Court File No. CV-17-11827-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

DUCA FINANCIAL SERVICES CREDIT LTD.

Applicant

- and -

2203824 ONTARIO INC.

Respondent

BRIEF OF AUTHORITIES
OF THE RECEIVER, MSI SPERGEL INC.

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators
95 Barber Greene Road, Suite 100
Toronto, ON M3C 3E9

LAWRENCE HANSEN
LSUC No. 41098W

SARA MOSADEQ
LSUC No. 67864K

Tel.: 416-449-1400
Fax: 416- 449-7071

Lawyers for the receiver msi Spergel Inc.

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TAB 1

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

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Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

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distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

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(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

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engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

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to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

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Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

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IN AGREEING TO SELL TO OEL?

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

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

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On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

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in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

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contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

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sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

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show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

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the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

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that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

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3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

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bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

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in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

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purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

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contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

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There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

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which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

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to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

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the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

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Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

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no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

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GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

> is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

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of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

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they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

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deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

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offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

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J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

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29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not

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include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

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noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

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contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

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negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

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its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

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law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

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procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

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court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

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TAB 2

2002 SCC 41 (CanLII)

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

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

Indexed as: Sierra Club of Canada *v.* Canada (Minister of Finance)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

Répertorié : Sierra Club du Canada *c.* Canada (Ministre des Finances)

Référence neutre : 2002 CSC 41.

N[o] du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

Jurisprudence

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

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

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

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

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

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

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

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

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

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

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

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

IACOBUCCI J. —

I. Introduction

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

LE JUGE IACOBUCCI —

I. Introduction

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

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

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

2

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

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

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II. Facts

II. Les faits

3

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

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

4

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

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

5

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

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

6

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

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

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

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

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

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

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

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

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9

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

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

10

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

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

III. Relevant Statutory Provisions

11

Federal Court Rules, 1998, SOR/98-106

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

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

III. Dispositions législatives

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

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

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

IV. Judgments Below

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

12

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

IV. Les décisions antérieures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24

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

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

25

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

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

26

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

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

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

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

(2) Robertson J.A. (dissenting)

(2) Le juge Robertson (dissident)

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

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

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

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

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

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

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

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

31

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

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

32

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

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

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

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

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

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

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

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

V. Issues

V. Questions en litige

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?

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

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

VI. Analysis

VI. Analyse

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

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

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

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

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

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.

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

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

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

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37

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

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

38

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

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

39

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A publication ban should only be ordered when:

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

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

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

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

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

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

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

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

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

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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.

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.

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47

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

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

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

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 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.

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

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

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

51

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

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

52

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

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

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

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

53

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

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

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

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

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

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

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

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

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

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.

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.

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).

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

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

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

57

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

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

B. *Application of the Test to this Appeal*

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

(1) Necessity

(1) Nécessité

58

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

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

59

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

(2) L'étape de la proportionnalité

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

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

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

(a) *Salutary Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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 soustendant 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]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

VII. Conclusion

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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.

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.

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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*.

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.

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TAB 3

Delview Construction Ltd. v. Meringolo

71 O.R. (3d) 1
[2004] O.J. No. 2317
Docket No. C40726

2004 CanLII 11188 (ON CA)

Court of Appeal for Ontario
Goudge, Simmons and Juriansz JJ.A.
June 3, 2004

Construction liens -- Procedure -- Corporation not permitted to rely on revival provisions of s. 241(5) of Business Corporations Act to proceed with construction lien action where time limits under Construction Lien Act for preserving and perfecting claim for lien expired while corporation was dissolved -- Business Corporations Act, R.S.O. 1990, c. B.16, s. 241(5) -- Construction Lien Act, R.S.O. 1990, c. C.30.

The plaintiff registered a construction lien against the defendant's property in October 1998 and shortly afterwards commenced an action against the defendant claiming payment of the balance owing under a construction contract and enforcement of its claim for lien. The plaintiff was incorporated in February 1999, three months after its lien was registered and its action commenced. The principal of the plaintiff incorporated another company, 826744 Ontario Limited ("826744"), in 1989, and that company was dissolved in 1995. The defendant moved for an order dismissing the action and vacating the claim for lien on the grounds that the plaintiff was not an existing corporation at the time the lien was registered and the action commenced. The plaintiff requested an order permitting it to amend its statement of claim and claim for lien by substituting the name of 826744, and filed evidence that 826744 was revived in January 2002. The motion judge vacated the plaintiff's claim for lien and certificate of action, but permitted the plaintiff's contract claim to

continue. The plaintiff appealed and the defendant cross-appealed. The Divisional Court dismissed the plaintiff's appeal, allowed the defendant's cross-appeal and dismissed the action. The plaintiff appealed.

Held, the appeal should be allowed in part.

Assuming, without deciding, that naming the plaintiff as the lien claimant in the claim for lien was a misnomer that could be corrected by s. 6 of the Construction Lien Act ("CLA"), the plaintiff was precluded from relying on the provisions of s. 241(5) of the Business Corporations Act ("OBCA"), which came into force in March 2000, to revive its action because the time periods stipulated in the CLA for registering and perfecting the plaintiff's construction lien expired prior to the revival of the 826744. Section 241(5) provides that "upon revival, the corporation, subject to . . . the rights, if any, acquired by any person during the period of dissolution, shall be deemed for all purposes to have never been dissolved".

A defendant acquires "rights" within the meaning of s. 241(5) of the OBCA by virtue of the passage of a limitation period. Some courts have held that the time limits for completing various steps stipulated in the CLA are not the same as a limitation period. However, in finding a distinction, the courts have noted that, unlike limitation periods which the court has a discretion to extend, the time limits set out in the CLA are prescribed by statute and leave [page2 n]o room for judicial discretion. To the extent to which there is any difference between the expiry of time limits stipulated in the CLA for registering and perfecting lien claims and the passage of a limitation period, the former present an equally compelling case for constituting "rights" within the meaning of s. 241(5) of the OBCA.

The Divisional Court erred in holding that the plaintiff's breach of contract action should be dismissed. Because the limitation period for that action would not expire until later this year, it was not obvious that the claim had no chance of success. Applying rule 26 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the plaintiff should be permitted to

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substitute the name of the 826744 for the name of the plaintiff in the statement of claim.

Cases referred to

602533 Ontario Inc. v. Shell Canada Ltd. (1998), 37 O.R. (3d) 504, 155 D.L.R. (4th) 562 (C.A.); Basarsky v. Quinlan, [1972] S.C.R. 380, 24 D.L.R. (3d) 720, [1972] 1 W.W.R. 303; Benjamin Schultz & Associates Ltd. v. Samet (1991), 4 O.R. (3d) 771, 83 D.L.R. (4th) 574 (Div. Ct.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, s. 241(5) [as am.]

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 6, 31, 34, 36

Interpretation Act, R.S.O. 1990, c. I.11, s. 14(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04, 26

APPEAL from a judgment of the Divisional Court (O'Driscoll, Then and Hambley JJ.) dated July 10, 2003, dismissing an appeal and allowing aross-appeal from an order vacating a claim for lien and certificate of action and allowing a contract claim to continue.

A.J. Esterbauer, for appellant.

Gary A. Beaulne, for respondent.

The judgment of the court was delivered by

[1] SIMMONS J.A.: -- The issues on this appeal relate to the

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effect of s. 241(5) of the Business Corporations Act, R.S.O. 1990, c. B.16, as amended by S.O. 1999, c. 12, Sched. F, s. 9 ("OBCA"), which provides a mechanism for the revival of corporations dissolved for failing to comply with certain filing requirements under the OBCA. This version of s. 241(5) of the OBCA came into force March 27, 2000 and will be referred to as the "2000 OBCA revival provision". It provides that: "upon revival, the corporation, subject to . . . the rights . . . acquired by any person during the period of dissolution, shall be deemed . . . to have never been dissolved". [page3]

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[2] The main issue on appeal is whether a revived corporation can proceed with a construction lien action where the time limits under the Construction Lien Act, R.S.O. 1990, c. C.30 ("CLA") for preserving and perfecting the claim for lien expired while the corporation was dissolved. [See Note 1 at end of the document]

[3] A secondary issue involves whether the property owner can resist the revived company's claim in contract, even though that claim is not statute-barred, because the revived company failed to apply for revival within the five-year time limit specified in a predecessor to the 2000 OBCA revival provision.

I. The Order Under Appeal

[4] The appellant appeals from a judgment of the Divisional Court dated July 10, 2003. The Divisional Court dismissed the appellant's appeal from an order of Snowie J., which vacated the appellant's claim for lien and certificate of action. In addition, the Divisional Court allowed the respondent's cross-appeal from the motion judge's order permitting the appellant's contract claim to continue, and dismissed the appellant's action.

II. Background

[5] The appellant registered a construction lien against the respondent's property on October 26, 1998. On November 4, 1998, the appellant commenced an action against the respondent, claiming payment of the balance owing under a construction

contract and enforcement of its claim for lien.

[6] Following completion of examinations for discovery, the respondent moved for an order dismissing the appellant's action and vacating the appellant's claim for lien on the grounds that the appellant was not an existing corporation at the time the lien was registered and the action commenced. The respondent filed evidence on the motion setting out the following chronology:

(i) Delview Construction Limited was incorporated on February 2, 1999, which was approximately three months after the appellant's lien was registered and its action commenced;

(ii) the principal of Delview Construction Limited incorporated another company, 826744 Ontario Limited ("826744"), on March 21, 1989; [page4]

(iii) 826744 carried on business under the registered style name Delview Construction from April 13, 1989 until April 12, 1994, when the registration of the style name expired; and

(iv) 826744 was dissolved by the Ministry of Consumer and Commercial Relations on February 18, 1995.

