing for the timely resolution of the disputes concerning the estate.

[24] Although the interests of the beneficiaries must be the primary concern of both trustees and the courts, as we see it, the courts can meet each of these concerns, and do justice to all of the parties without requiring that a replacement trustee be immediately appointed, so long as there are steps taken to ensure the proper administration of the estate. We reach this conclusion based on the following: First, the courts have historically exercised an inherent equitable jurisdiction to remove trustees, even if it would, for a period, leave no trustee to administer the estate, so long as provision was made for the estate's orderly administration. Second, no statute has removed this power. Finally, there may be reasonable alternatives to the immediate appointment of a new trustee that can ensure the proper administration of the estate.

[25] The motion judge erred not because he removed the respondents as trustees without appointing a replacement. Rather, the error was to remove them without making alternate provisions for the proper administration of the estate. It is for this reason alone that the matter must return to the Superior Court to be reconsidered.

II. Equitable Powers

[26] The courts have long recognized an inherent power to remove a trustee when circumstances require. In *Letterstedt v. Broers* (1881), 9 A.C. 371 (P.C.), Lord Blackburn stated, at pp. 386-87:

> [I]f it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee...it seems to their Lordships that the Court might think it proper to remove him.
>
> ...
>
> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on the details often of great nicety.

[27] When a sole remaining trustee was removed, the courts normally required a replacement trustee to be appointed. However, this was not intended to impose an additional burden to a trustee seeking to retire: see *Courtenay v. Courtenay* (1846), 3 Jo.

& Lat. 519, at p. 533. Where no replacement could be found by the retiring trustee, the court could take it upon itself to ensure a continued administration. In cases from that era, the court would attempt to locate new trustees itself: see *Gardiner v. Downes* (1856), 22 Beav. 395, 52 E.R. 1160.

[28] Alternatively, the court could take steps to obviate the need for a trustee. In *Mitchell v. Richey*, Mowat V.C. permitted a sole surviving trustee to retire without appointing a replacement. Rather, he ordered that a receiver previously appointed by the court be continued, and that the trust funds be paid into court to be administered for the good of the beneficiaries.

[29] The case of *Barker v. Peile* (1865), 2 Dr. & Sm. 340, 62 E.R. 651 illustrates the court's power to deal with an estate in the best interests of the beneficiaries in circumstances similar to the instant appeal. The case was summarized in the English Reports, at p. 651, in the following terms:

> It appeared that the Plaintiff was the surviving trustee of a voluntary settlement – that the trust fund had always been an ascertained fund, but that many questions had arised among the parties claiming the fund, and several suits had been instituted with reference to the settlement, to all of which the Plaintiff had been made a party. The Plaintiff, under these circumstances, being desirous of avoiding further annoyance with regard to the fund, instituted the suit for administration of the fund by the Court, asking to be discharged, and, if necessary, that new trustees of the settlement might be appointed.

[30] In that case the court ordered the discharge of the trustee in these circumstances, and took on the duty of administering the trust itself.

[31] The respondents argue in their factum that "[s]ince trusts must be continuously administered, there cannot be a suspension of trustee administration" and cite Gillese J.A.'s text on trusts as authority. It is worth setting out the passage that they refer to in its entirety:

> Trusts must be continuously administered: there can be no hiatus in the administration of a trust. At all times there must be a trustee, *or someone that the law designates as standing in his or her stead*, with responsibility for the administration of a trust. [Emphasis added.]

See Eileen E. Gillese, *The Law of Trusts* (Concord: Irwin Law, 1997), at p. 123.

[32] Contrary to the appellant's assertion, this passage confirms that there are situations where a trust, while still requiring administration, will lack a trustee to fulfill this role. While rare, this situation is not the impossibility that the appellant asserts.

[33] We recognize that there is good reason to ordinarily require a replacement trustee to be located. The fiduciary nature of the trustee role ensures that they "put the beneficiary's interests first in the performance of any act and the exercise of any powers or duties": see Gillese, at p. 130. History has proven that trustees are effective actors in ensuring that the estates of deceased persons are administered properly. When a trustee

wishes to resign, it will ordinarily fall to that person to locate a replacement trustee. The modern reality is that the court is ill suited to locate replacements.

[34] However, as we will discuss below, a trustee is not the only entity that can ensure the proper administration of an estate. In the very rare cases where equity demands that a sole trustee be removed, but no replacement is forthcoming, courts possess an inherent jurisdiction to order the trustee's removal and provide for the orderly administration of the estate.

[35] Before turning to these alternatives, we will consider the effect that modern legislation has on the inherent jurisdiction that we have described above.

III. Legislative provisions

[36] In our system of democracy, Parliament and the legislatures, acting within their constitutional limits, are sovereign. The Legislative Assembly of Ontario is entitled, if it so wishes, to override the common law (including principles of equity) and replace it with statute. Alternatively, they may pass legislation that complements common law rules and powers without overriding them. In the case of the *Trustee Act*, the legislature has not granted a positive power to remove a sole remaining trustee. As we will explain below, however, neither has the legislature removed the inherent power of the courts to do so in limited circumstances.

[37] The appellant effectively argues that the legislature has in fact overridden this inherent jurisdiction with the *Trustee Act*. He says that the judicial replacement of estate trustees is now governed entirely by s. 37 of that Act:

> 37. (1) The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.
>
> ...
>
> (3) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.
>
> (4) Where the executor or administrator removed is not a sole executor or administrator, the court need not, unless it sees fit, appoint any person to act in the place of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed passes to the remaining executor or administrator as if the person so removed had died.

[38] The appellants submit that s. 37(4) clearly establishes that where the court removes a sole executor, a replacement must be appointed. If this were not the case, then why set out in statute that, where an executor is removed and there is one or more remaining executors, no replacement is required?

[39] We would reject this argument.

[40] Professor Sullivan notes that there is a strong presumption, especially in cases of private law, against statutory provisions ousting traditional common law rules:

> It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury*, in a formulation adopted by many Canadian courts:
>
> > Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.
>
> ...
>
> This assumption is likely to apply to any legislation dealing with so-called "private law – the law of contracts, torts and private property... Finally, certain matters are subject to the inherent jurisdiction of the courts. It is doubtful that legislatures could succeed in fully ousting this jurisdiction.

See *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at pp. 431-32.

[41] The *Trustee Act* is not a complete code. It does not provide for a comprehensive system for the administration of trusts. In 1984, the Ontario Law Reform Commission released a seminal report on reforming the law of trusts as part of a comprehensive review of the law of property: see Ontario Law Reform Commission, *Report on the Law of Trusts* (Toronto: O.L.R.C. Rep., 1984). In their report, the Commission considered, and rejected the notion of a codification of the law of trustees, preferring a statute that

supplemented and clarified the judge-made law of trusts: see *Report on the Law of Trusts*, at pp. 12-15.

[42] More particularly, commentators widely accept that superior courts of equitable jurisdiction have an inherent power of appointment and removal that exists in parallel with provisions such as s. 37 of the *Trustee Act*: see Gillese, at p. 125; Waters, at p. 818; *Report on the Law of Trusts*, at pp. 86-87; Carmen S. Theriault ed., *Widdifield on Executors and Trustees*, 6th ed., looseleaf (Toronto: Carswell, 2002), at 15.2.2.

[43] As we read it, s. 37(4) does not constrain the power of the court to remove a sole remaining trustee and provide for an alternative mechanism for administering the trust in those rare cases where a replacement trustee is not available and the exercise of inherent jurisdiction is required.

[44] The purpose of s. 37(4) is to give the court discretion to decide not to replace a removed trustee when one or more trustees remain. In other words, there is no obligation to ensure that the "status quo" is maintained by appointing a replacement. In the spirit of simplifying the trusteeship regime, s. 37(4) also provides for how the powers and rights of the removed trustee devolve in the event that he or she is not replaced. The authority of the removed trustee vests in the remaining trustees.

[45] Such a clarification is understandable. Older decisions, such as *Mitchell*, express a judicial preference against moving from multiple estate trustees to a single trustee on the

premise that a testator's choice to appoint more than one trustee initially represents a desire to avoid their estate falling into the control of a single person: see *Mitchell*, at p. 449. This may be a relevant consideration in appropriate circumstances. Section 37(4) merely provides that such considerations need not predominate in all cases.

[46] In summary, it appears to me that no single provision of the *Trustee Act*, nor the Act as a whole, ousts the inherent equitable jurisdiction of the court to remove a trustee. This is true even if such a removal would leave the trust without a trustee, so long as the court ensures proper administration of the estate in the best interests of the beneficiaries.

IV. Administration of the Trust

[47] On the record before him, the motion judge found that the respondents have made a compelling case to be discharged as trustees.

[48] We would not interfere with the motion judge's finding in this respect. Given the combination of their age, Margaret Evans' state of health, their residence in British Columbia, and the difficulties and expenses involved in dealing with a claim being advanced by the appellant, responsibility for the administration of this estate appears to have become unduly burdensome. In our view, the motion judge's finding on this issue is reasonable and ought to be given deference.

[49] While we agree with the motion judge that, in exceptional circumstances, the court has the jurisdiction to remove a sole trustee without appointing a replacement, this power

may only be exercised where an alternative mode of administration can be put in place that secures the best interests of the beneficiaries and ensures that the estate's assets are properly maintained. The motion judge, in removing the respondents without providing for proper administration, committed an error.

[50] Because of this error, this matter must be remitted to the Superior Court to reconsider the removal application. Any order made then must protect the interests of the beneficiaries and take into account and facilitate the timely resolution of the underlying litigation over title to the house.

[51] While not strictly necessary for the disposition of this appeal, we will suggest potential options for addressing these issues.

[52] It is apparent that the fundamental issue that divides these parties is the ownership of the house, the only asset of the estate. Is it property of the appellant or is it the property of the estate? The house is of modest value and both the cost of maintaining it and legal fees are rapidly accumulating to the point that, however the dispute as to ownership is resolved, there will be little if anything left for the winner.

[53] Compounding these problems is the fact that there is no one to tend to the upkeep of the house. Katherine Gonder, the property's life tenant, is ill and no longer able to either occupy or use the home as contemplated by the will. The appellant lives in the Yukon, and while he claims an equitable interest in the home for himself and his

children, he does not appear to have been paying for its carriage nor tending to its care. As discussed above, the respondents are in no position to prevent the asset from wasting.

[54] At the hearing of the appeal, the appellant's counsel advised the court that the appellant's son has, though a form of "self help" moved into the house and is conducting some repairs and clean up of the property. The respondents, given their location, health issues and financial means do not appear to have taken steps to assert the estate's ownership of the property or prevent the son from acting in this manner. While the son's conduct may involve some maintenance of the property, there is no evidence as to the efficacy of these efforts.

[55] In the result, the estate's limited value is being consumed by both the costs of litigation, waste due to ineffective upkeep of the trust property, mounting expenses such as taxes and maintenance, and the failure to provide for rental income. Surely this is not in the interests of the beneficiaries.

[56] The motion judge had before him two motions: one for removal, and another for directions. In the latter motion, the respondents sought to have the court order the sale of the home. While the motion judge dismissed the motion for directions as moot, having already released the respondents from their trusteeship, for the reasons given above, this was not the correct approach. Without commenting on the merits of the motion for directions, the difficulties caused by the removal of the respondents as estate trustees might have been addressed by an order for a sale.

[57] A practical impediment to the sale of the home is the presence of a certificate of pending litigation registered on title. So long as it remains, no one would realistically purchase the property.

[58] On a new motion for removal, the respondents might renew the request to sell the property and seek an order discharging the certificate. This should be done on notice to all potentially interested parties and may require additions to the record. As an equitable instrument, a certificate may be discharged by the court "on any ... ground that is considered just": see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 103(6)(c). On such a motion, "the Judge must exercise his discretion in equity and look at all of the relative matters between the parties in determining whether or not the certificate should be vacated": see *Clock Investments v. Hardwood Estates Ltd. et. al.* (1977), 16 O.R. (2d) 671 (Div. Ct.), at p. 674.

[59] Because no motion was brought under r. 42.02 of the *Rules of Civil Procedure*, for a discharge of the certificate, there is insufficient information before the court to speculate on whether the equities would ultimately favour a discharge.

[60] If a sale of the property proves to be an available option because of a discharge, there are at least two mechanisms by which a sale could be realized. First, the will itself provides Katherine Gonder the authority to "at any time direct [the] Estate Trustees to sell [the house] and the proceeds of such sale shall revert to and form part of the residue

of [the] estate." Katherine Gonder has not been part of the proceedings below. We are simply not aware of whether she has been approached to approve a sale or not.

[61] Second, the respondents could renew the motion for directions that the motion judge found moot, in which they sought a judicial order for the sale of the property. The respondents had sought such an order from Goudge J.A. on the appellant's motion to extend time to appeal to this court. Goudge J.A., while commenting that a sale of the home seemed reasonable, felt that the appropriate procedure would be to bring a separate motion for directions. It appears that the respondents have brought such a motion before the Superior Court, returnable in mid-March.

[62] Once sold, the court could ensure the proper administration of the estate by ordering the funds to be into court pursuant to s. 36(1) of the *Trustee Act*[2]:

> 36. (1) Where any money belonging to a trust is in the hands or under the control of or is vested in a sole trustee or several trustees and it is the desire of the trustee, or of the majority of the trustees, to pay the money into court, the Superior Court of Justice may order the payment into court to be made by the sole trustee, or by the majority of the trustees, without the concurrence of the other or others if the concurrence cannot be obtained.

[2] Section 36(7) of the *Trustee Act* may also have relevance. It reads as follows:

> 36. (7) Where a trustee desires to be relieved from the trust, the court may order all property held for the trust to be transferred to the Public Trustee.

It appears to allow for the transfer of property such as the house to the Public Guardian and Trustee. We do not express a view as to whether the section would allow the court to make such an order. In any event, it may well be that in the circumstances of this case where the property is the subject of a claim, this option is not to be preferred as it would result in an increase in costs and complexity.

[63] If the funds from a sale of the home were paid into court, concerns related to physical maintenance and property taxes would be resolved, and the beneficiaries would be free to litigate or settle any claims they might have.