[7] In response to the respondent's motion, the appellant requested an order permitting it to amend its statement of claim and claim for lien by substituting the name "826744 Ontario Limited carrying on business as Delview Construction" for the name "Delview Construction Limited", and filed evidence confirming that 826744 was revived on January 16, 2002.

III. Analysis

[8] I agree with the Divisional Court's conclusion concerning the appellant's lien claim. The orders vacating the claim for lien and certificate of action must stand.

[9] Assuming, without deciding, that naming Delview Construction Limited as the lien claimant in the claim for lien

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was a misnomer that could be corrected by s. 6 of the CLA, I conclude that the appellant is precluded from relying on the provisions of the 2000 OBCA revival provision to revive its action. I reach this conclusion because the time periods stipulated in the CLA for registering and perfecting the appellant's construction lien expired prior to the revival of 826744.

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[10] The 2000 revival provision provides that upon revival, a previously dissolved corporation is subject to the rights acquired by any person during the period of dissolution:

> 241(5) Where a corporation is dissolved under subsection (4) or any predecessor of it, the Director on the application of any interested person, may, in his or her discretion . . . revive the corporation; upon revival, the corporation, subject to the terms and conditions imposed by the Director and to the rights, if any, acquired by any person during the period of dissolution, shall be deemed for all purposes to have never been dissolved.

(Emphasis added)

[11] In 602533 Ontario Inc. v. Shell Canada Ltd. (1998), 37 O.R. (3d) 504, 155 D.L.R. (4th) 562 (C.A.), this court confirmed that a defendant acquires "rights" within the meaning of s. 241(5) of the OBCA by virtue of the passage of a limitation period. Some courts have held that the time limits for completing various steps stipulated in the CLA are not the same as a limitation period: see Benjamin Schultz & Associates Ltd. v. Samet (1991), 4 O.R. (3d) 771, 83 D.L.R. (4th) 574 (Div. Ct.) dealing with the time limit for fixing a trial date. However, in finding a distinction, the courts [page5 h] ave noted that, unlike limitation periods where there is a discretion to extend under the Basarsky v. Quinlan, [1972] S.C.R. 380, 24 D.L.R. (3d) 720 line of cases, the time limits set out in the CLA are prescribed by statute and "[leave] no room for judicial discretion". Given the nature of this distinction, I conclude that, to the extent there is any difference between the expiry of the time limits stipulated in the CLA for registering and perfecting lien claims and the

passage of a limitation period, the former present an equally compelling case for constituting a "rights" within the meaning of s. 241(5) of the OBCA.

[12] However, I do not agree with the Divisional Court's conclusion that the appellant's breach of contract action should be dismissed at this time. Because the limitation period for that action will not expire until later this year, I conclude that it is not obvious that the appellant's claim has no chance of success, and that applying Rule 26 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ("Rules"), the amendment should be allowed.

[13] In this court, the respondent advanced three reasons for resisting the appellant's request to substitute the name 826744 for the name Delview Construction Limited in its statement of claim: (i) 826744 Ontario Limited was not a contracting party and the proposed action therefore has no chance of success; (ii) an action commenced in the name of a non-existing corporation is a nullity and cannot be amended; and (iii) the version of s. 241(5) of the OBCA that was in force at the time the action was commenced [see Note 2 at end of the document] ("1990 OBCA revival provision") gave the Director a discretion to revive a corporation only where an application for revival was "made within five years after the date of dissolution".

[14] In relation to the respondent's third reason, the five-year time limit for the appellant to apply for revival under the 1990 OBCA revival provision expired on February 17, 2000. This was one month before the 2000 OBCA revival provision came into force, and almost two years before 826744 applied for revival. The respondent therefore contends that 826744 lost its claim to revive the contract action for at least some period of time during the dissolution period, and that he is entitled to rely on 826744's loss as "a right" within the meaning of the 2000 revival provision. Put another way, the respondent contends that he is entitled to rely on "rights" he acquired under the 1990 revival provision: see s. 14(1) of the Interpretation Act, R.S.O. 1990, c. I.11. [page6]

[15] I reject all of the respondent's submissions.

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[16] The respondent's first submission is a defence grounded in facts and should be determined on a proper record after amended pleadings have been exchanged. Moreover, because it appears that there may be conflicting evidence on the identities of the contracting parties, this issue may require a trial for a proper resolution.

[17] As for the respondent's second submission, pleadings and discoveries had already been completed at the time these motions were heard. I note that in 602533 Ontario Inc., supra, although the action was commenced at a time when the revived corporation was dissolved, the court dismissed only the statute-barred claims, and not the entire action. In keeping with rule 1.04 requiring that the Rules be liberally construed "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits", I conclude that it is open to a court to make a retroactive order validating the action, once a dissolved corporation is revived.

[18] In this case, the motion judge did not make a specific order amending the statement of claim and claim for lien in the manner that the appellant had requested nor did she make an order retroactively validating the action. However, unlike the Divisional Court, which viewed Delview Construction Limited as the claimant, the motion judge treated the issue before her as one of misnomer and permitted the contract claim to continue. I take it as being implicit in her order that she considered that this was an appropriate case for making an order substituting the name 826744 for the appellant's name in the statement of claim and validating the action retroactively. Subject to my comments concerning the third issue raised by the respondent, I see no basis for interfering with the motion judge's approach.

[19] As for the respondent's third submission, I conclude that it raises a defence that may be grounded in facts and therefore should be determined on a proper record after amended pleadings have been exchanged. While the respondent may be correct that, once the five-year time limit for revival had passed, there was no means of reviving 826744 until the 2000 OBCA revival provision came into force, the appellant submitted

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otherwise in oral argument. This issue was not addressed in either set of reasons from the courts below. In my view, the question of what, if any, rights the respondent acquired under the 1990 revival provisions should not be determined without giving the appellant the opportunity to address the issue fully by way of pleadings and, if required, evidence concerning the operation of revival provisions predating the 2000 OBCA revival provision. [page7]

IV. Disposition

[20] For the reasons given, I would allow the appeal in part, by setting aside the order of the Divisional Court dismissing the appellant's action and by substituting an order: (i) permitting the appellant to substitute the name 826744 for the name Delview Construction Limited in the statement of claim; (ii) validating the amended statement of claim effective November 4, 1998; and (iii) authorizing 826744 to proceed with the appellant's contract action. In addition, I would stipulate that the substituted order is subject to a term that it is without prejudice to any defences that may be raised with respect to rights acquired during the period in which 826744 was dissolved and which version of s. 241(5) of the OBCA should be applied in determining any such issues.

[21] As success on the appeal was divided, I would make no order as to costs of the appeal. I would also set aside the costs order made by the Divisional Court and order that there be no costs of the appeal and cross-appeal to the Divisional Court and that the order of the motion judge concerning costs of the motion be restored.

Appeal allowed in part.

APPENDIX A

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 31, 34 and 36

Expiry of liens

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31(1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section.

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and

(ii) the date the contract is completed or abandoned; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of [page8 t]he contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date the contract is completed, and

(ii) the date the contract is abandoned.

Liens of other persons

(3) Subject to subsection (4), the lien of any other person,

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(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which the person last supplies services or materials to the improvement, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which the person last supplied services or materials to the improvement, and

(ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract.

Separate liens when ongoing supply

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(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date.

Declaration of last supply

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring, [page9]

(a) the date on which the person last supplied services or materials under that contract or subcontract; and

(b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the . person making the declaration. R.S.O. 1990, c. C.30, s. 31.

. . . . .

How lien preserved

34(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and

(b) where the lien does not attach to the premises, by

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giving to the owner a copy of the claim for lien together with the affidavit of verification required by subsection (6).

Public highway

(2) Where a claim for lien is in respect of a public street or highway owned by a municipality, the copy of the claim for lien and affidavit shall be given to the clerk of the municipality.

Premises owned by Crown

(3) Where the owner of the premises is the Crown, the copy of the claim for lien and affidavit shall be given to the office prescribed by regulation, or, where no office has been prescribed, to the ministry or Crown agency for whom the improvement is made.

Railway right-of-way

(4) Where the premises is a railway right-of-way, the copy of the claim for lien and affidavit shall be given to the manager or any person apparently in charge of any office of the railway in Ontario.

Contents of claim for lien

(5) Every claim for lien shall set out,

(a) the name and address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which those services or materials were supplied;

(b) a short description of the services or materials that were supplied;

(c) the contract price or subcontract price;

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(d) the amount claimed in respect of services or materials that have been supplied; and

(e) a description of the premises, [page10]

(i) where the lien attaches to the premises, sufficient for registration under the Land Titles Act or the Registry Act, as the case may be, or

(ii) where the lien does not attach to the premises, being the address or other identification of the location of the premises.

Affidavit of verification

(6) A claim for lien shall be verified by an affidavit of the person claiming the lien, including a trustee of the workers' trust fund where subsection 81(2) applies, or of an agent or assignee of the claimant who is informed of the facts set out in the claim, and the affidavit of the agent or assignee shall state that the agent or assignee believes those facts to be true.

Preservation of general lien

(7) Subject to subsection 44(4) (apportionment), a general lien shall be preserved against each of the premises that the person having the lien desires the lien to continue to apply against, and the claim against each premises may be for the price of the services or materials that have been supplied to all the premises.

Who may join in claim

(8) Any number of persons having liens upon the same premises may unite in a claim for lien, but where more than one lien is included in one claim, each person's lien shall be verified by affidavit as required by subsection (6). R.S.O. 1990, c. C.30, s. 34.

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. . . . .

What liens may be perfected

36(1) A lien may not be perfected unless it is preserved.

Expiry of preserved lien

(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five-day period next following the last day, under section 31, on which the lien could have been preserved.

How lien perfected

(3) A lien claimant perfects the lien claimant's preserved lien,

(a) where the lien attaches to the premises, when the lien claimant commences an action to enforce the lien and, except where an order to vacate the registration of the lien is made, the lien claimant registers a certificate of action in the prescribed form on the title of the premises; or

(b) where the lien does not attach to the premises, when the lien claimant commences an action to enforce the lien.

Rules re sheltering

(4) A preserved lien becomes perfected by sheltering under a lien perfected by another lien claimant in respect of the same improvement in accordance with the following rules:
[page11]

1. The preserved lien of a lien claimant is perfected by sheltering under the perfected lien of another lien claimant in respect of the same improvement where,

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i. the lien of that other lien claimant was a subsisting perfected lien at the time when the lien of the lien claimant was preserved, or

ii. the lien of that other lien claimant is perfected in accordance with clause (3)(a) or (b) between the time when the lien of the lien claimant was preserved and the time that the lien of the lien claimant would have expired under subsection (2).

2. The validity of the perfection of a sheltered lien does not depend upon the validity, proper preservation or perfection of the lien under which it is sheltered.

3. A sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered.

4. Upon notice given by a defendant named in a statement of claim, any lien claimant whose lien is sheltered under that statement of claim shall provide the defendant with further particulars of the claim for lien or of any fact alleged in the claim for lien.

General lien

(5) Subject to subsection 44(4) (apportionment), a preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply.

Where period of credit extended

(6) A person who has preserved a lien, but who has extended a period of credit for the payment of the amount to which the lien relates, may commence an action for the purpose of perfecting the lien even though the period of credit has not at the time expired. R.S.O. 1990, c. C.30, s. 36.

Notes

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1. See Appendix A attached for the text of the sections of the CLA that provide for preservation and perfection of liens.

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

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TAB 4

CITATION: Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc. 2012 ONSC 2182
COURT FILE NO.: 12-CV-443677
DATE: April 12, 2012

2012 ONSC 2182 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Thomas Gold Pettingill LLP

Applicant

- and -

Ani-Wall Concrete Forming Inc. and Cassels Brock & Blackwell LLP

Respondents

COUNSEL:

- Andrew L. Mercer for Thomas Gold Pettinghill LLP
- John Birch for Cassels Brock & Blackwell LLP
- George F. Vella for Ani-Wall Concrete Forming Inc.

HEARING DATE: April 5, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Respondent Ani-Wall Concrete Forming Inc., ("Ani-Wall") did not pay the final account of the Respondent Cassels Brock & Blackwell LLP ("Cassels Brock") for a litigation retainer that was transferred and completed by the Applicant, Thomas Gold Pettingill LLP ("TGP"). The litigation settled, and TGP has $61,351.64 from the settlement proceeds left in its trust account.

[2] In this Application, TGP applies for a declaration that Cassels Brock is entitled to the funds or, alternatively, that the funds be paid into court pursuant to an interpleader order. The Application is opposed by Ani-Wall, which claims the $61,351.64.

[3] The Application raises numerous difficult questions about the law and ethics associated with a matter of fundamental importance to the practice of law as both a business and a profession. The matter at the centre of this Application is the law and ethics of lawyers getting paid for their legal services and collecting their bills. Unfortunately, this Application and its subject matter are also a source of bitterness, resentment, and reciprocated scorn between lawyers and clients.

[4] Deciding this Application will involve considering: (a) the *Solicitors Act,* R.S.O. 1990, c. S.15; (b) the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B; (c), the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; (d) the former *Rules of Practice*, R.R.O. 1980, Reg. 540; (e) the *Rules of Professional Practice*; and (f) the law associated with undertakings, equitable assignments, directions, solicitor's liens, charging liens, charging orders, lawyer and client assessments, and debt collection actions.

[5] For the reasons that follow, it is my conclusion that with two terms, this Application should be granted, and the funds held by TGP in its trust account should be paid to Ani-Wall. The first term is that TGP should pay Ani-Wall's costs of this application. The second term is that within twenty days, Ani-Wall may obtain an appointment with an assessment officer for an assessment of Cassel Brock's accounts. To avoid confusion, I note here that the two terms do not prevent the immediate payment of the funds to Cassels Brock.

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B. PROCEDURAL AND EVIDENTIARY BACKGROUND

[6] TGP commenced this Application on January 10, 2012. It was supported by the affidavits of: (a) Bruce A. Thomas, Q.C., who was a partner at Cassels Brock from 1980 to June 30, 2008, when he and six other partners departed and founded TGP; and (b) Sue Baksh, an employee of Cassels Brock, who has been in charge of collecting the firm's accounts receivable since 1997. Mr. Thomas and Ms. Baksh were cross-examined on their affidavits in February 2012.

[7] Aristides Indio, also known as Steve Indio, is the Chief Operating Officer of Ani-Wall, and he swore an affidavit in opposition to the Application. Mr. Indio was cross-examined on his affidavit in February 2012.

[8] The Application came on for a hearing on March 5, 2012, when Cassels Brock asked for an adjournment because it wished to file a revised factum to respond to an argument in Ani-Wall's factum that Cassel Brock's claim to the funds was statute-barred under the *Limitations Act, 2002*.

[9] I granted the adjournment request, and the Application was rescheduled for April 5, 2012. I remained seized of the matter. On April 5, 2012, I heard the Application. By that time, I had TGP's factum, and two factums from each of Cassels Brock and Ani-Wall.

[10] As will become clearer from the discussion below, although Cassels Brock did not bring a cross-Application, practically speaking, its factum made a claim for declaratory and other relief, including the court granting a charging order or charging lien against the funds being held by the Applicant TGP, which openly supported the arguments advanced by Cassels Brock.

[11] Practically speaking, TGP and Cassels Brock were co-Applicants, and the hearing of the Application proceeded accordingly.

C. FACTUAL BACKGROUND

[12] In May 2003, Ani-Wall and Mr. Indio, its Chief Operating Officer, hired Cassels Brock to act for it in threatened litigation by a group of home builders who had complaints about allegedly defective foundation walls installed by Ani-Wall in housing developments in the Greater Toronto Area. Ani-Wall had claims of its own as its customers were refusing to pay $1.32 million because of the allegedly defective foundations.

[13] Bruce Thomas, a senior partner at Cassels Brock, had carriage of the file.

[14] Ani Wall signed a written retainer agreement. For present purposes, the following provisions of the agreement are relevant:

> Normal Billing Practices
>
> Our normal billing practice is to determine fees by multiplying the number of hours spent working on a matter by our regular and customary billing rates for services performed by members of the firm, billed monthly. The minimum billing increment is ordinary 1/10 of an hour. We anticipate in this matter that services will be provided by the following individuals: 1. Bruce Thomas, partner $475/hr.; 2. Stephen Morrison, partner $525/hr.; 3. Mark Smyth, associate $250/hr.; 4. Clerk $110/hr.
>
> The services of other solicitors and clerical staff employed or associated with the firm may be enlisted from time to time, where doing so will provide Ani-Wall with the most cost-efficient service. As indicated, time charges and disbursements are billed on a monthly basis after they are incurred and recorded by our billing department. We may occasionally defer billing for a given month (or months) if the accrued fees and costs do now warrant current billing, or if other circumstances would make it more convenient to defer billing.
>
> Our fee structure is based upon the premise that all statement are due and payable upon receipt, but in any event no later than 30 days after the date of the statement. We expect that Ani-Wall will review all bills promptly and report any questions to us within 30 days.
>
> Rights upon Discharge by Ani-Wall
>
> Ani-Wall has the right to discharge us as solicitors and counsel at any time, but such discharge shall not affect our right to be paid all unpaid fees, and all our previously incurred but unpaid time charges and disbursements, in accordance with this letter agreement.

[15] It is to be noted that the retainer agreement is silent about changes in the lawyers' hourly rates.

[16] The anticipated litigation about the allegedly defective foundations did commence, with the Plaintiffs claiming in excess of $10 million from Ani-Wall.

[17] During the period between May 2003 and the end of June 2008, the nature of Cassel Brock's retainer expanded. It expanded to encompass, among other things: (a) a dispute with Ani-Wall's insurer AXA, which had denied indemnity coverage, but which had agreed to pay for a defence; (b) an action against the suppliers of the concrete for the foundations; (c) assistance in obtaining financing for equipment; (d) certain

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construction lien actions; and (e) legal services for other corporations referred by Mr. Indio to Cassels Brock.

[18] During the retainer, Cassels Brock issued bills that contained descriptions of the services, time docketed, and rates of the lawyers providing services. Approximately 75% of the amount of the accounts was paid by AXA. The bills indicated that the hourly rates of the lawyers changed from time to time.