[64] A second potential option would be to address the problems that the life interest in the house are currently creating by resort to the court's inherent "salvage and emergency jurisdiction": see Waters, at pp. 1293-96. The court possesses an inherent jurisdiction to vary the terms of a trust in support of the settlor's intentions when circumstances "might 'reasonably be supposed to be one not foreseen or anticipated' by the testator, or one where his trustees were 'embarrassed by the emergency'": see *Tornroos v. Crocker*, [1957] S.C.R. 151, at p. 158.

[65] On a proper factual record, various events might be shown to have been unforeseen by Pearl Gonder. Conversely, on further evidence, it may be apparent that none of the subsequent events would have been unexpected. Potentially relevant considerations might include litigation over the estate in which one of the beneficiaries contended that the sole asset of the estate was not truly part of the estate at all; Katherine Gonder's illness; the presence of a certificate of pending litigation that impairs Katherine Gonder's power of sale under the will; the conflict of interest that the trustees created by becoming creditors of the estate; and the serious risk of waste of the estate's sole asset.

[66] Exercising this power, the court may be in a position to bypass Katherine Gonder's life interest and allow the estate to vest with the three beneficiaries, with title to the home held jointly between them.

[67] This solution would avoid the need to address the certificate of pending litigation or the tax lien on the home, allow for any beneficiary interested in maintaining the property to do so legitimately, and to preserve ownership of the property such that, if the appellant's claim were ultimately found meritorious, he could obtain title to the property rather than money damages.

CONCLUSION

[68] The removal of a sole trustee without appointment of a replacement is an extreme remedy, and will be inappropriate in most cases. It will only be available when no other option is realistically available. In our view, given the limited value of the estate, the conflict of interest that the respondents are now in as creditors of the estate, and the lack of viable replacement trustees, this is one such exceptional case.

[69] That said, the motion judge was wrong to remove the respondents as trustees without also crafting a mechanism by which the estate could continue to be administered.

[70] This is a case that cries out for a practical solution. It is in that spirit that the judge hearing this matter should approach the task.

[71] The suggestions for solutions that we have outlined above are merely that: suggestions. Nothing in these reasons should be read as preventing the motion judge from finding other equitable mechanisms for ensuring the proper administration of the estate and the protection of the interests of the beneficiaries.

[72] On further evidence, it may be clear that some of these options are illusory, while other as of yet not contemplated solutions may exist. What is necessary is that, together with any order removing the trustees, there must be an order that protects the best interests of the beneficiaries.

[73] We also note that the true core of the dispute in this case is between the appellant and the respondents in their capacity as beneficiaries, not as trustees. The dispute should proceed with this reality in mind.

[74] Taking all these circumstances into account, in our view, the appropriate order is that the appeal be allowed and remitted to the Superior Court to consider the application for removal in conjunction with a motion for directions assessing how to administer the estate. Any person having a claim to the property or the estate should be served with the motion for directions and this judgment. We would order that the issue of the costs of the motion under appeal be reserved to the judge hearing the motion. We would make no order as to the costs of the appeal.

[75] Given our finding on the first issue raised by the appellants, it is unnecessary to comment on the passing of accounts.

[76] Regrettably, this disposition resolves very little and essentially remits the matter to the Superior Court for resolution. Given the amounts at issue and the cost of further litigation, this appears to be a case that cries out for early resolution and some form of consensual out-of-court resolution. If the parties are prepared to consider that avenue and require the court's assistance, we may be approached through the Registrar to make appropriate arrangements.

"Paul Rouleau J.A."
"Gloria Epstein J.A."
"I agree Robert J. Sharpe J.A."

RELEASED: March 8, 2010

TAB 6

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

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

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

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

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

Jurisprudence

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

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

Statutes and Regulations Cited

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

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

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

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

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

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

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

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. nº 1633 (QL). Pourvoi accueilli.

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

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

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

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

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

IV. Judgments Below

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

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

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

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

III. Dispositions législatives

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

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

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

IV. Les décisions antérieures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

(2) Le juge Robertson (dissident)

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

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

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

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

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

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

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

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

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

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

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

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

V. Issues

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

B. Should the confidentiality order be granted in this case?

VI. Analysis

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

(1) The General Framework: Herein the *Dagenais* Principles

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

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

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

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

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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

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

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

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

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A publication ban should only be ordered when:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

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

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

(2) Les droits et les intérêts des parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Application of the Test to this Appeal*

(1) Necessity

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

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

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

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

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

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

(1) Nécessité

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

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

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. nº 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

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

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

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

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

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

(2) L'étape de la proportionnalité

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

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

(a) *Salutary Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

(b) *Deleterious Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

86

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

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

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

VII. Conclusion

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

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

Appeal allowed with costs.

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

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

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

Pourvoi accueilli avec dépens.

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

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

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

TAB 7

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*

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*

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

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

serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

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

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

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

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.

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.

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.

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

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

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.

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

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

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

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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Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

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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.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

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

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

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

I. Survol

[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] 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] 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

proportionality, the benefits of that order restricting openness outweigh its negative effects.

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

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist,

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] 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] 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

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.

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.

[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.*).

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] 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.

[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] 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.

[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.

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.

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

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

is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

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

V. Analysis

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

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

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] 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. Analyse

[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] 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

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.

[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*

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] 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).

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.

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.

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] 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.

[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] 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

[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,

dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

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

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

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

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] 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. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[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] 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

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).

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] 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*,

[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

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

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

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

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] 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] 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

case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

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

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of

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] 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] 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

"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.

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] 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

[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

estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

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

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its

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] 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. *L'importance pour le public de la protection de la vie privée*

[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

manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

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

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] 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.

[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

court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

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

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. 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).

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] 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] 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.*,

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.

however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of

« Privacy 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] 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] 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

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.

[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

are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

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

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] 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] 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

example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

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

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90

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] 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] 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.

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 multifaceted 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

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.

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] 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).

[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).

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

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[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] 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).

[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

CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

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

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

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] 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] 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] 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.

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

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

[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] 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

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

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

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

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

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] 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] 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] 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

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

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

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] 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

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

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

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses

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] 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] 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

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

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).

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

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

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

[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] 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] 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).

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

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

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

[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. *Les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important*

[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

either. This alone is sufficient to conclude that the sealing orders should not have been issued.

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

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

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

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) Le risque pour la vie privée allégué en l'espèce n'est pas sérieux

[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] 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

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

would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that

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] 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

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.

(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

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

by this information becoming publicly available was more than negligible.

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

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*,

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] 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] 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*

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

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

information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

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

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

Appeal dismissed.

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

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

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] 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.

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.

TAB 8

SUPREME COURT OF YUKON

Citation: *Sumitomo Canada Limited v Minto Metals Corp.*, 2024 YKSC 28

Date: 20240614
S.C. No. 23-A0086
Registry: Whitehorse

BETWEEN:

SUMITOMO CANADA LIMITED

PETITIONER

AND

MINTO METALS CORP.

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	Kibben Jackson (by videoconference)
Counsel for PricewaterhouseCoopers Inc.	Bryan C. Gibbons (In person)
Counsel for Selkirk First Nation	Mark Wallace (In person)
Counsel for Government of Yukon	Dorothy J. Miller (by videoconference) and Julie DesBrisay (In person)
Counsel for Cobalt Construction Inc.	Scott Turner (by videoconference)
Counsel for Maynbridge Capital Inc.	Mary Buttery, KC (by videoconference)
Counsel for Capstone Mining Corp.	Claire Hildebrand (by videoconference)
Counsel for Dyno Nobel Canada Inc, Thyssen Mining Construction of Canada Ltd. and BQE Water Inc.	Charles Bois and Terrence M. Warner (by videoconference)
Counsel for Fountain Tire Mine Service Ltd.; Mueller Electric (Div II) Ltd.; Borealis Fuels & Logistics Ltd.; Guillevin International Co.; Suncor Energy Services Inc.; and Major Drilling Group International Inc.	Kyle Carruthers, agent for James R. Tucker (In person)

Counsel for Finning (Canada) a division of Finning International Inc.	Eamonn Watson (by videoconference)
Counsel for Yukon Energy Corporation	Jeffrey Bradshaw (by videoconference)
Counsel for Caterpillar Financial Services Corporation	John D. Leslie (by videoconference)
Counsel for JDS Energy & Mining Inc.	Gary W. Whittle (In person)

REASONS FOR DECISION

OVERVIEW

[1] Minto Metals Corp. (“Minto Metals”), has been the owner-operator of an open pit and underground copper-gold-silver mine (“Minto mine”) located approximately 250 kilometres northwest of Whitehorse, Yukon, since 2021. On May 13, 2023, Minto Metals abandoned the Minto mine. These applications arise from the resulting receivership of the mine. The affected parties, with monies owing to them, are not in agreement with the Receiver’s recommended path forward.

[2] The Minto mine is on Category A[1] settlement land of Selkirk First Nation, a self-governing Yukon First Nation that was a beneficiary of resource extraction while the mine was operating. Sumitomo Canada Limited (“Sumitomo”), the purchaser of all the concentrate produced at the Minto mine and a secured lender to Minto Metals, with a first-ranking security interest in the concentrate, brought a court application for a court-

[1] Council of Yukon First Nations website, Umbrella Final Agreement Tab, Understanding of the Umbrella Final Agreement, Chapter 5, p. 11:

“(a) Category A Settlement Land

On Category A Settlement Land, a Yukon First Nation has complete ownership of the surface and subsurface. In other words, Yukon First Nations have rights equivalent to fee simple to the surface of the lands and full fee simple title to the sub-surface.

This means that Yukon First Nations have the right to use the surface of the land and the right to use what is below the surface, such as minerals and oil and gas.”

appointed receiver after the mine was abandoned. On July 24, 2023, PricewaterhouseCoopers Inc., LIT ("the Receiver") was appointed by the Court as the receiver over all the assets, undertakings, and property of Minto Metals.

[3] The Yukon government conducted immediate care and maintenance on the mine to protect the environment and human health and safety and is now undergoing reclamation and closure activities. They are accessing a reclamation bond consisting of $75 million, earlier posted by Minto Metals. The Yukon government has calculated a $19 million shortfall between the amount of the bond and the amount it will take to complete the reclamation and closure activities.

[4] The Receiver seeks three orders from this Court: for the approval of the Receiver's activities as set out in its various reports; for the approval of the Liquidation Plan; and for the sealing of its Confidential Supplemental Fourth Report, containing the Liquidation Plan.

[5] The Receiver conducted a Sales and Investment Solicitation Process ("SISP") to market and sell the Minto mine property as a whole, from August 2023 to May 2024. The Receiver concluded the SISP was unsuccessful in identifying a bidder who could meet the necessary criteria of sufficient price; ensuring fulfillment of the reclamation and closure obligations; maintaining valid regulatory permitting; and satisfying Selkirk First Nation land lease requirements and royalty payments within a time period that would not prejudice the ongoing environmental remediation or diminish the value of the assets.

[6] The Receiver has proposed the immediate implementation of the proposed Liquidation Plan in order to maximize the value of the assets, and to ensure their removal from the mine site for auction in Whitehorse during the summer months. The

remote location of the mine, requiring a river crossing, has created a risk of further delay until the ice road construction in January 2025, or even until the following summer of 2025.

[7] The Receiver's applications were opposed by Selkirk First Nation, eight lienholders, Sumitomo, and two of the bidders (whose views were expressed through other parties). Two lienholders, the secured lender, and the primary secured creditor supported the Receiver's applications. Six lienholders and the Yukon government took no position.

[8] Selkirk First Nation, supported by others opposing the Receiver's application, proposed a court-supervised bidding process, allowing the successful non-binding bidder three months of exclusivity to negotiate terms of the sale. If there were no sale, the Liquidation Plan could be implemented in the fall or winter.

[9] On May 13, 2024, I advised the parties by email of my decisions to grant the orders approving the Receiver's activities, the proposed Liquidation Plan, and the sealing of the final two pages only of the Liquidation Plan, with reasons to follow. Here are those reasons.

BACKGROUND

History of Mine

[10] The Minto mine was purchased in 2005 by Sherwood Copper and began operating in 2007 as an open pit copper-gold-silver mine. Capstone Mining Corp. ("Capstone") bought the mine in 2008 and continued operating it until 2018, when it went into care and maintenance due to low copper prices and a lack of capital. Capstone then sold the mine to Pembridge Resources PLC in 2019. In 2021, Minto

Metals took over after a reverse take-over. It was traded on the Toronto Stock Exchange.

[11] The mine had significant infrastructure including a mill, camp, airstrip, and energy distribution and various other buildings. It was capable of processing 4,000-4,400 tonnes of concentrate a day but was operating in recent years at 3,000 tonnes a day. All concentrate was purchased by Sumitomo through an offtake agreement.

[12] The mine site is located near Pelly Crossing, Yukon. Access requires crossing the Yukon River, by barge in the summer and by ice road in the winter. Twice each year, in fall before the river freezes, and in spring before the ice melts, there is no access for approximately six weeks.

[13] The concentrate was for many years transported by truck to the port of Skagway, Alaska, a distance of approximately 450 kilometres. However, the port shut down in 2022 and is not expected to re-open for another one to two years. As a result, the concentrate was transported by truck to Stewart, British Columbia, a distance of approximately 1,325 kilometres. This represented a significant cost increase.

[14] In 2019, the reclamation security was set at $72 million, which was posted by way of a surety bond. Minto Metals' most significant liability associated with the reclamation security was its tailings ponds, which had an estimated capacity of 11 million dry metric tonnes ("DMT"). By the end of 2022, only 600,000 DMT of capacity remained.

[15] In 2022, the Yukon government increased the reclamation security to $91 million. Minto Metals paid approximately $3 million towards the increase but was unable to meet any further obligations. Due to the levels of the tailings ponds and Minto Metals' inability

to post the full reclamation security, the Minto mine was placed on restricted operating conditions. These restricted operating conditions prevented the generation of sufficient cash flow to pay its obligations as they became due.

[16] As a result of its financial and operational difficulties, on May 12, 2023, Minto Metals made the decision to abandon the Minto mine. The positions of all employees were terminated and the directors resigned the following day.

Initial Sales Process and Limited Receivership

[17] Minto Metals began a sales bidding process on June 13, 2023, with Ernst & Young Inc. as sales advisor. The process was unsuccessful in identifying a bidder.

[18] Thus on June 29, 2023, the Supreme Court of British Columbia granted Sumitomo's application for a limited receivership order. PricewaterhouseCoopers Inc., LIT was appointed as limited receiver and manager without security over all copper concentrates of Minto Metals and was authorized to sell for a certain price the unsold concentrate to Sumitomo, who was in turn authorized to remove the copper concentrate from the mine site.

[19] On July 5, 2023, the Supreme Court of British Columbia granted a further order amending the limited receivership order to confirm all claims attached to the net proceeds of sale from the unsold concentrate in the same priority as immediately before the sale. The court also authorized all lien claimants to take the necessary steps to preserve their rights as lien claimants.

[20] On July 24, 2023, after receiving a report from the limited receiver, the Supreme Court of British Columbia set aside the amended limited receivership order. It granted an order approving a settlement agreement between Sumitomo and the Yukon

government and directing the limited receiver to pay to the Yukon government the funds collected from the sale of concentrate to Sumitomo.

Receivership Order

[21] The court discharged the limited receiver upon payment of the settlement amount and appointed PricewaterhouseCoopers Inc., LIT as the receiver and manager without security of all the assets, undertakings and property of Minto (the "Receivership Order"). This Receivership Order dated July 24, 2023, governs these proceedings.

[22] On August 25, 2023, this Court granted an order transferring the proceedings from the Supreme Court of British Columbia to the Supreme Court of Yukon.

[23] The Receivership Order authorized a borrowing charge of $500,000 for the Receiver. This was increased by the Court authorization of another $500,000 on November 15, 2023.

[24] The Receivership Order, among other things, authorized the Receiver's activities to market and negotiate the terms and conditions of sale of any or all of the property; to sell, transfer, lease or assign the property; and to engage property, financial and legal experts to assist in the execution of their duties.

Stakeholders

[25] During these proceedings, the Receiver identified the following three key stakeholders: 1) the Yukon government – the regulator and the entity responsible for ensuring the care and maintenance, reclamation and closure were carried out; 2) Selkirk First Nation – the landholder and creditor; and 3) Capstone – the primary secured creditor and indemnifier of the bond provided by Zurich Insurance Group ("Zurich") that is accessed by the Yukon government for the implementation of

reclamation and closure. Other stakeholders included the lienholders, equipment lessors, Sumitomo, and Maynbridge Capital Inc. (“Maynbridge”).

[26] Maynbridge provides bridge financing to restructuring companies. On August 30, 2023, it agreed to make a senior secured super-priority Receiver’s Certificate credit facility available to the Receiver to fund the receivership, the Receiver’s activities and its counsel. The funding agreement authorized no more than $1 million, plus interest at 13% per annum calculated monthly and a standby fee of 2%. The agreement matured on March 31, 2024 and was not renewed.

Sales and Investment Solicitation Process (SISP)

[27] The Receiver began a SISP on August 28, 2023. It aimed to solicit bids for a purchase of all or substantially all of the assets of the Minto mine, *en bloc*, that is, as a whole. Alternatively, it aimed to obtain an investment into Minto Metals to facilitate negotiations for an agreement to sell. The Receiver determined an *en bloc* sale was the best way to maximize the value of the assets. The Receiver also determined that an expeditious process was preferable, in order to limit carrying costs, to capitalize on expressions of interest and to achieve a solution before winter.

[28] By October 9, 2023, after an initial three-day extension to the deadline for receipt of bids, six non-binding bids for an asset or share purchase of Minto Metals were submitted to the Receiver. Discussions occurred to clarify aspects of the bids. The deadline for non-binding bids was extended a second time for a limited number of bidders at their request to November 1, 2023. At that time three non-binding bids were submitted.

[29] Between October 6, 2023, and December 15, 2023, the Receiver reviewed and discussed each bid. An additional proposal provided outside of the SISP timelines was not pursued because of outstanding due diligence requirements.

[30] The Receiver entered into a term sheet with Granite Creek Copper Ltd. ("Granite Creek"), the most viable bidder in the Receiver's view, in early 2024. The other two bids were not pursued because of insufficient cash offers and ongoing uncertainties relating to reclamation and closure activities and permitting. Between January and March 2024, the Receiver facilitated and participated in numerous discussions among the key stakeholders and the bidder in an attempt to advance the proposal. By March 2024, the Receiver concluded that the complexities of land leases, royalties, assignments of permits and licences, reclamation security and environmental remediation could not be resolved in a reasonable time.

[31] On March 27, 2024, the Receiver proposed termination of the SISP and immediate liquidation, as it reported it had exhausted its efforts and monies available to it. One week later, Granite Creek submitted a new proposal, which the Receiver recommended for consideration. The proposal included a nine-month exclusivity period in exchange for $2.2 million in cash to allow Granite Creek to negotiate the outstanding issues surrounding their proposed acquisition of the property.

[32] At the court hearing on April 5, 2024 for approval of the Receiver's activities and next steps, including a consideration of the Granite Creek exclusivity agreement, and by follow-up letter dated April 8, 2024, Selkirk First Nation proposed a postponement of Court approval of the liquidation plan, or of the Granite Creek exclusivity agreement, until a court-supervised bidding process were held to assess any other proposed bids.

Selkirk First Nation stated they had received “credible indications” that other unidentified parties had a serious interest in acquiring the mine. They suggested a 30-day period for receiving sealed bids, assessment of the bids by some combination of the Court, the Receiver and the stakeholders, and a determination by the Court if any should be accepted. If so, the successful bidder would have the exclusive right for three months to negotiate and complete a definitive agreement for the purchase of Minto Metals or its assets within a reasonable time to be set by the Court. If no successful bid were received or agreement negotiated, the Receiver’s proposed liquidation plan could be approved and implemented. The hearing was adjourned to early May to allow discussions about the alternatives to occur.

[33] During this time other parties expressed interest in purchasing the mine property as a going-concern or purchasing a subset of the property. However, no formal requests or proposals were forthcoming from these informal expressions of interest.

[34] The key stakeholders, the Receiver, and the bidder discussed the Granite Creek exclusivity agreement. They were unable to agree on the length of the proposed exclusivity period: the Yukon government was concerned about the impact of nine months on the implementation of the reclamation and closure plan and access to the reclamation bond, while Granite Creek needed the time to develop solutions to the outstanding issues. Selkirk First Nation agreed with the need for more time.

[35] After further discussion, the Receiver returned to its recommendation to terminate the SISP and proceed to liquidation. This is part of the applications currently before the Court.

[36] In the meantime, during the spring of 2024, Selkirk First Nation and some of the lienholders had initiated further discussions about the purchase of the mine by The Fiore Group ("Fiore"), one of the bidders whose bid was not pursued by the Receiver after December 2023. The Receiver was not aware of these discussions. Selkirk First Nation did not respond to the Receiver's request by letter dated May 1, 2024, for a discussion about their proposed sales process.

[37] Selkirk First Nation included in its court material for the current applications a letter from Fiore setting out a revised non-binding bid that substantially increased their financial offer. In response, the Receiver submitted another report to the Court, including Fiore's November 1, 2023 revised non-binding bid, Fiore's answers to the Receiver's questions sent during the SISP, further email exchanges between Fiore and the Receiver, concerns of the Receiver about Fiore's final non-binding bid, a summary of the positions of creditors and stakeholders on the Receiver's and Selkirk First Nation's proposals filed for the May 10th hearing, and answers to questions about the liquidation plan.

POSITION OF THE PARTIES

Receiver

[38] The Receiver states it spent eight months running a SISP and negotiating with interested bidders with the input and involvement of the key stakeholders. Their goal was to achieve an agreement primarily among Selkirk First Nation, the Yukon government, Capstone, and a bidder to allow for a sale of the mine. In the Receiver's view, no bidder succeeded in developing a proposal that satisfied the complexities raised by the state of the mine. The assessed risks of ensuring continued access by the

Yukon government to the reclamation security after a sale, given the unwillingness of any bidder to assume current reclamation liabilities; of the ability of a bidder to obtain regulatory permits for exploration and restart of the mine while reclamation and closure activities were continuing; and of the sufficiency of cash to support the transition, all outweighed the recognized benefits of an *en bloc* sale.

[39] The Receiver did not support Selkirk First Nation's proposal. The delay would create further uncertainty and contribute to the depreciation of the assets. No new viable bidders had emerged and the two remaining interested bidders – Granite Creek and Fiore – had not been successful in proposing solutions to the outstanding issues. The Receiver assessed the information it received about the final non-binding bid from Fiore as not substantially different from its November 1, 2023 bid. Although Fiore offered a higher purchase price, it was still considered insufficient and there was no advancement of due diligence and discussions on the above-noted risks. Liquidation was the best way of maximizing the value of the assets.

Selkirk First Nation

[40] Selkirk First Nation opposed the proposed liquidation of assets based on prematurity, and unfairness in the way the Receiver conducted the SISP. Underlying their position was their belief in the benefits of the future operation of the mine for Selkirk First Nation and for the Yukon. Their proposal for a new court-supervised bidding process was to allow the consideration of the final non-binding Fiore bid which Selkirk First Nation said addressed a significant number of issues raised by the Receiver. The new bidding process could also consider potential bids from other interested parties. The downside of this process, if unsuccessful, would be minimal.

Liquidation could proceed at the latest in the latter half of September, before the freezing of the river. By contrast, liquidation of the assets at any time would mean the mine is unlikely ever to operate again.

[41] More specifically, Selkirk First Nation emphasized that the economic importance of an operating mine to them, through financial and employment benefits, was an overriding concern that was not sufficiently considered by the Receiver. The Receiver's plan did not support economic reconciliation or adequately appreciate the benefits under s. 5.6 of the Selkirk First Nation Final Agreement of royalty payments to the First Nation. The Receiver's view also failed to recognize sufficiently the alliance between Selkirk First Nation and Fiore for the purposes of shared equity and governance. The economic benefits of the mine accrued to many Yukon businesses and to the people of the Yukon, also stakeholders. The opposition to liquidation by eight priority lienholders, amounting to $20.9 million worth of lien claims, and thus with substantial risk, strengthened this view. The Receiver's failure to consider the interests in continuing the operation of the mine was unfair and unreasonable.

[42] Further, the existence of the mine on Selkirk First Nation Category A settlement land was an exceptional circumstance. A finding of exceptional circumstance precludes the requirement of Court deference to the Receiver's recommendations.

[43] Selkirk First Nation criticized the Receiver's conduct of disclosing the Fiore November 1, 2023 confidential non-binding bid in their court materials; and for assessing Fiore's non-binding bids as though they were final bids. Selkirk First Nation stated the Receiver and the Yukon government failed to meet with Fiore to discuss their

proposal in the fall of 2023; and the Receiver unfairly characterized Granite Creek's bid to enhance its advantages.

[44] Selkirk First Nation supported Fiore's final non-binding bid. They said it addressed concerns raised by the Receiver and the Yukon government. Fiore increased their cash offer to a $200,000 non-refundable deposit on acceptance of Fiore's bid, and $6 million payable on closing. $35.72 million of debt was to be settled directly with creditors. The $200,000 could fund the costs of the bidding process and Receivership over the next four months. The relatively short proposed three-month exclusivity period addressed Receiver and stakeholder concerns about undue asset depreciation as well as Yukon government timing concerns related to ongoing reclamation responsibilities. Fiore demonstrated commitment to the ongoing operation of the mine by their offer of significant controlling equity and governance participation to Selkirk First Nation and equity participation to the lienholders through the offer of share warrants as part of the debt settlement.

[45] Selkirk First Nation also offered, subject to due diligence, to purchase Maynbridge's position.

Yukon government

[46] The Yukon government took no position on Selkirk First Nation's proposed new bidding process, or the Receiver's recommendation to liquidate. The Yukon government stated they respected the views of the Receiver as an officer of the court, and they respected Selkirk First Nation's desire to have an operating mine. As a result of the immediate risks created to the environment and human health and safety by the

abandonment of the mine, they were required as a regulator to enter the site on an urgent basis to work towards remediation, reclamation, and closure.

[47] To this point their activities have been conducted in a way that does not foreclose a sale. The Yukon government is required to continue these activities until another party assumes full responsibility to close and reclaim the mine site. For this reason, the Yukon government needs to continue to access the reclamation security bond, and to limit their exposure to the approximate $19 million shortfall between the security of $75 million paid by Minto Metals, and the projected cost of $94 million to close and reclaim the mine. The Yukon government stated these requirements were of "primary importance" and they had significant concerns about any exclusivity agreement, sale, or liquidation that may have compromised them.

[48] Certainty around the timing of any sales process or liquidation was needed. Stephen Mead, Assistant Deputy Minister of Mineral Resources & Geoscience Services in the Department of Energy, Mines and Resources, deposed in his affidavit:

> 9. Any lack of certainty regarding the timing for removal of major assets … from the site due to an extended sale process or a prospective mine purchase will have significant impacts on remediation planning. If an extended exclusivity period is granted with no set plans for liquidation of assets, it would impede YG's reclamation planning and execution.
>
> 10. If a new or extended sale process were approved by the Court, YG would engage in discussions with any potential Bidder to ensure the work of reclaiming and closing the site could be fully integrated with any future plans a Bidder may have, so as to ensure that YG's reclamation and closure work, and the reimbursement of such costs from security, are not impeded or compromised in any way.

[49] The Yukon government advised that while they have had some conversations with Fiore about the reclamation and closure issues, those conversations have not

advanced beyond the conceptual stage, and no detailed plan has been discussed. Only during very recent conversations with Fiore has the Yukon government perceived that Fiore has gained an increased understanding of the reclamation, bond, and regulatory permitting issues they would need to address to move forward with a sale.

[50] The Yukon government and the Receiver have discussed the proposed liquidation plan and have agreed that any order for liquidation will not apply to assets required by the Yukon government for its closure and reclamation work.

Capstone Mining Corp.

[51] Capstone, Minto Metals' primary first ranking secured creditor, is owed approximately $5 million (USD) in secured debt, and is the guarantor of the reclamation security bond. From the outset of these proceedings, Capstone expressed concern about a prolonged sales process or receivership, because of the costs likely to be incurred to the detriment of stakeholders, and the erosion of value of creditors' security. Their view is that the lengthy and expensive sales process pursued by the Receiver has been exhausted, with no reason to believe a new bidding process will result in a different outcome, given the transaction's unresolved complexities. Capstone noted $1.2 million in professional fees have been expended to date and no party has offered to fund a new sales process. Finally, Capstone argued that a new court-supervised bidding process would not respect the integrity of the insolvency process run by the Receiver, thereby undermining commercial morality and the future confidence of businesspersons in dealing with receivers.