[19] It is common ground that Mr. Indio complained about the amount of the fees. However, it is also common ground that except for the final invoice dated June 23, 2008 in the amount of $64,582.33, all of the accounts were paid and there was a partial payment of the last invoice in September 2008, leaving a net balance of $59,372.42 before interest under the *Solicitors Act.*

[20] There, however, is no common ground on whether Mr. Indio ever complained about the fact that from time to time Cassels Brock increased the hourly rates of the lawyers engaged for Ani-Wall. Ms. Baksh deposed that Mr. Indio never complained about the rates. This is denied by Mr. Indio, who deposed that he did complain but "did not put any complaints in writing due to the fact that Cassels Brock, Bruce Thomas and the lawyers working with him were so intricately involved in the matters, that I felt that Ani-Wall had no choice but to allow them to continue."

[21] In any event, Cassels Brock continued to act for Ani-Wall until the end of June 2008. Around this time, Mr. Thomas told Mr. Indio that he and six other Cassels Brock partners had decided to form TGP, a boutique litigation law firm. Mr. Indio agreed to have the Ani-Wall files transferred to the new firm. To effect the transfer of the files, Mr. Indio signed a simple client direction and authorization, which stated:

> Client Direction and Authorization
>
> To: Cassels Brock & Blackwell, LLP
>
> Re: Steve Indio
>
> File Name – Ani-Wall Concrete Forming Inc. ….
>
> You are hereby authorized and directed to transfer all your files and documents relating to the above matters and to forward all trust monies held for us to Thomas Gold Pettinghill LLP subject to any conditions you may impose with respect to your access to the files and documents transferred and this shall be your good and sufficient authority for so doing.

[22] Around this time, in the ongoing litigation about the allegedly defective foundations, a mediation session was scheduled for September 2008. Mr. Thomas deposed that Mr. Indio agreed that Cassels Brock's final account would be paid from the anticipated settlement proceeds. Ms. Baksh deposed that Mr. Indio agreed that the cash-strapped Ani-Wall would pay Cassels Brock's final account from the anticipated settlement proceeds. Ms. Baksh deposed:

> I confirmed with Mr. Indio that the file was going to be taken by TGP on the understanding that the unpaid bill would be paid at the time the settlement. At no time did he advise me

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> that he was intending to challenge the fees of Cassels. Had he done so, the file would not have been released to TGP, as it was.

[23] Mr. Indio disputed the evidence of Mr. Thomas and Ms. Baksh. In paragraphs 7 and 16 of his affidavit, Mr. Indio stated:

> 7. [W]hen this matter of the matters in issue and file were transferred from Cassels Brock to Thomas Gold Pettinghill LLP, I was aware that Cassels Brock had not been paid for all of the invoices rendered, but I did not agree that any outstanding amounts or that any accounts for that matter would be paid without question and I had made it clear previously to Bruce Thomas that I took issue with the amounts being charged. I stated that this earlier and on each occasion he advised me that these accounts would subsequently be covered by others and there would be little or no cost to Ani-Wall. I did not state that the amounts allegedly owing to Cassels were to be paid out of the settlement funds.
>
> 16. Ani-Wall Concrete Forming did not authorize Bruce Thomas or any other person to undertake to pay the accounts of Cassels Brock & Blackwell LLP which are in issue in this matter, our to the funds from any settlement or other otherwise and I note that the document which is Exhibit "K" to the affidavit of Bruce Thomas does not mention the accounts of Cassels, Brock & Blackwell LLP whatsoever.

[24] On his cross-examination, Mr. Thomas stated that to bring about the transfer of the files to TGP, he gave a personal undertaking to Cassels Brock that its account would be paid from the anticipated settlement proceeds. He believed that this was the honourable thing to do. During his cross-examination, Mr. Thomas, however, admitted that he did not have instructions to give any undertaking that would bind Ani-Wall. His evidence was as follows:

> Q. Does that [referring to the Client Direction and Authorization] mention an undertaking or give you instructions to give an undertaking to pay Cassels Brock's account?
>
> A. Well, I didn't need any authority to give an undertaking.
>
> Q. It's a simple …
>
> A. I didn't need any authority to give an undertaking, Mr. Vella. That's the honourable thing to do. In fact, I never thought there would be any issue because one doesn't get a file from a firm, without having some arrangement made with respect to the outstanding bills, if there are any. And we, of course, never assumed there would be a problem of this nature, and we gave an undertaking freely because that's the -- provided by the Law Society of Upper Canada rules. That's what you do, and I did it.
>
> Q. Without getting any written authority from your client to do?
>
> A. I didn't need any authority from a client, to give an undertaking to see a bill paid. That's not required. That's something you do as an honourable and professional thing to do and I did it. And, of course, I had discussions with Sue Baksh, the lady who was just here giving evidence. I explained to her that we would see the files would be paid, and there was never any – this thing all came out of the woodwork, after the settlement was achieved. And Mr. Indio knew that he was getting a very substantial sum of money. Then, after all that was done, he raised the issue of these rights. ….

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[25] The mediation session went forward in September 2008, and the parties agreed to settle the litigation. As part of the settlement, Ani-Wall received $345,195.69 from its insurer and $2,273,000 from other parties in the litigation. Under the settlement, Ani-Wall was only a recipient, and it did not have to pay any of the other parties.

[26] Mr. Thomas describes the $2.6 million outcome as a "very substantial" success for Ani-Wall, virtually making it whole for its losses and providing a full recovery of the legal fees paid by Ani-Wall to Cassels Brock and TGP. Mr. Indio was not nearly so happy with the outcome, and he deposed that Ani-Wall's legal expenses were not completely covered by the settlement by a deficiency of several hundred thousand dollars and that Ani-Wall lost several hundred thousands of dollars in possible reimbursement from the insurer.

[27] In 2009, TGP received the settlement funds, and the funds were paid to Ani-Wall with a holdback for Cassels Brock's final account. Mr. Indio's instructions, however, were not to remit the holdback funds to Cassels Brock.

[28] On January 29, 2009, on behalf of Ani-Wall, Mr. Indio wrote Cassels Brock and demanded a refund of alleged overpayments. The letter stated:

> Dear Cassels Brock,
>
> According to your records you show that there are accounts owing.
>
> I told Mr. Bruce Thomas in 2003 that the hourly rates were excessive. At the time Ani-Wall was being invoiced at the rates listed below ….
>
> I mentioned that we needed a decrease in these rates. I was told that I should not worry about rates since they would be covered by others. Time has proven that they are not. Certainly, we never accepted increases to these rates. …..
>
> I am looking forward to a refund cheque as soon as possible.
>
> Yours truly,
>
> Ani-Wall Concrete Forming Inc.

[29] Mr. Thomas, however, wished to honour his personal undertaking and to have Cassels Brock's bill paid. As already noted, Mr. Indio's instructions, however, were to the contrary. In a letter dated January 29, 2009, Mr. Indio told Mr. Thomas not to pay Cassels Brock's outstanding account. Mr. Indio stated that he had overpaid Cassels Brock and that he had never agreed to the escalating rates in the accounts that had already been paid. On February 20, 2009 and again on May 22, 2009, Mr. Indio wrote letters to Mr. Thomas instructing him that Ani-Wall was prepared to release only $4,236.37 to Cassels Brock and stating that TGP should not hold back any funds. Mr. Indio demanded payment of the money out of trust.

[30] Meanwhile, on March 5, 2009, Ms. Baksh for Cassels Brock was pressing for payment, and she wrote Mr. Thomas as follows:

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> Dear Mr. Thomas,
>
> Re: Ani-Wall
>
> It is my understanding that this matter has been settled and that you have in your trust account sufficient funds to pay our accounts receivable in this matter.
>
> Ani-Wall promised to pay our accounts receivable out of the settlement proceeds. When you left the firm the file was given to you on the understanding that you would pay the amount outstanding out of the settlement proceeds. Kindly remit the funds to Cassels Brock and Blackwell LLP at your earliest opportunity.

[31] Despite Cassel Brock's request, TGP did not remit any funds, although Mr. Thomas felt the position taken by Ani-Wall was unfair. He urged Ani-Wall to pay or to have its accounts assessed. In paragraphs 36 and 37 of his affidavit, Mr. Thomas deposed:

> 36. I have had telephone discussions and meeting with Mr. Indio concerning the position set in his January 29, 2009 letter. I have explained my view that his position was unfair, unreasonable and wrong. I suggested that he see his regular lawyer, George Vella, and have the Cassells bills assessed. On May 22, 2009, Mr. Indio wrote me to advise that he would the Cassels bills reviewed, as I had suggested by an assessment officer. To date, no request for assessment has ever been made.
>
> 37. I have explained to Mr. Indio that his approach is inconsistent with any appreciation for the value of the services rendered and the results obtained. Mr. Indio is attempting to augment his settlement by failing to give Cassels funds that were intended to cover his legal fees. We have reached an impasse in our discussions. …

[32] It is not clear from the evidentiary record what happened between May 2009 and the end of November 2011, but on December 5, 2011 and on January 17, 2011, Ani-Wall's lawyer, Mr. Vella wrote Mr. Thomas and demanded payment of the funds still being held in trust at TGP.

[33] As noted above, TGP commenced this Application on January 10, 2012.

D. THE ARGUMENTS OF THE PARTIES

[34] Ani-Wall's argument is that it is the owner of the settlement funds and that Cassels Brock has no proprietary interest in the funds being held in the trust account by way of solicitors' lien, charging lien, charging order, or otherwise. In the alternative, if Cassels Brock has a proprietary claim to the funds being held in trust, then Ani-Wall submits that Cassels Brock's claim for payment for its final account is statute-barred.

[35] Ani-Wall also argues that TGP is not entitled to interplead the funds being held in trust, because, under rule 43.02 (1)(b)(ii), the person seeking an interpleader order must "claim no beneficial interest in the property, other than a lien for costs, fees or experts." Ani-Wall argues that Mr. Thomas has a beneficial interest in the funds because a payment to Cassels Brock would discharge Mr. Thomas' personal undertaking and thus TGP is disqualified from seeking an interpleader order. (I note

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here that because of my decision that Cassels Brock is entitled to the funds without interpleader, I will not rule on this argument.)

[36] For its part, TGP supports Cassel Brock's position. TGP's argument is that Ani-Wall is not entitled to the funds being held in trust, and if Ani-Wall had a grievance about the amount of the Cassels Brock accounts, it should have sought an assessment under the *Solicitors Act*, which, however, is no longer available because of the passage of time and the absence of extraordinary circumstances that would justify allowing an assessment.

[37] Accordingly, TGP submits that the money held in trust should be paid to Cassels Brock, or, in the alternative, the money should be paid into court pursuant to an interpleader order.

[38] Cassels Brock's argument is that it, and not Ani-Wall, is entitled to the funds. It submits that it is the owner of the funds, i.e., it has a proprietary claim to the funds. Cassels Brock submits that its entitlement is based on the agreement among TGP, Ani-Wall, and Cassels Brock made at the time of the transfer of the files. It says that it relied on this agreement and did not assert a solicitor's lien at the time of the file transfer.

[39] In the alternative, Cassels Brock claims a charging lien or charging order over the funds because its lawyers were instrumental in the successful outcome of the action that yielded the funds. Cassels Brock submits that these claims are not subject to any limitation period under the *Limitations Act, 2002*. In this regard, it advances two mutually exclusive arguments. The first argument is that a charging lien, being a manifestation of the common law court's and the courts of equity's inherent jurisdiction, is not subject to any limitation period. The second argument relies on s.16 (1)(a) of the *Limitations Act, 2002*, which provides that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought. Cassels Brock and TGP submit that a charging lien or charging order is declaratory in nature and, therefore, pursuant to s. 16(1)(1), these claims are not subject to a limitation period.

[40] In the alternative, Cassels Brock submits that if there is a limitation period, it did not start to run until the late fall of 2011, when Cassels Brock learned about Ani-Wall's demand for payment. Cassels Brock submits that until late 2011, it believed that the funds belonged to it, so there was no basis for it to commence any action.

[41] I also note that Cassels Brock also submitted that if it was subject to a limitation period, then so was Ani-Wall, which would produce some sort of stalemate or legal paradox of no assistance to either party. I foreshadow here to say that there will be no stalemate. As set out below, my opinion is that Ani-Wall's claim to the settlement funds and Cassels Brock's claim for a charging order or charging lien on the settlement funds are not statute-barred but Cassels Brock's contract claim comes too late.

[42] In any event, Cassels Brock also submits that Ani-Wall's complaint about the fees lacks merit since Ani-Wall received detailed accounts and had the opportunity to review the accounts that contained full details of services performed and fees charged. It submits that even to this day, Ani-Wall has not particularized any overcharging. Cassels

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Brock submits that there are no special circumstances that would justify ordering an assessment of its accounts. I again foreshadow to say that I will not decide the merits of Ani-Wall's complaint about excessive fees although I will order an assessment if Ani-Wall requests one within twenty days.

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E. LEGISLATIVE AND REGULATORY PROVISIONS

[43] In order to decide this matter, it is necessary to refer to legislative or regulatory provisions from the *Solicitors Act,* the *Limitations Act,* rule 43.02 (1) of the *Rules of Civil Procedure*, Rule 696 of the former *Rules of Practice*, and the *Rules of Professional Conduct.* The relevant provisions are set out below.

Solicitors Act

Solicitors to deliver their bill one month before bringing action for costs

2. (1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of the solicitor, his or her executor, administrator or assignee or, in the case of a partnership, by one of the partners, either with his or her own name, or with the name of the partnership, has been delivered to the person to be charged therewith, or sent by post to, or left for the person at the person's office or place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

Not necessary in first instance to prove contents of bill delivered

(2) In proving compliance with this Act it is not necessary in the first instance to prove the contents of the bill delivered, sent or left, but it is sufficient to prove that a bill of fees, charges or disbursements subscribed as required by subsection (1), or enclosed in or accompanied by such letter, was so delivered, sent or left, but the other party may show that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act.

Charges in lump sum

(3) A solicitor's bill of fees, charges or disbursements is sufficient in form if it contains a reasonable statement or description of the services rendered with a lump sum charge therefor together with a detailed statement of disbursements, and in any action upon or assessment of such a bill if it is deemed proper further details of the services rendered may be ordered.

Order for assessment on requisition

3. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,

(a) by the client, for the delivery and assessment of the solicitor's bill;

(b) by the client, for the assessment of a bill already delivered, within one month from its delivery;

(c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.

No reference on application of party chargeable after verdict or after 12 months from delivery

4. (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for the reference is made.

Directions as to costs

(2) Where the reference is made under subsection (1), the court or judge, in making it, may give any special directions relative to its costs.

Payment not to preclude assessment

11. The payment of a bill does not preclude the court from referring it for assessment, if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

Solicitors' Charging Orders
Charge on property for costs

34. (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding.

Conveyance to defeat is void

(2) A conveyance made to defeat or which may operate to defeat a charge under subsection (1) is, unless made to a person who purchased the property for value in good faith and without notice of the charge, void as against the charge.

Assessment and recovery

(3) The court may order that the solicitor's bill for services be assessed in accordance with this Act and that payment shall be made out of the charged property.

<u>*Limitations Act, 2002*</u>

Definitions

1. In this Act,

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

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Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

16.(1) There is no limitation period in respect of,

(a) a proceeding for a declaration if no consequential relief is sought;

Rules of Civil Procedure

CHANGE IN REPRESENTATION BY PARTY

Notice of Change of Lawyer

15.03 (1) A party who has a lawyer of record may change the lawyer of record by serving on the lawyer and every other party and filing, with proof of service, a notice of change of lawyer (Form 15A) giving the name, address and telephone number of the new lawyer.

Claim for Lawyer's Lien

(4) A party may move, on notice to the party's former lawyer of record, for an order determining whether and to what extent the lawyer has a right to a lawyer's lien.

(5) In the order, the court may impose such terms as are just in connection with the lien and its discharge.

43.02 (1) A person may seek an interpleader order (Form 43A) in respect of property if,

(a) two or more other persons have made adverse claims in respect of the property; and

(b) the first-named person,

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(i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and

(ii) is willing to deposit the property with the court or dispose of it as the court directs.

Rules of Practice

Rule 696

696 (1) Where a solicitor has been employed to prosecute or defend any cause or matter, the court may, upon a summary application, declare such solicitor, or his personal representatives, to be entitled to a charge upon the property recovered or preserved through the instrumentality of such solicitor, for his costs, charges and expenses of or in reference to such cause, matter or proceeding, and all conveyances and acts done to defeat, or which may operate to defeat, such charge or right are, unless made to a bona fide purchaser for value without notice, absolutely void and of no effect as against such charge.

(2) The court may make an order for taxation of such costs, charges and expenses and for the raising and payment of the same out of the property.

Rules of Professional Conduct

2.09 WITHDRAWAL FROM REPRESENTATION

Manner of Withdrawal

(8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

(9) Upon discharge or withdrawal, a lawyer shall

(a) subject to the lawyer's right to a lien, deliver to or to the order of the client all

papers and property to which the client is entitled, …,

(d) promptly render an account for outstanding fees and disbursements, and

(e) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client.

Commentary

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute. ….

Where upon the discharge or withdrawal of the lawyer, the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

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> *Duty of Successor Licensee*
>
> (10) Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.
>
> *Commentary*
>
> It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.
>
> 6.03 RESPONSIBILITY TO LAWYERS AND OTHERS
>
> *Undertakings*
>
> (10) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.
>
> *Commentary*
>
> Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility. ….

F. DISCUSSION

1. Introduction

[44] The purpose or point of TGP's Application is to use the funds in its trust account to discharge Mr. Thomas' personal undertaking to have Cassels Brocks' final account to Ani-Wall paid. Thus, the essential question to be determined in the Application is whether these funds belong to Cassels Brock or to Ani-Wall. A review of several legal concepts; namely, undertakings, the obligations of a successor lawyer on the transfer of a file, assessments under the *Solicitor*s *Act*, solicitor's liens, charging liens, and charging orders, and then a chronological, event by event analysis is required to answer that question.

2. Undertakings

[45] Lawyer's undertakings are of two types. The first type of undertaking is an undertaking given by the lawyer acting as an agent of his or her client; the lawyer makes it clear that the principal, i.e. the client, is the party responsible for the satisfaction of the undertaking. This type of undertaking does not expose the lawyer to liability: *Re Jost*

and Solicitors (1978), 7 C.P.C. 303 (N.S.S.C.); *Wakefield v. Duckworth & Co.*, [1915] 1 K.B. 218 The second type of undertaking, which does expose the lawyer to liability, is the personal undertaking of the lawyer acting in his or her professional capacity as a lawyer.

[46] In the case at bar, I conclude that Mr. Thomas made the second type of undertaking, a personal undertaking, not an undertaking made as agent for his client Ani-Wall.