Maynbridge Capital Inc.

[52] Maynbridge and the Receiver entered into a funding agreement in which Maynbridge agreed to provide a credit facility of no more than $1 million to fund the Minto Metals receivership, the Receiver's activities and its counsel. The funding agreement matured on March 31, 2024, and was not renewed; the full $1 million plus interest at 13% per annum calculated monthly and legal fees are due.

[53] Maynbridge opposes a new sales process because of the delay and uncertainty it will cause. It supports the Receiver's recommendation for liquidation because it will prevent continued depreciation of Minto Metals' assets, and allow for the movement of Minto Metals assets across the Yukon River before 2025.

[54] Maynbridge would take no position if another party purchased its position.

Lienholders, Sumitomo, and Bidders who Support the New Sales Process

[55] Some of the lienholders who supported the new sales process proposed by Selkirk First Nation provided letters of support of the process to Fiore, who attached them to their final non-binding bid and who also supported a new sales process.

[56] Sumitomo supported a new sales process for the purpose of restarting the mine because it was in the best interest of their creditors and stakeholders.

[57] Granite Creek, through the lawyer for Sumitomo, expressed their continuing interest in pursuing a non-binding bid.

Lienholders who Support Liquidation

[58] Finning (Canada), a division of Finning International Inc., supported liquidation because of concerns that a further delay will cause a loss of asset value and will diminish recoveries for creditors; and because of a belief that the sales process was

exhausted to the extent that the numerous challenges could not be resolved in a reasonable time or at all.

[59] Caterpillar Financial Services Corporation supported the liquidation process as long as it retained control over the liquidation of its own equipment.

LAW

[60] The context of this matter is an insolvency. The court in *Canada (Minister of Indian Affairs and Northern Development v Curragh Inc.*) (1994), 114 DLR (4th) 176 (Ont. Gen. Div) ("*Curragh*"), recognized that where one is dealing with an insolvency situation one is "not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability" (at 185).

[61] In keeping with this reality, two overarching policy considerations in bankruptcy and insolvency proceedings are urgency and commercial certainty: "[d]elay fuels increased costs and breeds chaos and confusion, all of which risk adversely affecting the interests of parties with a direct and immediate stake in the sale process." (*1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144 at para. 48). The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") is remedial legislation and should be given liberal interpretation to facilitate its objectives (*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 ("*Third Eye*") at para. 43).

[62] A receiver's powers derive from s. 243(1) of the *BIA*.

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an

> insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

[63] It is generally accepted that when Parliament enacted s. 243 and imported the broad language set out in (c) from a previous section dealing with interim receivers, the wide-ranging orders available to interim receivers were similarly available to court-appointed receivers. Courts have adopted the approach that s. 243 allows the receiver to do what "'justice dictates' but also what 'practicality demands'" (*Curragh* at 185). Further, judges are given the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" (*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 at para. 20).

[64] The purpose of a court-appointed receiver is to "'enhance and facilitate the preservation and realization of the assets for the benefit of creditors': … Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515." [citations omitted] (*Third Eye* at para. 73). As noted in *Bayhold Financial Corp v Clarkson Co* (1991), 108 NSR (2d) 198 (CA) "the essence of a receiver's powers is to liquidate the assets" (at 15). The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors" (*1117387 Ontario Inc v National Trust Company*, 2010 ONCA 340 at para. 77). Or, put another way, "[i]n general terms, the function of a court-appointed receiver is to ascertain the assets of the debtor, get some fix on their approximate value, and determine the path

the receiver should follow in an attempt to yield the greatest return possible" (*Denison Environmental Services v Cantera Mining Ltd* (2005), 11 CBR (5th) 207 (Ont. SCJ) at para. 12).

[65] While the primary concern of a receiver is to protect the interests of the creditors, a secondary consideration in the sale context is the integrity of the process by which the sale is effected.

[66] A receiver seeks court approval for the following reasons:

- to allow the receiver to move forward with the next step in the proceedings;
- to bring the receiver's activities before the court; to allow the concerns of the stakeholders to be addressed and any problems rectified;
- to allow the court to be satisfied that the receiver's activities have been conducted prudently and diligently;
- to provide protection for the receiver not otherwise provided by the *BIA* or the appointing order; and
- to protect creditors from delay and disruption caused by re-litigation of issues and potential indemnity claims by the receiver.

[67] While this list was developed in the context of describing a Monitor's role in CCAA (*Companies' Creditors Arrangement Act*) proceedings, the principles apply equally to receivers in the context of a receivership. The court approval acts as a check and accountability mechanism on the receiver's activities.

[68] The court-appointed receiver does the work that otherwise the court would have to do. Courts have, over many years, shown deference to the expertise and

recommendations of the receivers. “[P]redictability and certainty are hallmarks of the legitimacy of a receiver to deal with assets … ‘the court accords a high degree of deference to the implementation of the disposition strategy developed by a court-appointed receiver’” (*Atrium Mortgage Investment Corp v King Edward Apartments Inc*, 2018 SKQB 296 at para 59). The Court in the leading case of *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1 (CA) (“*Soundair*”) at 6, wrote :

> Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

ANALYSIS

[69] Selkirk First Nation, supported by some lienholders, has criticized aspects of the sales process undertaken by the Receiver, leading to their argument for a new court-supervised sales process. Part of the court approval process in this case requires an assessment of the Receiver’s conduct of the SISP and ultimate reason to terminate. The principles in *Soundair* are equally applicable here even though in that case court approval was sought for a sales process. Both contexts require a review of the Receiver’s conduct.

[70] *Soundair* sets out the following factors a court must consider in reviewing a sale by a court-appointed receiver:

- Has the receiver made a sufficient effort to get the best price and has it acted providently?
- Has the receiver considered the interests of all parties?
- The efficacy and integrity of the sales process by which offers are obtained; and
- Has there been unfairness in the working out of the process?

[71] I will address each of these factors in the context of this case.

i) Sufficient efforts to obtain best price and acting providently

[72] A review of the Receiver's development, implementation, and proposed termination of the SISP reveals its efforts to obtain the best price and its provident approach, also described as acting prudently, fairly, and not arbitrarily.

[73] The SISP was developed with input from the stakeholders. The Receiver imposed a tight timeline 1) to limit the ongoing carrying costs of the Minto mine; 2) to advance the process before the fall and winter seasons limited access to the Minto mine; and 3) to capture the current interests expressed. The SISP encompassed a due diligence period for the potential bidders, including access to a virtual data room (containing 40GB of data related to Minto Metals' exploration data, mine design, operations, financials, and general assets) and a site visit, a non-binding bid deadline, a time period in which to assess the bids, communication with qualified bidders and the performance of final due diligence, a binding bid deadline, final bid assessment and notification of selected bidder, and court approval of the successful bid.

[74] The Receiver engaged in extensive marketing by directly contacting 44 potential bidders, including those who participated in the June 2023 sales process, advertising the SISP publicly on its website, and encouraging stakeholders to identify interested parties. The data room included information from Minto Metals' de-activated server, and was available within less than two weeks of the beginning of the SISP. Eight of the 51 interested parties as of September 5, 2023, were able to obtain access to the data room to undertake due diligence.

[75] The evaluation criteria for the bids included:

- purchase price;
- non-cash consideration such as royalty payments, deferred payments, assumption of liabilities;
- the effect on the likelihood of closing the transaction of any condition and due diligence requirements;
- plan for ongoing care and maintenance of the Minto mine;
- the nature and sufficiency of funding for the proposed transaction;
- planned working relations with and expected benefits that may accrue to the Selkirk First Nation, including royalty payment assumptions;
- impact on former employees of Minto Metals and Yukon businesses;
- recognition of compliance bond requirements by the Yukon government and any other security required by other regulators;
- previous technical, financial, environmental, regulatory and operational experience of the bidder, including its willingness and ability to obtain and maintain any necessary regulatory approval and compliance in connection

with the ownership, development, exploration, operation or care and maintenance of the Minto mine, and its associated capital expenditures, timelines and mining targets; and

- historical health, safety and environmental record and operational experience with similar undertakings, and record of successful restart of mines from care and maintenance status.

[76] The SISP provided that the sale of assets would be "as is, where is", and would require the transfer of licences, permits, and agreements necessary for ongoing operation.

[77] The Receiver's rejection of all three non-binding bids demonstrated their attempts to obtain the best price and act providently. Acting providently in this context included a consideration of the benefits of an operating mine and the regulatory/permitting issues and continuation of the reclamation and closure activities, including ongoing access to the bond.

Bidder 1

[78] Bidder 1, a British Columbia company operating in critical minerals, with mining projects in and outside of Canada and a market capitalization of $30 million, did not offer enough cash. Their bid also required the Yukon government to continue to assume the remediation/reclamation liabilities and there was uncertainty about transferring the permits and licences to the Bidder. The Receiver's rejection of this bid was prudent, fair, and not arbitrary.

Bidder 2 - Fiore Group

[79] Bidder 2, now known as Fiore, was a team of mine explorers, developers, and operators with over three decades of experience in starting up mining companies around the world. Between September 1 and October 9, 2023, the Receiver met on at least 12 occasions with Fiore virtually or through coordinated meetings with Fiore and other stakeholders. Despite the Receiver's assessment of Fiore's initial non-binding bid submitted on October 9 as economically unattractive as a result of not providing sufficient cash to fund the transaction, and inappropriately requiring the Yukon government to indemnify the closure liabilities, the Receiver continued discussions with Fiore at the request of Selkirk First Nation.

[80] During the discussions, Fiore presented several informal offers that conflicted with later non-binding offers, leaving the Receiver uncertain about Fiore's intentions.

[81] On November 1, 2023, Fiore submitted its third non-binding bid, proposing the acquisition of Minto Metals through an asset purchase or a share purchase by way of a reverse vesting order, at a purchase price of $15.25 million. This consisted of $2.25 million cash up front and $3 million or 75% of net proceeds of surplus asset sales within six months of closing. The remaining $10 million would be paid at three different times, conditional on the recommencement of commercial production and sale of certain amounts of copper. Conditions included:

- no obligation on Fiore for the indebtedness or liabilities of Minto Metals;
- the maintenance of all mining claims, leases, licences and permits until closing, and regulatory authorizations remaining in place;

- continuation by Yukon government of the reclamation and closure activities by using the reclamation bond secured by Zurich and indemnified by Capstone, separate from care and maintenance and future operations;
- the continuation or replacement by Fiore of the reclamation bond upon the restart of the Minto mine with a new mine plan and new reclamation and closure plan; and
- the continuation of the indemnification by Capstone of the reclamation bond, and their affirmation of support of the Fiore bid.

[82] Fiore's bid contained these additional aspects:

- provision of significant unspecified equity interests and governance responsibilities to Selkirk First Nation in the new company;
- commitment to work with Selkirk First Nation directors, officers, and senior management in the management and funding of the Minto mine upon restart;
- commitment to use qualified Yukon businesses and suppliers;
- discontinuance of the dewatering of the underground mine;
- initiation of an exploration and drilling program and completion of an updated feasibility study after reduction of environmental liabilities; and
- obtaining equity financing of $10-$20 million during the first year to fund care and maintenance and exploration.

[83] The Receiver's concerns with Fiore's proposal were: 1) the insufficiency of the cash commitment: the initial $2.25 million would result in minimal distribution to the

creditors, and uncertainty was created by a substantial portion of the cash consideration being conditional upon future events such as the commercial production of specific amounts of copper concentrate, over which the Receiver had no control; 2) it was unclear how the care and maintenance activities were to be carried out by Fiore and how the reclamation/closure activities to be continued by the Yukon government would be defined, separated and implemented in the context of the reclamation bond requirements and the regulatory permitting requirements; 3) Fiore's general lack of familiarity with the Minto mine, and with the authorizations needed for exploration activities, as well as a significant amount of outstanding due diligence, mainly related to the ability of the completion of reclamation and closure activities, with bond access, and the exploration activities to occur simultaneously; 4) Fiore's contacting of stakeholders and officials outside of the SISP process in an apparent attempt to create leverage for its bid, and Fiore's request for disclosure by the Receiver of a minimum bid suggested a failure to respect and appreciate the need for integrity and fairness of the bidding process.

[84] These reasons for rejecting the Fiore revised bid of November 1, 2023, showed the Receiver's attempt to get the best price and to act providently. The uncertainties created by the lack of due diligence on the issues affecting reclamation required the exercise of caution by the Receiver.

Bidder 3 – Granite Creek Copper Ltd.

[85] Bidder 3, now known to be Granite Creek, was a Canadian exploration company, familiar with operations in the Yukon. Their revised non-binding bid was to acquire Minto Metals through an asset purchase or through shares by way of a vesting order at the

Receiver's determination. Their price was $18 million consisting of $5 million in cash on closing, $3 million in cash, 180 days after closing, without conditions, and $10 million on the restart of the Minto mine or the occurrence of commercial production. They provided a commitment letter to the Receiver for the initial cash amount of $6 million. A material condition was the carrying out by the Yukon government of closure activities, utilizing the reclamation bond to reduce existing liabilities. Granite Creek would perform their exploration work once the Minto mine was ready for restart.

[86] On completion of the initial exploration work, Granite Creek would raise an additional $16 million for a 20,000 to 30,000 metre drilling program to expand the resource base and conduct a feasibility study, estimated to take 24 months. Then Granite Creek would seek a mine operator partner, raise additional capital for a restart of the mine, and on restart would assume all permits and licences associated with the mine, including those related to the existing reclamation bond, and assume or post new reclamation security as required by the regulatory assessors.

[87] Granite Creek offered Selkirk First Nation 12.5% interest in the new company and one of four seats at the board of directors.

[88] Noting Granite Creek's reasonable price offer, the Receiver commended their well-researched, flexible, and thoughtful approach to the complexities of the proposed transaction. Granite Creek respected the Yukon government concerns about the need to continue the reclamation activities with access to the bond.

[89] The Receiver negotiated a term sheet with Granite Creek in January 2024. In February 2024, the Receiver met with the key stakeholders to discuss the ability of the Yukon government to access the reclamation bond and the permits and licences to

continue with reclamation activities during the proposed transaction, how the permits and licences could be held by the Receiver on behalf of Minto Metals until Granite Creek was ready to assume them, what property would be transferred on closing to allow for exploration activities, what property and assets would be transferred to Granite Creek once it was ready to restart the mine, how would Granite Creek access the mine on closing, and what negotiations, meetings, and agreements with the Yukon government would be necessary to coordinate the continuing reclamation and closure plan with the proposed restart of the operations.

[90] The Receiver's concerns about the Granite Creek bid were: 1) the financial capability of Granite Creek as identified by the stakeholders; 2) uncertainty around the future mine operation because Granite Creek is an exploration company; 3) the absence of a regulatory framework to freeze or postpone the permits and licences while Granite Creek conducted exploration over the following two-to-three years, thereby increasing uncertainty and costs for Minto Metals because of, among other things, the permit requirement to report annually; 4) uncertainty about the delayed payment of $3 million and the valuation of the promised $10 million assumption of liabilities.

[91] After further meetings with the stakeholders to discuss these and other concerns, the Receiver renegotiated the term sheet with Granite Creek to reflect changes requested by the stakeholders: namely, that Granite Creek perform exploration and development activities to a certain standard; they create a mine operation restart plan; and that confirmation would be received that reclamation activities are not occurring on the property on which exploration would occur.

[92] Despite significant discussions, the Receiver nevertheless identified insurmountable concerns surrounding the Yukon government's ongoing ability to access to the reclamation bond and continue their reclamation and closure work under Granite Creek's proposed transaction. The Receiver was not confident of the support of the key stakeholders on this issue as well as on the issue of Granite Creek's financial capability. As a result it recommended rejection of the Granite Creek proposed transaction.

[93] However, Granite Creek presented to the Receiver a modification to their bid in March 2024 and the Court granted the Receiver's request for an adjournment to enable all stakeholders to consider the revised bid. As noted above, Granite Creek proposed a nine-month exclusivity agreement to allow them to make further efforts to address the Receiver and stakeholder concerns, especially around the reclamation bond and financial capability. They also included an option to negotiate the sale of any non-essential equipment from the mine, to split the proceeds with the Receiver, and receive a 20% commission.

[94] The Receiver ultimately rejected Granite Creek's revised bid, primarily because of the inability of key stakeholders to agree on the nine-month delay. As noted above, while Selkirk First Nation did not disagree with that time period, the Yukon government had concerns about its effect on the planning of the ongoing reclamation and closure work and access to the bond. Capstone and others were concerned about the diminishing value of the assets over that time period.

[95] The Receiver demonstrated a concern for obtaining the best price as well as prudence, reasonableness and foresight in negotiating for as long as reasonably possible but ultimately rejecting Granite Creek's bid. The concern about Granite Creek's

ability to meet the financial obligations it promised were considered. Their inability to address the regulatory permitting and environmental remediation concerns was also a sufficient reason to reject the bid. The Receiver acted fairly and prudently by helping to ensure the abandoned mine did not become a major liability upon the taxpayers of the Yukon, and reducing exposure to environmental risks.

ii) Consideration of Interests of all Parties

[96] Selkirk First Nation argued that the Receiver did not sufficiently consider its interests, or the economic interests of the Yukon (although it is not a party), in keeping the mine operational. They argued their interests as a self-governing First Nation with the mine on their settlement land and the significant equity and governance opportunities offered by Fiore constituted an "exceptional circumstance" as set out in the jurisprudence, allowing the Court to decline to follow the Receiver's recommendation. They noted the contribution to economic reconciliation with Selkirk First Nation that the continued operation of the mine would provide.

[97] Exceptional or special circumstances were referenced in the *Soundair* case (at 25-6):

> … The court should not proceed against the recommendations of its Receiver except **in special circumstances** and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> …
>
> It is equally clear, in my view, though perhaps not so clearly enunciated, that **it is only in an exceptional case** that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has

> acted reasonably, prudently and fairly and not arbitrarily. [*Crown Trust Co v Rosenberg* (1986), 39 DLR (4th) 526 ("*Crown Trust*") at 548 and 550 (my emphasis)

[98] The dissenting judgment described the facts in the *Soundair* case as exceptional in the sense that upon the application made for approval of the sale of the assets of the debtor, two competing offers were placed before the court. The two secured creditors were unanimous in their position that they desired the court to approve the sale to 922, the company that the Receiver did not recommend. This is a factual difference from the current case, in which the disagreement is about whether or not the bidding process should be continued. Further, although there is significant support for a new sales process in this case, that support is not unanimous among the creditors and interested parties.

[99] This Court was not provided with any other cases defining exceptional circumstances in the context of a receivership sales process.

[100] Here, Selkirk First Nation, supported by some lienholders and other stakeholders, are advocating for a new sales process, not court approval of a sale to Fiore, (although all supportive parties appear to favour Fiore's most recent non-binding bid). This Court cannot accept the dissent in *Soundair* as a precedential legal principle, and in any event, as noted, there are significant distinguishing facts. Further, Selkirk First Nation's argument about exceptional circumstance is not process-oriented as in the *Soundair* dissent, but is based on their status as a self-governing First Nation owner of the land.

[101] There is no doubt that as a self-governing First Nation owner of the land, Selkirk First Nation is in an enviable position of receiving royalty payments and profiting in

many other ways from an operating mine. Their desire to continue to discuss the possibilities of continuing the mine operation is easy to understand. As noted by counsel for Maynbridge, their interests are primarily economic and financial, like those of the other stakeholders. This is an undeniably valid interest but is not an exceptional circumstance as understood in law.

[102] Unlike Granite Creek, who specified that Selkirk First Nation would be getting a 12.5% interest, Fiore did not specify the proportion or type of interest offered to Selkirk First Nation in their November non-binding bid. While in their final non-binding bid Fiore advised they would be providing Selkirk First Nation with a controlling equity and governance interest, no details were provided. The Receiver had no way to assess it, except that they knew it was more than 12.5%.

[103] The significant involvement of Selkirk First Nation in a new entity planning to restart the mine operation was an important assessment factor and satisfied part of the evaluation criteria. But the outstanding concerns about the need to continue the environmental remediation with access to the security bond, and whether the regulatory permits could allow for simultaneous exploration and remediation were fundamental to the future mine operation.

[104] Consideration of interests of other parties by the Receiver was evident. They met regularly with key stakeholders – identified as Selkirk First Nation, Yukon government and Capstone – and bidders and held 40 meetings in total. The lienholders stated they had two meetings with the Receiver, confirming the Receiver's focus upon the three key stakeholders, including Selkirk First Nation, but not to the exclusion of other stakeholders. These meetings, as well as the Receiver's good faith assessment of the

modified Granite Creek bid, demonstrated their recognition of the interests of those stakeholders in continuing the mine operation.

[105] It is noteworthy that many of those who were in favour of another sales process have been promised an equity participation through a share warrant or other arrangements not yet known to this Court or the Receiver. Like Selkirk First Nation, they stand to benefit substantially from the mine reopening. Their support for a new sales process must be viewed in that context.

[106] The people of the Yukon are not a party to this proceeding, so there is no legal requirement for the Receiver to consider their interests. There is no doubt that businesses of the Yukon, as well as the population in general would benefit economically from the ongoing successful operation of the mine. The Receiver was aware of this; hence their efforts with the SISP to maximize asset value. Through its many meetings with all of the stakeholders, and its assessments of the bids, the Receiver necessarily considered the various interests of people of the Yukon: an operating mine's undoubted economic benefits, and an abandoned mine's proper reclamation and closure to ensure environmental remediation and taxpayer cost containment.

iii) Efficacy and Integrity of the Sale Process

[107] Selkirk First Nation raised several arguments about the Receiver's failure to conduct a sales process with integrity and efficacy:

- the Receiver's criticism of Fiore's lack of due diligence was inappropriate because it was a non-binding bid, not a binding bid;

- the Receiver and the Yukon government did not meet with Fiore enough in November 2023 to discuss bid expectations;
- the Receiver unfairly disclosed the confidential Fiore November bid before the May court hearing; and
- the Receiver enhanced the Granite Creek revised bid to the detriment of the Fiore bid.

[108] The lienholders did not express specific concerns about the conduct of the SISP.

a) Due diligence

[109] The Receiver's expressed concerns about Fiore's lack of due diligence were appropriate for a non-binding bid. In their third report, the Receiver wrote that by December 2023, over three months after the commencement of the process, it was clear Fiore was still unfamiliar with the Minto mine, and the authorizations related to Minto's permits and licences associated with their exploration plans. This level of expected due diligence is consistent with a non-binding bid, especially when the evaluation criteria are assessed – such as previous technical, financial, environmental, regulatory and operational experience of the bidder, including its willingness and ability to obtain and maintain any necessary regulatory approval and compliance in connection with the ownership, development, exploration, operation, or care and maintenance of the Minto mine, and its associated capital expenditures, timelines and mining targets; recognition of compliance bond requirements by the Yukon government and any other security required by other regulators; and historical health, safety and environmental record and operational experience with similar undertakings, and record of successful restart of mines from care and maintenance status. Further, counsel for the Yukon

government at the May 10 hearing confirmed two recent phone calls with Fiore revealed their clearer understanding of these criteria and existing issues and expectations; however Fiore had no proposals about how to meet the challenges.

b) Insufficient meetings

[110] As noted above, the Receiver met virtually with Fiore or facilitated meetings among stakeholders, including the Yukon government, and Fiore on at least 12 occasions after receiving their initial non-binding bid. The meetings resulted in at least one revised bid. There were also email exchanges for clarification. The Yukon government provided Fiore a copy of the implementation plan with details of the reclamation work immediately after a meeting on December 1 with Fiore, the Receiver, and Selkirk First Nation. It is not clear how more meetings would have made a difference, especially given Fiore's stated position in December that they would not be conducting further due diligence or addressing the reclamation, closure and bond questions, or providing a detailed proposal for its exploration plans and activities to determine their impact on the Yukon government's activities, until a price point was agreed. Fiore further stated in December they were unwilling to increase their price, which was unacceptably low. The initial amount would result in minimal distribution to the creditors and further sums were conditional upon events beyond the Receiver's control, such as production of concentrate.

[111] The Receiver conducted or facilitated a sufficient number of meetings with Fiore in the fall of 2023.

c) Unfair disclosure of November bid

[112] The Receiver did not unfairly disclose the Fiore November bid because: 1) the November bid was rejected by the Receiver, and Fiore was no longer part of the SISP; 2) in effect, Fiore disclosed the November bid themselves, by providing their similar final non-binding bid to the Court for the May hearing. The November offered price was included in the Receiver's reports, to explain their rejection of the offer and their efforts to obtain the best price, as required. It was used to compare to the Fiore disclosed final non-binding bid price offer. The integrity of the SISP was not compromised by this.

d) Unfair enhancement of Granite Creek bid

[113] The allegedly unfair enhancements by the Receiver of Granite Creek's bid referenced by Selkirk First Nation were: 1) the minimizing of their financial capabilities and 2) the unconditional characterization of the $2.2 million up-front cash payment, when the proposal was for Granite Creek to have the option to negotiate the sale of any non-essential equipment from the mine, split the proceeds with the Receiver, and receive a 20% commission.

[114] Both issues were set out clearly by the Receiver in their reports – concerns by stakeholders about Granite Creek's ability to raise financing formed one of the reasons for rejecting their bid, and the condition about sale of non-essential equipment in the modified bid was clearly stated in the supplement to the third report. This condition did not exist in Granite Creek's first non-binding bid and the Receiver did not unfairly describe or enhance it.

[115] These criticisms reflect Selkirk First Nation's disagreement with the Receiver's decision to terminate the SISP without assessing the Fiore bid. Selkirk First Nation

argued that the Fiore final non-binding bid addressed many of the Receiver's reasons for rejection set out in the third report.

[116] However, the final non-binding bid still contained no plan to address the reclamation and closure, bond, and regulatory permitting complexities. Fiore referred to further necessary discussions with YG, and the other regulators. The only changes were an increase in the purchase price and the inclusion of the lienholders in the equities, to address their debt. The reference to an equity interest and governance participation for Selkirk First Nation remained but was described as "controlling" without further detail.

[117] The final non-binding bid from Fiore group was developed well after the deadline for bids, at the request of Selkirk First Nation and certain lienholders. To replace the Receiver – conducted SISP with a new court-supervised sales process, at this stage, would undermine the integrity of the Receiver's process, and require significant justification.

[118] Where a receiver has not conducted a sales process properly, conducting a court-supervised process after the receiver's sales process may be appropriate. For example, the receipt by a court of a substantially higher offer after the receiver recommended another offer may justify another process, depending on the receiver's actions. However, as the Court of Appeal wrote in *Soundair* "that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court" (at 14).

[119] In assessing whether the receiver has properly conducted its activities, "[t]he court must exercise extreme caution before it interferes with the process adopted by a

receiver to sell an unusual asset" (*Soundair* at 20). While the court must ensure the process is fair, it "ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise" (*Crown Trust* at 548).

[120] Here, the criticisms of the Receiver's process were insufficient to justify a new court-supervised sales process. No party objected to the SISP, or to the Receiver's decision not to accept Fiore's non-binding bid in November 2023, or to the Receiver's continuing negotiation with Granite Creek. The only concerns expressed to the Court by Selkirk First Nation were ensuring the process was not rushed, and by some lienholders about the lack of timely information from the Receiver. These were addressed through court adjournments before approval orders, and Court directions to hold conference calls with all stakeholders to ensure they had the relevant information.

[121] The proposed new court-supervised process was described in general terms by Selkirk First Nation. A mine is an unusual asset, with complexities similar to those of an airline, the subject matter in *Soundair*. The Court is not equipped with the knowledge and expertise to assess and evaluate on its own an asset as complex as an abandoned mine, and Selkirk First Nation did not suggest this approach. However, the court-supervised process suggested by them did not contain any suggestions about the means of determination of a fair process, the selection of evaluation criteria, the development of a marketing process, the management of and access to the data room, answering questions from potential bidders, facilitating discussions with potential bidders and the stakeholders about the bids, in particular to address the environmental remediation and regulatory/permitting complexities, and assisting with finalizing or

clarifying the bids. Further, there was no information on how received bids would be assessed, by whom, and what weight would be given to each assessor's view, except Selkirk First Nation's acknowledgement that the Receiver's views should have greater weight. While ultimately in a court-supervised process, these decisions would fall to the Court, guidance and suggestions are necessary and helpful.