[47] Sometimes the exposure of a lawyer for liability for breach of a personal undertaking may be explained as a matter of the law of contract. This explanation will follow if the rules of contract formation are satisfied for the promise or undertaking. The case of *Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, (1971), 16 D.L.R. (3d) 736 (S.C.C.), revg. (1969), 5 D.L.R. (3d) 15 (Ont. C.A.), is an example. In this case, a law firm's undertaking to pay funds to a manufacturer was a binding contract.

[48] More often, however, the enforcement of the undertaking cannot be explained as a matter of contract because, for example, the element of consideration may be missing. The enforcement of these undertakings is then explained as an incident of the court's inherent jurisdiction to supervise its officers and to secure their honest conduct: *Re Hilliard, Ex. P. Smith* (1845), 2 Dow. & L. 919; *Watton v. Parsons* (1977), 80 D.L.R. (3d) 297 (Nfld. Dist. Ct.); *Regatta Investments Limited v. Haig*, [1985] 6 W.W.R. 635 (Man. Q.B.).

[49] The court's summary jurisdiction to enforce lawyers' undertakings is rooted in the idea that the court should secure high standards of conduct, honesty, and integrity from its officers. Because this jurisdiction is a matter of the honour of the profession, it follows that, for the court to exercise its jurisdiction, the lawyer must give the undertaking while he or she is acting in a professional capacity. For example, if a lawyer borrows money in his or her personal capacity and promises to repay, that promise is not an undertaking in his or her capacity as a lawyer that is enforceable summarily by the court: *Silver & Drake v. Baines*, [1971] 1 Q.B. 396 (C.A.).

[50] When the terms of the undertaking are clear, the beneficiary of the undertaking may apply in a summary way to the court for an order that the lawyer comply with his or her undertaking or pay compensation if unable to do so: *United Mining and Finance Corporation Ltd. v. Becher*, [1910] 2 K.B. 296 (C.A.); *Re Williams v. Swan. & Gray Coach Lines*, [1942] 4 D.L.R. 488 (Ont. C.A.) *Re Solicitor* (1916), 37 O.L.R. 310 (C.A.); *Watton v. Parsons* (1977), 80 D.L.R. (3d) 297 (Nfld. Dist. Ct.); *Bank of British Columbia v. Mutrie* (1981), 120 D.L.R. (3d) 177 (B.C.C.A.); *John Fox v. Bannister, King & Rigbeys*, [1988] 1 Q.B. 925 (C.A.); *Witten v. Leung* (1983), 148 D.L.R. (3d) 418 (Alta. Q.B.).

[51] If a lawyer fails to honour his or her undertaking, then he or she may also be punished for contempt. *Cain v. Genereux* (1981), 21 R.P.R. 156 (Ont. H.C.J.) is an example. In this case, the lawyer for the vendor undertook to a first mortgagee to use closing funds to discharge the existing first mortgage. The lawyers for the mortgagee successfully moved to have the vendor's lawyer committed for contempt for his failure

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to honour the undertaking. See also *Domfab Limited v. Ross, Viner* (1976), 22 N.S.R. (2d) 185 (N.S. T.D.).

[52] In my opinion, in the case at bar, Mr. Thomas gave a personal undertaking to pay Cassel Brock's account and this undertaking is enforceable by Cassels Brock.

[53] From the discussion in the next section of these reasons, I conclude that Mr. Thomas breached his undertaking to Cassels Brock.

3. The Obligations of a Successor Lawyer on the Transfer of a File.

[54] Although he gave an undertaking to pay Cassel Brock's outstanding account receivable out of the proceeds of the anticipated settlement payable to Ani-Wall, Mr. Thomas had no professional obligation to Cassels Brock to give this undertaking. Unfortunately, the duties of a successor lawyer on the transfer of a file are not clear and there are different arrangements that are possible, some of which may prove problematic if the client does not support the undertaking.

[55] The Honourable John Morden discussed the ethical duties of a successor lawyer in J.W. Morden, "A Succeeding Solicitor's Duty to Protect the Account of the Former Solicitor" (1971), 4 *Law Society of Upper Canada Gazette* 257, and he stated at p. 258:

> It is my view that no rule of professional conduct can be laid down to cover the situation respecting unpaid accounts where a client moves from one solicitor to another. It is quite clear that it is the client's absolute right to terminate his relationship with his solicitor at any time. In many cases a rule that a superseding solicitor was obliged to make arrangements to "protect the account" of the former solicitor would unjustly interfere with this right. In some cases there undoubtedly will be good grounds for the client leaving his former solicitor and it may that his liability to pay any fee at this point would be questionable. It would be wrong to create the impression by a formal rule that the members of the legal profession have a concerted or collective position against clients desiring to change their legal advisers – a rule which works to the benefit of individual members of the profession.

[56] More recently, Justice Rawlins of the Alberta Court of Queen's Bench addressed the question of the successor lawyer's duties to his or her predecessor in *Merchant Law Group v. McLeod & Co.*, *supra* at para. 53, where he stated:

> In my view, while solicitors are duty-bound to extend reasonable courtesies to one another, there is no such duty to ensure payment of another solicitor's account absent some intervention by the Court. I am supported in this view by Chapter 14 of the Law Society of Alberta's *Code of Professional Conduct*, which deals with withdrawal by and dismissal of a solicitor. Commentary 3 to Rule 3 of that Chapter provides, in part, as follows:
>
>> A withdrawing lawyer should not enforce a solicitor's lien for non-payment of fees if the client is prepared to enter into an arrangement that reasonably assures the lawyer of payment in due course. Successor counsel may also be requested to undertake to pay an outstanding account from the monies ultimately recovered by that counsel. Where the matter in question is subject to a contingency agreement, the lawyers may agree to divide the contingent fee on the basis of apportionment of total effort required to effect settlement.

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Further, Commentary 5 to Rule 5 provides, in part, as follows:

> Both the withdrawing and successor lawyer must cooperate in facilitating a smooth transition with as little inconvenience and expense to the client as possible. A successor lawyer has no general duty to ensure that the previous lawyer has been paid, but it is appropriate to encourage the client to resolve an outstanding account.

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[57] In *Bogoroch & Associates v. Sternberg*, [2005] O.J. No. 2522 (S.C.J.), Justice Wilton-Siegel discussed the problems associated with the various different arrangements to "protect a lawyer's account." In this case, Richard Campbell was injured in a motor vehicle accident, and he retained Bogoroch & Associates to act for him to make tort claims and statutory accident benefit claims. The firm acted for a time, but Mr. Campbell decided to retain a different lawyer, Gerald Sternberg, to assume carriage of his claims. In order to obtain the file, Mr. Sternberg gave an undertaking to Bogoroch & Associates to protect its account, which was understood to mean that Mr. Sternberg would ensure that the account would be paid out of any arbitration or settlement proceeds after payment of Sternberg's account. There, however, was no complementary undertaking or acknowledgement from Mr. Campbell.

[58] Mr. Sternberg assumed carriage of the matter, and he negotiated a $75,000 settlement with Mr. Campbell's accident benefits insurer. Mr. Campbell demanded that the settlement proceeds be paid directly to him and not to Mr. Sternberg in trust. Mr. Sternberg understood that Mr. Campbell wanted a direct payment to prevent Mr. Sternberg from using the funds to pay Bogoroch & Associates's account. Mr. Sternberg advised Bogoroch & Associates that it was probable that Campbell would be paid directly and thus he would be unable to honour the undertaking.

[59] Meanwhile, Bogoroch & Associates issued an account for $31,435.97 and sent a copy to Mr. Sternberg, but before it could obtain a charging order, Mr. Campbell received the settlement proceeds. Subsequently, Bogoroch & Associates sued Mr. Sternberg on his undertaking to protect the account.

[60] Justice Wilton-Siegel noted that there was no uniform practice among lawyers with respect to the actions, if any, that should be taken at the time of the transfer of a client's file and thus the obligations of a solicitor giving an undertaking were unclear. At paragraphs 57 and 58 of his judgment, Justice Wilton-Siegel set out a list of actions that a lawyer giving an undertaking to protect his or her predecessors account might take. He stated:

> 57. First, there are a number of actions that a lawyer giving an undertaking to protect another lawyer's account might take at the time of giving the undertaking. These include the following, some of which are alternatives:
>
>> 1. obtaining an acknowledgement from his client that the client is aware of the solicitor's undertaking and agrees to abide by it;
>>
>> 2. obtaining a direction from the client to have all proceeds paid to the solicitor in trust in order to pay the first solicitor's legal account out of the proceeds;

> 3. providing the first solicitor with an undertaking from the client to have all proceeds paid in trust to the solicitor with carriage of the matter;
>
> 4. providing a solicitor's undertaking and advising the client of this commitment; and
>
> 5. providing a solicitor's undertaking without advising the client of this commitment.

> 58. In addition, the first solicitor may provide an account for his services up to the time of transfer to the client or to the solicitor assuming carriage of the action. In that event, the solicitor assuming the matter may discuss the account with the client and obtain either his agreement to the quantum or an indication that the client requires an assessment of the account.