[122] Selkirk First Nation's proposed new bidding process is inconsistent with the overriding policy objectives of bankruptcies and insolvencies – urgency and commercial certainty. Optimistically, the delay created by the proposed sales process would be at minimum four months, but possibly longer. In the meantime, the assets would continue to depreciate, and stakeholders would continue to receive no return. Further, the asset liquidation window would be at risk of delay by 6-12 months, if the sales process were not successful. There would be ongoing uncertainty about the path forward until the sales process, also uncertain, were completed. The Yukon government is currently at the stage in the reclamation and closure process where decisions to implement next steps are required. If a change in direction requires changes to decisions, the financial implications for the Yukon government could be significant.

[123] It is not clear who will bear the risk and expense of a new sales process as no party has offered to fund it. There are two problems with Selkirk First Nation's suggestion that the $200,000 non-refundable deposit offered by Fiore could satisfy that funding need. First, the amount is unlikely to be sufficient, given what the Receiver has spent to date on its SISP and given the additional work required for a court-supervised process. Second, that amount would only be forthcoming if the Fiore bid is accepted for consideration, making it conditional.

[124] The criticisms levelled at the Receiver about the sales process it conducted and seeks to terminate do not affect its efficacy and integrity. There is no basis for a new court-supervised bidding process as the Receiver conducted an efficacious process with integrity. Implementation of the new sales process would undermine the integrity of the Receiver's process. As noted by the Court of Appeal in *Soundair*, the integrity of an insolvency process must be respected "in the interests of both commercial morality and the future confidence of business persons in dealing with receivers" (McKinley JA, in agreement with Galligan JA, at 1).

iv) Unfairness in the Working Out of the Process

[125] Objections related to unfairness in the working out of the process have been substantially addressed above and will not be repeated. No party has demonstrated the Receiver's unfairness in the working out of the SISP sufficient to justify not accepting the Receiver's recommendations.

CONCLUSION ON TERMINATION OF SISP AND IMPLEMENTATION OF LIQUIDATION PLAN

Termination of SISP

[126] The Receiver concluded that termination of the SISP was the best course of action because: 1) additional exploration and assessments were required before a restart of the mine, estimated to take between six months to three years; 2) the current authorizations and permits do not allow a purchaser to undertake mining operations in areas of the Minto mine subject to exploration and the current water licence does not authorize extraction of all the mineral resources within the claims, and this could delay any restart of the operation; 3) the new purchaser would have to address the $19 million shortfall in reclamation and closure security, and develop a new operations and

reclamation and closure plan with additional security, currently unknown until plans and permit amendments in place; 4) there were insurmountable transition issues relating to the use of infrastructure between the current ongoing reclamation and closure work and the restart of the mine; and 5) there is a significant risk of Yukon government losing access to the outstanding reclamation bond (approximately $50 million) to complete the reclamation and closure as a result of the bidders' activities.

[127] Despite significant discussions facilitated and encouraged by the Receiver among the key stakeholders and bidders to address these identified challenges, they remained unresolved, with no clear timing indication of their ability to be resolved.

[128] The new bidding process proposed by Selkirk First Nation was not recommended by the Receiver because any new bids would be unlikely to contain solutions to the complexities, within the proposed time, due to the large outstanding due diligence required. No entity has offered to fund the new process and the Receiver has exhausted the monies available to it.

[129] In sum, for the reasons noted above, the Receiver conducted the SISP fairly and acted prudently, reasonably, and without arbitrariness in its proposal to terminate it.

Liquidation Plan

[130] The Receiver has prepared an extensive assessment of the liquidation of assets. It provided the plan for review by the parties who signed confidentiality provisions and answered questions in several conference calls.

[131] The Receiver provided a liquidation analysis including estimated recoveries associated with the two bidders and the appraised liquidation values based on three

different assumptions: forced liquidation value, orderly liquidation value and fair market value.

[132] The Receiver has worked out an arrangement with counsel to several equipment lessors the release of their equipment subject to the Receiver's charges and borrowing charges and other priority claims. The Receiver has discussed with the Yukon government their intention to assert security over the assets for the costs of remedying environmental condition or damage affecting real property.

[133] There were no objections to the Receiver's liquidation plan and analysis from those who reviewed it.

Sealing Order

[134] Originally, the Receiver requested the entire confidential supplementary fourth report containing the details of the liquidation plan be sealed because of the harm to obtaining value from Minto Metals' assets created by revealing the liquidation value estimated by the Receiver. Their position was revised at the hearing to request only the last two pages of the confidential report be sealed. Those pages contained the financial information; the balance of the report set out the proposed process, which had been disclosed to the parties and the Court in the Liquidator's earlier report and did not contain confidentially sensitive economic information.

[135] Applying the three-step test for a restriction on court openness set out in *Sherman Estate v Donovan*, 2021 SCC 25 at para. 38, in this case the Receiver has satisfied the test for sealing the last two pages by establishing: 1) public disclosure of the value and pricing of the Minto Metals assets to be marketed for sale could result in reduced recoveries and a detrimental impact on creditors; 2) there is no reasonable

alternative to a time limited sealing order of the part of the report containing the asset value and pricing information; and 3) the benefits of maximizing recoveries for the creditors by sealing that information outweigh any negative effects on the open-court principle.

ORDER

[136] The Receiver has fulfilled its primary and secondary obligations with its proposal to terminate the SISP and liquidate the assets – to maximize value from the assets for the stakeholders, and to ensure the integrity of any sales process. The following orders are granted for the reasons set out in this decision:

1. The Order requesting approval of the Receiver's activities as set out in the Supplement to the Second Report and the Third Report is granted in the form submitted to the Court.
2. The Order requesting a Sealing Order over the Receiver's Confidential Supplement to the Fourth Report to Court dated May 6 is not granted. An order granting the sealing of the final two pages of that Confidential Supplement to the Fourth Report to Court dated May 6 is granted. With that amendment in the appropriate places of the form of Order submitted to the Court, that Order will be granted. The information currently in the Confidential Supplement to the Fourth Report except for the last two pages shall be filed with the Court and made publicly available.
3. The Order requesting approval of the Receiver's activities as set out in the Supplement to the Third Report, the Fourth Report, and the Confidential Supplement to the Fourth Report is granted in the form submitted to the

Court, except for the amendment needed to reflect the sealing of only the last two pages of the Confidential Supplement to the Fourth Report.

4. The Order requesting authorization to proceed with the Liquidation Plan is granted in the most recent form of order submitted to the Court that references the ongoing access of the Yukon government to the Minto mine site and use of Minto Metals' equipment in accordance with the Receivership Order dated July 24, 2023, with the appropriate amendment to reflect the sealing of only the last two pages of the Confidential Supplement to the Fourth Report.

_____
DUNCAN C.J.

TAB 9

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-057679-199

DATE: April 27, 2023

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

In the Matter of *The Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 of Fortress Global Enterprises et al.:

INVESTISSEMENT QUÉBEC
FIERA PRIVATE DEBT INC.
Applicant / Secured Creditors

and
FORTRESS GLOBAL ENTERPRISES INC.
FORTRESS SPECIALTY CELLULOSE INC.
FORTRESS BIOENERGY LTD.
FORTRESS XYLITOL INC.
9217-6536 QUÉBEC INC.
Debtors

and
DELOITTE RESTRUCTURING INC.
Applicant/Monitor

JUDGMENT ON APPLICATION TO EXTEND A STAY OF PROCEEDINGS AND AN APPLICATION TO APPROVE A SETTLEMENT AGREEMENT WITH A FORMER EMPLOYEE
(Sections 11 and 11.02(2) of the *Companies' Creditors Arrangement Act*)

OVERVIEW

[1] The Court is seized with two motions:

[2] In the first motion (the "**Stay Application**"), the Applicant, Investissement Québec ("**IQ**") in its capacity as interim lender and secured creditor of the Debtors, seeks the issuance of an order:

2.1. to extend the Stay Period (as defined below) until June 23, 2023;

2.2. to confirm that the Stay (as defined below) applies to the SAP Proceedings (as defined below); and

2.3. to approve the activities of Deloitte Restructuring Inc., in its capacity as court-appointed monitor of Fortress (as defined hereinafter) ("**Deloitte**" or the "**Monitor**") as described in its Nineteenth report to this Court dated April 25, 2023 (the "**Nineteenth Report**");

2.4. to allow Appendixes A and B of the Nineteenth Report to be filed under seal.

[3] In the second motion (the "**Settlement Approval Application**"), the Monitor seeks the issuance of an order:

3.1. to approve the terms and conditions of the Settlement Agreement (as defined below) between Fortress and a Former Employee (as defined hereinafter);

3.2. to authorize the Monitor to enter into and execute the Settlement Agreement for and on behalf of Fortress; and

3.3. to allow the Settlement Agreement as well as the exchange of documents which led it to be filed under seal.

CONTEXT

[4] On December 16, 2019, Justice Marie-Anne Paquette, j.s.c. (as she then was) issued a first-day initial order (the "**First Day Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of Fortress Global Enterprises Inc., Fortress Specialty Cellulose Inc., Fortress Bioenergy Ltd., Fortress Xylitol Inc. and 9217-6536 Québec Inc. (collectively, "**Fortress**" or the "**Debtors**"), pursuant to which:

4.1. Deloitte was appointed as monitor of the Debtors;

4.2. all claims against the Debtors, their properties and their directors and officers were stayed (the "**Stay**") until December 26, 2019 (the "**Stay Period**"); and

4.3. the Debtors were authorized to borrow from IQ an amount of up to $1,000,000 on the terms and conditions of the Interim Financing Term Sheet (the "**Interim Financing Term Sheet**"), which was to be secured by a super-priority charge and security over all of the assets of each of the Debtors in the aggregate amount of $1,200,000 (the "**Interim Lender Charge**").

[5] On the same day, the Court appointed Deloitte as receiver to the Debtors for the sole purpose of allowing their respective employees to recover amounts which may be owing to them pursuant to the *Wage Earner Protection Program Act*.[1]

[6] On December 26, 2019, the Court issued an Amended First Day Order which:

6.1. Extended the Stay Period until January 10, 2020;

6.2. Authorized the Debtors to borrow from IQ an amount of up to $1,500,000 under the terms and conditions set forth in the Interim Financing Agreement, to be secured by an Interim Lender Charge of $1,800,000; and

6.3. Authorized the Debtors (with the prior approval of the Monitor), or the Monitor (on behalf of the Debtors), to pay amounts owing for goods or services actually supplied to the Debtors either prior to or after the date of this Order up to a maximum of $250,000, to the extent that, in the opinion of the Monitor, the supplier was essential to the business and ongoing operations of the Debtors.

[7] On January 10, 2020, the Court issued an Amended and Restated Initial Order which provided:

7.1. an extension of the Stay Period until May 2, 2020;

7.2. the authorization for the Debtors to borrow from IQ an amount of up to $6,000,000 under the terms and conditions set forth in the Interim Financing Agreement, to be secured by an Interim Lender Charge of $7,200,000;

7.3. the creation of a key employee retention plan (the "**KERP**") and a charge in the amount of $610,000 to secure the payment of Fortress' obligations under the KERP (the "**KERP Charge**"); and

7.4. an increase in the Monitor's powers, including the powers to conduct and control the financial affairs and operations of the Debtors, and carry on the business of the Debtors.

[8] The Court also issued a Claims Procedure Order which established a "Claims Bar Date" of March 16, 2020 (except for restructuring claims).

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1 *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1.

[9] Since then, the Court has rendered further orders, including:

9.1. an order dated March 23, 2020 clarifying that the Stay applied to proceedings commenced before the *Tribunal Administratif du Québec* (the "**TAQ**") and suspending penal proceedings before the Court of Quebec, criminal division;

9.2. orders extending the Stay Period (which is currently set to expire on April 28, 2023);

9.3. orders to approve a First Amending Agreement, a Second Amending Agreement, a Third Amending Agreement, a Fourth Amending Agreement, a Fifth Amending Agreement and a Sixth Amending Agreement to the Interim Financing Term Sheet, providing for an increase to the Facility Amount (as defined in the Interim Financing Agreement) to a total amount of $33,800,000, and a corresponding increase to the Interim Lender Charge to a total amount of $40,460,000; and

9.4. an order dated February 11, 2022 approving a litigation funding agreement with Omni Bridgeway (Fund 5) Canada Investments Limited to allow Fortress to pursue proceedings against Les Pompes Gould Inc.

[10] On April 20, 2023, the undersigned was appointed to case manage the present proceedings.

ANALYSIS

1. The Stay of Proceedings

[11] The Debtors' restructuring efforts have proven challenging.

1.1 Pre-Filing Solicitation Efforts

[12] Prior to the issuance of the First Day Order, a sale and investment solicitation process ("**SISP**") was conducted by the Debtors with the assistance of its financial advisors (and in consultation with IQ and Deloitte).

[13] Despite these efforts, no offer, indication of interest or other proposal were submitted to the Debtors prior to the filing of the proceedings.

1.2 The 2021 SISP

[14] Further to the commencement of the CCAA proceedings, the Debtors and the Monitor, in consultation with IQ and Fiera, held discussions with various parties on an informal basis regarding a potential transaction which would allow the continuation of the Debtors' operations.

[15] On September 3, 2020, the Monitor received an offer from one of these parties for the acquisition of Fortress Bioenergy Ltd.'s ("**Fortress Bioenergy**") cogeneration facility (the "**Cogeneration Facility**"). The offer was shared with IQ and Fiera and was subsequently refused. The Monitor also received a draft letter of intention for the same facility, which was also shared with IQ and Fiera, and was subsequently refused.

[16] In 2021, the Debtors and the Monitor continued to have active discussions with various interested parties with a view of securing a binding offer with a party willing to continue the operations of the Debtors as a going concern.

[17] Despite these continued efforts, no agreement was reached.

[18] In late July 2021, the Monitor met with respective representatives and counsel of IQ and Fiera to discuss the status of this file as well as the next steps.

[19] The parties agreed to establish a formal deadline for the submission of letters of intent as well as the terms and conditions in connection with the acquisition of the Debtors' business and assets (the "**2021 SISP**").

[20] The Monitor communicated with (22) potentially interested parties, including parties that had previously manifested some interest in acquiring the Debtors' business and assets (parties potentially interested in a going concern transaction and parties potentially interested in submitting liquidation offers whereby the Debtors' assets would be decommissioned and dismantled).

[21] On August 4, 2021, the Monitor sent these parties solicitation materials and advised them that offers should be submitted to the Monitor by no later than September 15, 2021.

[22] The Monitor received several offers (the "**2021 Offers**") from various parties including going concern offers from strategic parties as well as liquidation bids.

[23] On September 17, 2021, the Monitor presented a summary of the 2021 Offers to IQ and Fiera.

[24] Since several of the 2021 Offers contained conditions relating to IQ and the Québec government (including requests for financial support), IQ, together with the Monitor, proceeded with a detailed review of each and every one of the 2021 Offers in order to assess their respective viability.

[25] In late 2021, IQ and the Monitor decided to focus their discussions on one of the bidders (the "**Original Potential Purchaser**") and to evaluate its ability to implement a project involving the restart of Fortress' Pulp Mill and Cogeneration Facility (the "**Original Proposed Project**").

[26] Discussions and meetings were held between this Original Potential Purchaser, the Monitor, IQ as well as other governmental entities to clarify its offer, negotiate certain improvements to same and ultimately discuss the path going forward in order to properly assess the Original Potential Purchaser's Original Proposed Project and determine how this project could be implemented.

[27] Unfortunately, it became clear that certain conditions relating to the Original Proposed Project and the required participation from the Quebec government in the project could not be met.

[28] In March 2022, the Quebec government notified the Original Potential Purchaser that no agreement could be reached in connection with the Original Proposed Project.

1.3 Subsequent Discussions with Other Potential Purchasers

[29] Fortress, the Quebec government and the Monitor continued discussions with other parties and considered other potential transactions and projects involving the acquisition of Fortress' assets.

[30] In late September 2022, Fortress and the Monitor received a non-binding letter of intent, together with a business plan, from a party potentially interested in acquiring the business and assets of Fortress.

[31] Again, the offer did not result in a transaction.

[32] Fortress and the Monitor continued their discussions with several other parties which remained interested in a potential transaction involving the assets of Fortress.

1.4 The 2023 SISP

[33] On March 16, 2023, the Monitor communicated new terms and conditions to potential bidders which had shown renewed interest in Fortress' assets.

[34] By the deadline of April 14, 2023, Fortress and the Monitor had received six offers from different interested parties (the "**2023 Offers**"), including parties which had previously demonstrated an interest in a potential transaction, as well as other parties which had, until then, demonstrated no such interest.

[35] The Monitor confirms that some of the 2023 Offers were submitted by serious parties and it believes that some of these offers could be beneficial for Fortress as well as for the region of Thurso.

[36] The 2023 Offers were shared with IQ which will be proceeding with an analysis of these offers, together with the Monitor and various branches of the Quebec government.

1.5 Implementation of the "Cold Idle Plus Scenario"

[37] In parallel with the above discussions, the Monitor continued to maintain Fortress' activities to a minimum, in order to reduce operating costs, while maintaining the value of Fortress' assets for a potential purchaser in the hope that the demand for pulp and related products would increase.

[38] In accordance with the powers granted to it by the Court, the Monitor, in consultation with IQ, decided that:

38.1. Fortress Specialty Cellulose Inc.'s ("**Fortress Specialty**") specialty cellulose mill located in Thurso, Québec (the "**Pulp Mill**") would be idled indefinitely so as to minimize operating costs while market conditions improved; and

38.2. Fortress Bioenergy's Cogeneration Facility would continue to operate, but at a substantially reduced production rate.

[39] On March 24, 2020, the Quebec Government ordered the closure of all Quebec non-essential businesses due to the COVID-19 pandemic. This prompted the temporary shutdown of the Cogeneration Facility, which was intended to take place, in any event, a few weeks later given low demand for electricity and the fact that the Pulp Mill would not require to be heated during the spring and summer months.

[40] As non-essential businesses gradually reopened and the market price for dissolving pulp increased, Fortress, under the supervision and oversight of the Monitor, proceeded to restart its Cogeneration Facility between the fall of 2020 until the spring of 2021, with a view to preserve the value of Fortress' assets and maximize its revenues.

[41] As the market price for dissolving pulp remained strong,[2] Fortress, under the supervision and oversight of the Monitor, restarted the Cogeneration Facility during the fall of 2021 until the spring of 2022.

[42] However, further to the unsuccessful 2021 SISP, a decision was taken to gradually implement a "Cold Idle Plus Scenario", as described in the Monitor's Sixteenth, Seventeenth and Eighteenth Report.

[43] The scenario's goal was to allow Fortress to significantly reduce its operating expenses while it continued to work with the Quebec government to determine the eventual path forward, and, at the same time, allow it to protect and preserve any remaining value of its assets for any future transaction or project, as the case may be.

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[2] In December 2019, dissolving pulp was sold at market price of US$640 per metric ton, whereas in the first half of 2021, the market price for dissolving pulp went up to US$1,100 per metric ton. Today, the market price for dissolving pulp now ranges between US$900 to $US925 per metric ton.

[44] The Cold Idle Plus Scenario also allowed Fortress to assist the City of Thurso for the treatment of its wastewater and plan for environmental remediation of the site, which has remained ongoing over the course of the past few months.

1.6 Extension of the Stay Period

[45] The Stay Period is currently set to expire on April 28, 2023.

[46] IQ asks that the Stay Period be extended to June 23, 2023.

[47] IQ submits that this two-month extension of the Stay Period will allow IQ, together with the Quebec government and the Monitor, to assess the 2023 Offers received as part of the 2023 SISP, as well as other remaining available options.

[48] The Monitor believes that there is a strong possibility that a viable project will be selected from the recent offers, and that the Quebec government will be able to provide an indication about its interest by the end of June 2023.

[49] The main conditions of the 2023 SISP are attached to the Nineteenth Report as Appendix A. A table summarizing the main terms of the 2023 Offers is attached to the Nineteenth Report as Appendix B.

[50] Absent an order from this court ordering the extension of the Stay Period, the parties would be forced to initiate receivership or bankruptcy proceedings under the *Bankruptcy and Insolvency Act*[3] (the "**BIA**"). IQ submits that such proceedings would not significantly alter the current situation or the challenges which Fortress and its stakeholders are currently facing.

[51] However, such proceedings would require additional filing of court materials and reports which would distract funds and efforts from the primary goal of finding a viable solution.

[52] IQ, Fortress and the Monitor all believe that the maintenance of the CCAA proceedings and the Stay remain appropriate in the circumstances, especially given the 2023 Offers recently received.

[53] As indicated in the Monitor's Nineteenth Report, an updated operation budget has been prepared to continue implementing the Cold Idle Plus Scenario while Fortress and the Monitor attempt to finalize a transaction with a potential purchaser.

[54] The Cash Flow Statement contained in the Nineteenth Report indicates that Fortress should have sufficient liquidity to continue to meet its obligations in the ordinary course of business within the Interim Financing Facility that was granted to Fortress through the Sixth Amending Agreement.

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[3] *Bankruptcy and Insolvency Act*, L.R.C. 1985, c. B-3.

1.7 Filing of Appendixes A and B of the Nineteenth Report under Seal

[55] Fortress, IQ and the Monitor ask that Appendixes A and B of the Nineteenth Report be filed under seal.

[56] In *Sherman Estate v Donovan*,[4] the Supreme Court of Canada confirmed that a sealing order can only be granted in the following circumstances:

> 56.1. court openness poses a serious risk to an important public interest;
>
> 56.2. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> 56.3. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[57] These conditions are met here.

[58] Canadian courts, as a general practice, consider that all aspects of a bidding or sales process should be kept confidential. The sealing of this information protects the integrity of the process and ensures that, while the process is running its course, all potential bidders are treated equitably, and no one obtains an unfair advantage. Courts have considered that publicly divulging such information would negatively impact on future realizations on the assets and the parties' efforts to maximize value for stakeholders. The commercial interests of the monitor, bidders, creditors and other stakeholders to promote a fair sales and solicitation process in restructuring, insolvency or liquidation matters constitutes an important public interest.[5]

[59] A sealing order is required to protect this interest. There are no reasonable alternatives to the sealing order. No stakeholders will be materially prejudiced by sealing the information. The requested order is limited to Appendixes A and B of the Nineteenth Report which contains the information about the process and the bids received in the context of the 2023 SISP.

[60] As a matter of proportionality, the benefits of the limited order outweigh its negative effects.

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4 *Sherman Estate* v. *Donovan*, 2021 SCC 25, para. 38.

5 *Ontario Securities Commission* v. *Bridging Finance Inc.*, 2022 ONSC 1857, para. 53; *Yukon (Government of)* v. 2022 YKSC 2, paras. 39 to 43; *Danier Leather Inc. (Re)*, 2016 ONSC 1044, paras. 82 to 86; *GE Canada Real Estate Financing Business Property Co* v. *1262354 Ontario Inc*., 2014 ONSC 1173, paras. 33 and 34; *Look Communications Inc* v. *Look Mobile Corp* (2009), 183 ACWS (3d) 736 (Ont Sup Ct); *887574 Ontario Inc.* v. *Pizza Pizza Ltd.*, (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div.).

1.8 Application of the Stay to the SAP Proceedings

[61] Prior to the initiation of the CCAA proceedings, Fortress Specialty operated the Pulp Mill under an authorization certificate (the "**Authorization Certificate**") issued by the *Ministère de l'Environnement, de la Lutte contre les changements climatiques, de la Faune et des Parcs* (the "**MELCC**") in accordance with the *Loi sur la qualité de l'environnement*,[6] (the "**LQE**") and the *Règlement sur les fabriques de pâtes et papier*.[7]

[62] As a result of the Debtors' financial situation, the Pulp Mill's operations have been suspended since on or about October 8, 2019.

[63] On July 7, 2021, the *Bureau de réexamen* of the MELCC imposed a monetary administrative penalty in the amount of 10,000$ (the "**SAP**") against Fortress Specialty (the "**SAP Decision**").

[64] On August 6, 2021, Fortress Specialty contested the SAP Decision before the TAQ in file number STE-Q-257041-2108 (the "**SAP Proceedings**").[8]

[65] IQ seeks a declaration from the Court specifying that the Stay applies to the SAP Proceedings.

[66] The MELCC is a "regulatory body" under section 11.1 of the CCAA.

[67] As such, a stay order under section 11.02 of the CCAA generally does not affect an investigation, suit, proceeding or action by the MELCC in respect of the debtor company unless the Court is of the opinion that:

> 67.1. a viable compromise or arrangement could not be made in respect of the company if the regulatory proceeding is not stayed; and
>
> 67.2. it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[68] IQ submits that the SAP could prevent the closing of a transaction in respect of the Debtors. It points out that certain of the letters of intention received by the Debtors include the Debtors' permits and licences as part of the purchased assets.

[69] The Monitor was informed that if the SAP is confirmed, the MELCC could, without any other motive, refuse to amend or renew Fortress Specialty's Authorization Certificate in accordance with section 115.5 of the LQE.

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6 *Loi sur la qualité de l'environnement*, RLRQ, c. Q-2.
7 *Règlement sur les fabriques de pâtes et papiers*, RLRQ, c. Q-2, r. 27.
8 Exhibit R-2 to the Stay Application.

[70] The loss of the Authorization Certificate would have a significant impact on the Debtor's perspective of closing a transaction and would considerably diminish the value of Fortress Specialty's assets.

[71] Furthermore, for the purpose of the Cold Idle Plus Scenario, the Debtors proceeded to lay-offs and they submit that they do not have the resources to adequately prepare for the SAP Proceedings.

[72] Because the Pulp Mill is in Cold Idle Plus mode, there is no risk that the alleged violations of the LQE and its regulation will continue.

[73] As such, the order sought would have a minimal impact on the public interest.

[74] IQ, the Monitor and the Debtors support the Stay Application.

[75] The MELCC does not oppose it.

[76] No creditor of the Debtors will be materially prejudiced by the extension of the Stay.

[77] The Court is also mindful of the fact that a similar request in connection with proceedings before the TAQ was previously granted by this court on March 23, 2020.[9]

2. The Approval of a Settlement with a Former Employee

[78] In its Seventeenth and Eighteenth Reports to this court, the Monitor advised the Court that a former employee of Fortress (the "**Former Employee**") had sent a demand letter (the "**Demand Letter**") to Fortress and IQ seeking damages for constructive dismissal.[10]

[79] The Former Employee sought payment of amounts allegedly owed for the period of the CCAA proceedings as well as under the KERP.

[80] The Monitor contested the allegations of the Demand Letter and took the position that no amounts were owed by Fortress to the Former Employee.[11]

[81] Nonetheless the Monitor informed the Former Employee that it would be willing to consider a private dispute resolution process to avoid potential litigation.

[82] Further to several discussions and exchanges between the Monitor, IQ, the Former Employee and their respective legal counsel, the parties have agreed on the terms and conditions of a settlement agreement (the "**Settlement Agreement**"), which

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9 Exhibits R-4 and R-5 to the Stay Application.
10 Exhibit A-2 to the Settlement Approval Application (filed under seal).
11 Exhibit A-3 to the Settlement Approval Application (filed under seal).

remains conditional upon the approval of the Court given that Fortress remains subject to the CCAA Proceedings.[12]

[83] The Settlement Agreement provides for:

83.1. the payment of compensation to the Former Employee in exchange for a full and final release in favour of Fortress and IQ with respect to the allegations contained in the Demand Letter; and

83.2. the confidentiality of the terms and conditions of the Settlement Agreement in order to preserve the confidentiality of the identity of the Former Employee.

[84] The Monitor asks that the Court approve the Settlement Agreement. The Court agrees.

[85] The terms and conditions of the Settlement Agreement are reasonable in the circumstance, namely because they allow the parties to avoid the costs and inconvenience associated with a potential litigation with the Former Employee, which would, in all likelihood, exceed the amount of consideration provided for under the Settlement Agreement given the numerous parties involved.

[86] IQ, in its capacity as the interim lender, is supportive of the Settlement Agreement.

[87] No party will be materially prejudiced as a result of the Settlement Agreement.

[88] The Settlement Agreement allows Fortress to operate within its budget without harming its restructuring initiatives.

[89] The Monitor also asks that the Court order that the Demand Letter (Exhibit A-2), the Monitor's Response (Exhibit A-3) and the Settlement Agreement (Exhibit A-4) be filed under seal until further order of the Court, given that the disclosure of these documents would necessarily result in the identification of the Former Employee.