[61] Justice Wilton-Siegel stated that since the successor lawyer's undertaking was a continuing obligation that included the implied promise not to assist the client in frustrating the lawyer's performance of the undertaking, the manner in which the lawyer gave the undertaking could later create a conflict of interest between the lawyer and his or her client and also place the lawyer in circumstances where he or she might breach his or her obligations to comply with the *Rules of Professional Conduct*. He described the problems and paradoxes at paragraphs 61 to 67 of his reasons, where he stated:

> 61. The parties addressed the operation of the Rules of Professional Conduct in the context of Camp-bell's decision to require payment of the settlement proceeds directly to himself. By doing so, Sternberg was placed in a position of conflict of interest. While the operation of the Rules of Professional Conduct in these circumstances was not thoroughly canvassed, the following observations are relevant for these Reasons.
>
> 62. First, the plaintiff properly describes the conflict of interest as a conflict between the obligations of the solicitor to perform the solicitor's personal undertaking in favour of the first solicitor and the obligation of the solicitor to fulfill his or her professional responsibilities to the client by acting in accordance with the client's instructions. As discussed further below, the undertaking in favour of the first solicitor is a continuing obligation and carries an implied covenant to refrain from actions that would assist the client in frustrating its performance.
>
> 63. Second, at least three different *Rules of Professional Conduct* address the position of a solicitor who, having given an undertaking to a former solicitor of record, learns that the client is seeking to frustrate performance of the undertaking. Rule 2.04(3) provides that a lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client consents. I note, however, that this Rule only addresses the relationship between the solicitor and the client and not the relationship between the two solicitors. Second, Rule 2.09(7) of the *Rules of Professional Conduct* requires a lawyer to withdraw from representation of a client if it becomes clear that the lawyer's continued employment will lead to a breach of the rules. This rule could come into play if the solicitor who has assumed carriage of the action finds himself in a conflict of interest because it has become impossible to honour both the client's instructions and the solicitor's personal obligations under the undertaking. Lastly, having undertaken to represent the client, a solicitor is not permitted to withdraw that representation without justifiable cause. Justifiable cause includes a loss of confidence by the solicitor resulting from deceit or other improper behaviour of the client. To the same end, Rule 4.01(2)(b) of the *Rules of Professional Conduct* also provides that a solicitor shall not knowingly assist or permit a client to do

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> anything that the lawyer considers to be dishonourable or dishonest. However, justifiable cause does not extend to a conflict of interest arising solely as a result of the solicitor's actions.
>
> 64. Third, whether or not the conflict can be resolved without risk of liability to, or disciplinary sanction of, the solicitor depends upon whether the solicitor can demonstrate a justifiable cause permitting his or her withdrawal from the action. In circumstances similar to those contemplated in this decision, the issue of whether or not justifiable cause exists depends on whether or not the solicitor who gave the undertaking has taken some action to make the client aware of the undertaking and to obtain the client's express or implied consent thereto.
>
> 65. If the solicitor has done so, Rule 4.01(2)(b) articulates a positive obligation to withdraw from the action and provides a "safe harbour" from any disciplinary action. Similarly, in these circumstances, public policy prevents claims by the client against the solicitor for any loss resulting from the withdrawal of services. In addition, in these circumstances, if the solicitor has received funds in his or her trust account, the funds may be interpleaded, also without legal exposure to the solicitor.
>
> 66. Conversely, in the absence of such consent, the solicitor faces an insoluble conflict between two courses of action. If the solicitor withdraws from the action without the consent of the client, there is the potential for a claim by the client for any loss resulting from the withdrawal of his services. If the solicitor continues to represent the client, the solicitor breaches the continuing obligations of the undertaking, with the potential for a claim by the first solicitor for any loss resulting from the failure to perform the undertaking. In addition, each course of action appears to contravene the *Rules of Professional Conduct* and carries the potential for disciplinary sanctions.
>
> 67. Lastly, the foregoing analysis demonstrates that a solicitor who gives an undertaking and does not take some course of action at the time of doing so to avoid the potential for a conflict of interest runs the risk of a contravention of the Rules of Professional Conduct if the client subsequently takes actions which would frustrate the undertaking. However, the Rules of Professional Conduct do not mandate any specific actions or procedures to be taken or followed by either party when a solicitor gives an undertaking in the circumstances contemplated by this action.

[62] Moving from the lawyer’s ethical or professional responsibilities to the law’s enforcement of undertakings, Justice Wilton-Siegel concluded that although there were good practical and professional reasons for doing so, there was no legal requirement that a lawyer give an undertaking to the predecessor lawyer or any obligation to ensure that any undertaking was acknowledged by the client or to ensure that funds are payable to the lawyer. Lawyers were free to come to their own arrangements.

[63] There are obligations, however, if a lawyer does give an undertaking. The undertaking will include a continuing obligation of the solicitor to refrain from actions that would frustrate the performance of the undertaking. The lawyer who gives an undertaking is expected to provide timely notification of circumstances coming to the lawyer’s attention that may prevent the lawyer from honouring his or her undertaking. The former lawyer must be advised of all facts necessary to permit him or her to protect his or her account.

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[64] The notice obligations under an undertaking could give rise to a breach of confidentiality obligations to the client by the lawyer who gave the undertaking, and this could only be addressed by express permission from the client. As a practical matter, in most situations, this permission will only be given, if at all, at the time the file is transferred, and thus, as a practical matter, the lawyer giving the undertaking must address the issue. The solicitor takes the risk of legal exposure to his or her client if the lawyer does not obtain permission to give this disclosure prior to the conflict arising.

[65] Finally, the undertaking requires the lawyer to cease acting on behalf of the client from the time when the lawyer learns that the client proposes to take actions that would frustrate the undertaking. Whether the obligation to withdraw conflicts with the solicitor's professional responsibilities to the client will depends upon the particular circumstances of a case.

[66] Justice Wilton-Siegel concluded that Mr. Sternberg breached his obligations by continuing to act for Mr. Campbell. By failing to take any steps at the time of taking over this litigation, Mr. Sternberg took on himself the risk of exposure to his client after any future withdrawal from the action, as well as the risk of exposure to any claim for breach of confidentiality.

[67] The above discussion leads me to the conclusion that Mr. Thomas was under no obligation to give an undertaking to have Cassels Brock's account paid from the proceeds of the settlement but having given the undertaking, Mr. Thomas breached it when Ani-Wall gave instructions that the settlement funds not be paid to Cassels Brock and Mr. Thomas did not himself honour the undertaking by paying the account.

4. Equitable Assignment

[68] In my opinion, Mr. Thomas needed instruction from Ani-Wall to bind it to an agreement to use the settlement funds to pay Cassels Brock's final account. For Mr. Thomas to have made an undertaking without personal liability but binding on Ani-Wall, he would have had to implement instructions from Ani-Wall to make an equitable assignment or direction of the settlement proceeds. This approach is one of the possibilities mentioned in *Bogoroch & Associates v. Sternberg*, *supra.*

[69] Under the law of equitable assignments, if a debtor, to repay a debt, gives his or her creditor an order upon a person who holds a specific fund for the debtor that the fund be used to repay the debt, there is an equitable assignment of the fund. There must be both an agreement to pay out of a specific fund and the intent to create a property interest in that fund: *Burn v. Carvalho* (1839), 4 My. & Cr. 690; *Rodick v. Gandell* (1852) 1 D.M. & G. 763; *Palmer v. Carey*, [1926] A.C. 703 (P.C.); *Family Trust Corp v. Morra* (1987), 60 O.R. (2d) 30 (Div. Ct.); *Rawlings, Sumner, Tilson Electric Ltd. v. Commercial Courts of London Ltd.* (1980), 32 O.R. (2d) 377 (H.C.J.); *Bilek v. Salter (Estate)*, [2009] O.J. No. 4454 (S.C.J.).

[70] An irrevocable direction for a valuable consideration requiring that funds shall be applied to the debt owing to a creditor, creates a beneficial property interest in favour

of the creditor. Such a direction, followed by receipt of the funds on closing, makes a solicitor liable for failure to honour the equitable assignment, provided there is consideration for the direction: *Family Trust Corp. v. Morra*, *supra*; *Van Melle v. Muir,* [2000] O.J. No. 5717 (S.C.J.).

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[71] A leading case about equitable assignments and about lawyers' undertakings is *Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, *supra*. In this case, the Defendant Goden Holdings was a lender. It was owned by the law firm Gotfrid & Dennis. Goden Holdings agreed to lend funds to Hyacinthine Properties for the construction of a building, the advances to be secured by a mortgage of the land being improved. The mortgage, however, did not absolutely oblige Goden Holdings to make advances. The plaintiff Frankel Structural Steel Ltd. agreed to supply steel to Hyacinthine Properties and obtained a direction from Hyacinthine Properties to Goden Holdings and to Gotfrid & Dennis to pay the Plaintiff from the mortgage advances. The Plaintiff also obtained a personal assurance from a partner in the law firm that the Plaintiff would be paid from the advances. In the result, the Plaintiff was paid in part only and it sued Goden Holdings and the law firm for the balance of $48,3000 owed to it by Hyacinthine Properties.

[72] Both the Ontario Court of Appeal and the Supreme Court of Canada held that the Plaintiff could not succeed on the basis of an equitable assignment. This claim failed because the lender's discretion to advance or not advance funds meant that no fund ever came into existence, and so there was no subject matter which could be equitably assigned. The Plaintiff, however, was entitled to succeed on an alternative ground. The Court of Appeal held that the Plaintiff could succeed in contract against Goden Holdings because the partner's assurance of payment was a unilateral contract to pay for steel delivered to Hyacinthine Properties.