[90] This request is also appropriate in the circumstances.

[91] No public proceedings have been filed by the Former Employee relating to the facts alleged in the Demand Letter.

[92] In accordance with the guidance provided in article 1 of the *Quebec Civil Code of Procedure*, the parties considered private prevention and resolution processes before referring their dispute to the courts.

[93] Discussions which take place in this context are protected by settlement privilege. Settlement privilege "wraps a protective veil around the efforts parties make to settle their

[12] Exhibit A-4 to the Settlement Approval Application (filed under seal).

disputes by ensuring that communications made in the course of these negotiations are inadmissible". The privilege protects the discussions that have led to a settlement as well as the contents of the settlement itself.[13]

[94] Thus, the request to seal the documents is granted.

3. Provisional Execution Notwithstanding Appeal

[95] Article 661 of the *Civil Code of Procedure* allows the court, upon application, to order provisional execution for the whole or a part only of the judgment, "if bringing an appeal is likely to cause serious or irreparable prejudice to one of the parties".

[96] Both applicants have asked for provisional execution.

[97] With regard to the Stay Application, the serious prejudice is clear. The Stay expires tomorrow and without it, the important restructuring efforts to date would be put in jeopardy.

[98] With regard to the Settlement Approval Application, the prejudice is less evident.

[99] The parties submit that the Settlement Agreement was reached in December 2022 and that delays ensued in the appointment of a supervision judge to replace Chief Justice Paquette.

[100] Indeed, the parties cannot be faulted for this delay.

[101] This being said, this fact alone does not imply a serious prejudice. The Settlement Agreement gives Fortress ten days to pay. An additional eleven days will not make much of a difference.

[102] Moreover, the fact that a party as been waiting a long time for a judgment, even when it alleges being in urgent need of money (which is not the case here), is generally not considered a sufficient reason to obtain provisional execution of a judgment.[14]

[103] Thus, the criteria for provisional execution of the judgment related to the Settlement Agreement Application are not met.

FOR THESE REASONS, THE COURT:

[104] **GRANTS** the Application for the Issuance of an Order Extending the Stay Period and Extending the Stay to the SAP Proceedings (the "**Stay Application**");

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13 *Sable Offshore Energy Inc.* v. *Ameron International Corp*., 2013 SCC 37, paras. 2 and 18.
14 *141517 Canada ltée (Clermont ltée)* c. *Godin*, 2020 QCCS 1778, para. 35.

[105] **DECLARES** that all capitalized terms used but not otherwise defined in the present Order shall have the meanings ascribed to them in the First Day Order or in the Stay Application or the Settlement Approval Application;

[106] **ORDERS** that the Stay Period (as defined in the First Day Order) shall be extended to and including June 23, 2023, and specifies that such Stay Period shall apply to the Proceedings (as defined in the First Day Order) commenced before the *Tribunal administratif du Québec* under the file number STE-Q-257041-2108;

[107] **APPROVES** the activities of the Monitor, up to the date of this Order as described in the Nineteenth Report of the Monitor and in his testimony at the hearing;

[108] **ORDERS** that Appendixes A and B to the Nineteenth report of the Monitor filed in connection with the Stay Application are confidential and are filed under seal and **PRAYS ACT** of the Monitor's undertaking to communicate such exhibit to certain creditors following an undertaking of confidentiality and subject to such redactions as the Monitor deems appropriate;

[109] **GRANTS** the Application for the Issuance of an Order Approving the Settlement of the Claim of a Former Employee and the Execution of a Settlement Agreement (the "**Settlement Approval Application**");

[110] **ORDERS** that any prior delay for the presentation of the Settlement Approval Application is hereby abridged and validated so that the Settlement Approval Application is properly returnable today and hereby dispenses with any further notification thereof;

[111] **PERMITS** notification of this Order at any time and place and by any means whatsoever, including by email;

[112] **APPROVES** the terms and conditions of the Settlement Agreement between Fortress and the Former Employee (Exhibit A-4 (under seal) to the Settlement Approval Application);

[113] **AUTHORIZES** the Monitor, for and on behalf of Fortress Global Enterprises Inc. as well as in its capacity as Monitor, to enter into and execute the Settlement Agreement.

[114] **ORDERS** that Exhibits A-2 and A-3 filed in support of the Settlement Agreement Application are confidential and are filed under seal until further order from this court;

[115] **ORDERS** that Exhibit A-4 filed in support of the Settlement Agreement Application is confidential and is filed under seal and **PRAYS ACT** of the Monitor's undertaking to communicate such exhibit to certain creditors following an undertaking of confidentiality and subject to such redactions as the Monitor deems appropriate;

[116] **ORDERS** the provisional execution of the conclusions in paragraphs [104] to[108] and [114] to [115] of this Order notwithstanding appeal, and without the requirement to provide any security or provision for costs whatsoever.

[117] **THE WHOLE** without costs.

_____
MARTIN F. SHEEHAN, J.S.C..

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Hearing date: April 27, 2023

TAB 10

CITATION: Laurentian University of Sudbury, 2021 ONSC 4769
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-07-05

SUPERIOR COURT OF JUSTICE - ONTARIO

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 LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc.

Vern W. DaRe, for the DIP Lender

Pamela Huff, for Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for Toronto-Dominion Bank

George Benchetrit, for Bank of Montreal

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Andrew J. Hatnay, for Thorneloe University

Tracey Henry, for Laurentian University Staff Union (LUSU)

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association (LUSA)

André Claude, for University of Sudbury

HEARD: July 5, 2021

ENDORSEMENT

[1] Laurentian University of Sudbury (the "Applicant" or "LU") brought this motion for an order authorizing and directing the Applicant to retain Cushman & Wakefield ("C&W") as real estate advisor to the Applicant (in such capacity, the "Real Estate Advisor").

[2] The evidentiary basis for the requested relief is set out in the Fifth Report of the Monitor.

[3] No party opposed the requested relief.

[4] The Applicant is of the view that a Real Estate Advisor with experience and expertise, particularly in the post-secondary and public sectors, will provide critical guidance to the Applicant and be in the best position to advise on developing a strategic plan for the Applicant's real estate portfolio.

[5] The Applicant issued a request for quotations on May 18, 2021 and 32 organizations downloaded the relevant material. The Applicant ultimately received six proposals, which it reviewed with the Monitor. Interviews were then conducted with four potential candidates.

[6] The Applicant notes that the Amended and Restated Initial Order does not require the Applicant to seek court approval when retaining a real estate advisor. The Applicant notes that the process that was undertaken represented a hybrid between: (a) the procurement process that would typically be undertaken by the Applicant within the public sector outside of a CCAA proceeding; and (b) the steps and process that would be undertaken by an Applicant or the Monitor in inviting expressions of interest to act as a real estate advisor in a CCAA proceeding, in communicating with such parties and in reviewing and considering responses received from interested parties. As the process did not strictly follow all terms of a public sector procurement process, and incorporated aspects of a more typical CCAA engagement process, the Applicant decided to seek court approval of same.

[7] In addition, in the proposed draft order, the Applicant inserted language that purports to provide additional protection for those involved in the selection process.

[8] The Monitor comments on certain public sector parameters beginning at para. 22 of the Fifth Report, and concludes at paragraph as follows 33:

> "The Monitor notes that while the process carried out in respect of soliciting and receiving proposals and selecting C&W was carried out within a shortened timeline and did not meet all the requirements of the Public Sector Parameters, the Monitor is satisfied that the process was open, transparent and competitive and similar to processes conducted in other CCAA proceedings. The Monitor also notes that the abbreviated process is necessary in the circumstances to permit LU to advance its restructuring efforts on a timely basis.

[9] The Monitor supported the Applicant's position.

[10] Having reviewed the Fifth Report of the Monitor and hearing submissions, I am satisfied that it is appropriate to authorize and direct LU to retain the services of C&W, as Real Estate Advisor.

[11] The Applicant also seeks, as part of the order, a provision sealing the unredacted proposal of C&W which will be attached as a Confidential Appendix to the Fifth Report. C&W has advised the Applicant that its unredacted proposal contains commercially sensitive and proprietary information that, if disclose publicly and made available to competitors, could jeopardize the business of C&W.

[12] The appropriateness of including a sealing provision in a order was recently addressed by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38.

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[13] Having reviewed the Confidential Appendix, I expressed the view that certain aspects of the appendix did not appear to contain commercially sensitive and proprietary information. Upon receiving further instructions, counsel advised that certain portions of the appendix could form part of the public record and the scope of the sealing provision was narrowed.

[14] In my view, the revised form of Confidential Appendix satisfies the three prerequisites referenced in *Sherman Estate*.

[15] In the result, LU's motion is granted and an order has been signed.

Chief Justice G.B. Morawetz

Date: July 5, 2021

TAB 11

CARSWELL

OOSTERHOFF ON TRUSTS

TENTH EDITION

Albert H. Oosterhoff

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that the conferral of such confidentiality may enable unworthy trustees to use it as a shield for the concealment of their culpable inadequacies, but this risk cannot have been ignored in the 19th century, and now that it is recognised that the general principle of confidentiality is subject to being overridden as a matter of discretion by the court, it may fairly be supposed that the risk has if anything become more rather than less manageable.

[57] My reason for concluding that, regardless of my own opinion, I am bound to continue to treat the *Londonderry* principle as still being good law is simply because it formed part of the ratio of that decision, it has never been overruled, and because, if anything, it received a general endorsement rather than criticism in *Schmidt v Rosewood Trust Ltd* [2003] 2 A.C. 709.

Further Reading

E.E. Gillese, "Pension Plans, Fiduciary Duties and the Thorny Question of Disclosure" (2011), 90 Can. Bar Rev. 517.

L. Smith. "Access to Trust Information: *Schmidt v. Rosewood Trust Ltd.*" (2003), 23 Estates Trusts & Pensions J. 1.

§ 3:3 Fiduciary Duty

All fiduciaries are required to act honestly and in good faith and to use their powers properly and only for the purposes for which they were granted. They are precluded from making unauthorized profits, from delegating their responsibilities, and from having conflicting interests or duties. In short, a fiduciary cannot act in a self-interested fashion unless authorized to do so.

The word "fiduciary" is derived from the Latin *fiducia*, meaning trust or reliance. The express trustee is not the only fiduciary, but is often regarded as the paradigm. Fiduciary duties are also imposed on agents, business partners, company directors and officers, and solicitors. Like trustees, they also exercise their discretion when managing the assets or affairs of others and are expected to do so only for proper purposes.

The categories of fiduciary relationships, like the categories of negligence, are not closed. They can be extended by analogy to situations in which the relevant criteria are satisfied. In Canada, those criteria were set out in *Frame v. Smith*, where Wilson J. said that a fiduciary relationship was one in which:[1]

(1) The fiduciary has scope for the exercise of some discretion or power.
(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In *Hodgkinson v. Simms*, La Forest J. suggested that an element of vulnerability was not essential to every fiduciary relationship. He regarded Wilson J.'s three-part test as containing "indicia that help recognize a fiduciary relationship rather than the ingredients that define it."[2] Accordingly, while acknowledging that *Frame v. Smith* provides "a useful guide,"[3] he also found that it "encounters difficulties in identifying relationships described by a slightly different use of the term 'fiduciary', *viz.*, situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the

[Section 3:3]

[1]*Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 at 136 [S.C.R.].

specific circumstances of that particular relationship."[4] He concluded that special vulnerability need not always be demonstrated. At a minimum, all that is required for the imposition of fiduciary obligations is a relationship of trust and confidence in which the plaintiff relies upon the defendant.[5]

Canadian law has gone well beyond both the traditional concept of fiduciary relationships and the modern approach taken in other jurisdictions. Legend has it that Chief Justice Mason of the High Court of Australia once remarked that in Canada there are only three classes of people: those who are fiduciaries, those who are about to become fiduciaries, and judges.[6] Moreover, expansions of the fiduciary principle have not always been accompanied by the level of analysis that such developments warrant.[7] Few concepts have stirred the Canadian judicial imagination in quite the same way. There is, consequently, a real danger that, having been released from its historical origins, the fiduciary principle is becoming an unruly horse of public policy,[8] pressed into service whenever existing doctrines are perceived to be inapplicable or inadequate.

It is common to refer to the "no conflict rule" and the "no profit rule". The former requires a fiduciary to avoid situations in which personal interests or other duties conflict with the beneficiary's interests. The latter states that a fiduciary must not profit from the fiduciary position. It is crucial to understand that these rules were developed largely *pour encourager les autres*. They were intended to be prophylactic, not merely sanctioning past transgressions, but also deterring future disloyalty. It is useful to consider a few illustrations.

In *Breen v. Williams*, Gaudron and McHugh JJ., of the High Court of Australia, drew a lesson from Matthew 6:24.[9]

> The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that "[n]o man can serve two masters." Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.

Chief Justice Cardozo, while on the New York Court of Appeal, described the fiduciary obligation of a "co-adventurer":[10]

> Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fi-

[4]*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 [S.C.R.].

[5]*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 at 418–19 [S.C.R.].

[6]E. Cherniak, "Comment on Paper by Professor Jeffrey G. MacIntosh", in Special Lectures of the Law Society of Upper Canada 1990: Fiduciary Duties (Toronto: DeBoo, 1991) at 275. The real punch line awaits delivery. Given current trends in Canadian legal literature, the day may well come when someone accuses a judge of breaching a fiduciary duty while discharging professional obligations. See E. Gibson, "The Gendered Wage Dilemma", in K. Cooper-Stephenson & E. Gibson, eds., Tort Theory (Toronto: Captus, 1993) 185 at 203–4 (judges guilty of violating human rights legislation when quantifying compensation for loss of income by reference to "discriminatory" actuarial evidence).

[7]*A. (C.) v. C. (J.W.) (1998)*, 166 D.L.R. (4th) 475, 1998 CarswellBC 2370 (C.A.) at 496, *per* McEachern C.J.B.C. ("The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern").

[8]*Richardson v. Mellish* (1824), 2 Bing 229 (C.P.) at 252.

TWO SHORES CAPITAL CORP. **v.** **PRODUCTIVITY MEDIA INC. et al.** Court File No.: CV-24-00730869-00CL
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES
(Motion for Directions under s. 60 of the *Trustee Act*, returnable March 6, 2025)

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