[73] For the case at bar, in my opinion, it would have been possible to establish an equitable assignment of the proceeds from the settlement once that fund came into existence but no equitable assignment was created at the time of the transfer of the file because the fund did not exist and might never have come into existence. Moreover, at the time of the transfer, Ani-Wall did not agree to pay out of a specific fund and it did not have any intent to create a property interest in that fund to pay an account that it was disputing.

5. Assessments under the *Solicitors Act*

[74] Under the *Solicitors Act*, where the retainer is not in dispute, a client may requisition a local registrar of the court for an order for the assessment of any solicitor's account, unpaid or paid, within one month of the delivery of the account: *Enterprise Rent-a-Car Co. v. Shapiro, Cohen, Andrews, Finlayson*, [1998] O.J. No. 727 (C.A.). If the client acts within one month of the delivery of the lawyer's bill, no court intervention is required for the assessment to be scheduled.

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[75] After the one-month period, the court may order an assessment if there are "special circumstances:" *Guillemette v. Doucet*, [2007] O.J. No. 4172 (C.A.); *Brusby v. Flak,* 2011 ONSC 4917.

[76] Subject to the client establishing special circumstances, the client's claim for an assessment is also subject to the two-year limitation period prescribed for claims under the *Limitations Act, 2002*. In other words, the two-year period of the *Act* applies, unless the one-year limitation period of the *Solicitors Act* is extended by operation of the special circumstances doctrine: *Guillemette v. Doucet*, *supra.*

[77] In *Guillemette v. Doucet*, *supra* at para. 35, the Court of Appeal held that a superior court has an inherent jurisdiction to review lawyers' accounts entirely apart from any statutory authority and that inherent jurisdiction is not subject to a time limit.

[78] "Special circumstances" includes any circumstances of an exceptional nature affecting the matter of costs or the liability of a client that a judge, in the exercise of his or her judicial discretion in each particular case, may consider to justify an assessment of the account: *Glanc v. O'Donohue & O'Donohue*, [2008] O.J. No. 1946 (C.A.); *Rooney v. Jasinski*, [1952] O.J. No. 426 (C.A.); *Minkarious v. Abraham, Duggan*, [1995] O.J. No. 3494 (Gen. Div.); *Plazavest Financial Corp. v. National Bank of Canada*, [2000] O.J. No. 1102 (C.A.); *Ling v. Naylor*, [1998] O.J. No. 5263 (Gen. Div.).

[79] In determining whether there are special circumstances, the court exercises a broad discretion to be exercised on a case-by-case basis and with an eye to all of the relevant circumstances: *Plazavest Financial Corp. v. National Bank of Canada*, *supra*; *Guillemette v. Doucet*, *supra*; *Minkarious v. Abraham, Duggan*, *supra.*

[80] Special circumstances is a fact-specific inquiry, but the starting point is the perspective of the client, and public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for assessment of a solicitor's bill: *Echo Energy v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 ONCA 709 at para. 36; *Andrew Feldstein & Associates Professional Corp. v. Keramidopulos*, [2007] O.J. No. 3683 at para. 63 (S.C.J.); *Price v. Sonsini*, [2002] O.J. No. 2607 (C.A.).

[81] In my opinion, in the case at bar, there are special circumstances including the imperfect way in which the transfer of the file was handled, and it is not too late for the court to order that Cassels Brock's accounts be assessed.

6. Solicitor's Liens

[82] When a client discharges a lawyer without just cause, the lawyer may exercise a lien for fees over the documents in his or her possession, and the lawyer may retain the file material until he or she is paid, subject to the court's jurisdiction to interfere with the exercise of the lien, without actually nullifying it, to protect the interests of third parties: *Collison v. Hurst*, [1946] O.J. No. 212 (C.A.); *Re Gladstone*, [1971] O.J. No. 1881 (C.A.); *Maricic v. Stancer, Sidenberg*, [1992] O.J. No. 1540 (Gen. Div.); *1271122 Ontario Inc. v. Shutam Canada Inc.*, [2003] O.J. No. 1638 (Master); *Medici v. Roy*,

[2004] O.J. No. 2789 (S.C.J.); *Szabo Estate v. Adelson*, [2007] O.J. No. 636 (S.C.J.); *Kupnicki v. Macerola*, [2007] O.J. No. 2541 (Master); *Goodmans LLP v. Ferrara*, [2009] O.J. No. 2425 (S.C.J.).

[83] In the case at bar, Cassels Brock had a right to a solicitor's lien but it did not exercise that right because it accepted Mr. Thomas' personal undertaking. Had it exercised its right to a solicitor's lien, under rules 15.03 (4) and (5) of the *Rules of Civil Procedure*, the court has the jurisdiction to determine whether and to what extent the lawyer has a right to a lawyer's lien and the court may impose such terms as are just in connection with the lien and its discharge.

7. <u>Charging Orders and Charging Liens</u>

[84] A charging order is a statutorily-based proprietary right of a lawyer to claim property owned by a client or former client when the lawyer's acts were instrumental in recovering the property. A charging order is similar to a charging lien, which is a manifestation of the common law court's and the court of equity's inherent jurisdiction.

[85] Pursuant to s. 34 (1) of the *Solicitors* Act, a lawyer has a right to a charging order to encumber any property recovered or preserved by the instrumentality of the lawyer in a proceeding: *Bilek v. Salter Estate*, [2009] O.J. No. 4454 (S.C.J.); *Re Tots and Teens Sault Ste. Marie*, [1975] O.J. No. 2549 (H.C.J.); *Siskind, Cromarty, Ivey and Dowler v. Ross, Bennett & Lake*, [1994] O.J. No. 1807 (Gen. Div.).

[86] Section 34 is the successor of Rule 696 of the former *Rules of Practice* and was added to the *Solicitors Act* by the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 214 and not continued as part of the *Rules of Civil Procedure.*

[87] For a charging order or for a charging lien, property includes choses in action and proceeds that will become available in the future: *Pino v. Vanroon*, [1998] O.J. No. 4354 (Gen. Div.); *Medici v. Roy*, [2004] O.J. No. 2789 (S.C.J.).

[88] The charging order or charging lien is for the lawyer's fees, costs and disbursements in the proceeding. To obtain a charging order or charging lien, a lawyer must demonstrate that: (a) the fund, or property, is in existence at the time the order is granted; (b) the property was recovered or preserved through the instrumentality of the lawyer; and (c) there must be some evidence that the client cannot or will not pay the lawyer's fees:" *Bilek v. Salter Estate*, [2009] O.J. No. 4454 (S.C.J.); *Langston v. Landen*, [2008] O.J. No. 4936 (S.C.J.); *Kushnir v. Lowry*, [2003] O.J. No. 4093 (C.A.); *Higgott v. Higgott*, [1989] O.J. No. 1290 (Gen. Div.); *Blue Resources Ltd. v. Sheriff*, [1996] O.J. No. 1175 (Gen. Div.); *Budinsky v. The Breakers East Inc.*, [1993] O.J. No. 1984 (Gen. Div.).

[89] As already noted above, in addition to the statutory charging order under the *Solicitors Act*, common law courts and courts of equity have an inherent jurisdiction to charge assets recovered or preserved through the instrumentality of a lawyer for a client: *Re Cochard,* 2005 ABQB 679 at paras. 60 to 86 (Alta. Q.B.); *Pino v. Vanroon, supra* at para. 11; *Re Tots and Teens Sault Ste. Marie*, *supra*; *Merchant Law Group v. McLeod & Co.* 2005 ABQB 875.

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[90] For present purposes, it is important to note the legal nature of the charging lien, which is modestly different from a statutorily-based charging order. A charging lien is an inchoate right that immediately arises by operation of law the moment property has been recovered or preserved by the lawyer's instrumentality: *Bell v. Wright*, [1895] S.C.J. No. 45 (S.C.C.). Charging liens can be claimed only on the fruits of the proceeding in which recovery was made: *The London Mutual Fire Insurance Co. v. Jacob*, [1889] O.J. No. 22 (C.A.).Thus, a charging lien is pre-existing right that is confirmed by order of the court: *Pino v. Vanroon, supra,* at para. 11.

[91] In *Re Tots and Teens Sault Ste. Marie*, *supra* at paras. 15 and 17, Justice Henry described the charging lien as follows:

> 15. [T]he Courts have always had an inherent jurisdiction to declare that the solicitor's claim for his costs was a charge upon the fund representing the fruits of his diligence on behalf of his client. ….
>
> 17. It is to be observed that the order made is declaratory and this presupposes that there is a pre-existing right at common law or in equity, so that the order of the Court merely declares and gives effect to that right. The inherent jurisdiction of the Court, however to apply its equitable jurisdiction in favour of the solicitor remains.

[92] A subtle point that is worth noting is that the charging lien or charging order binds the client from the time of its creation but notice of the charging lien is required to bind a successor lawyer who otherwise could disburse the funds to a *bona fide* third party without notice of the charging order or charging lien. Charging orders or charging liens are not enforceable against *bona fide* purchasers for value without notice of the lawyers' claim for payment of his costs and expenses for the litigation.

[93] In *Franklin Services Co. Ltd. v. City of Halifax* (1977), 20 N.S.R. (2d) 306 (N.S.T.D.), Chief Justice Cowan stated that the Court will exercise its jurisdiction where the solicitor has given the opposite party or his or her solicitor notice of the lien against settlement proceeds, in which case the opposite party and his or her solicitor will, at his or her peril, pay the client or release the lawyer's claim to a share of the recovery. See also *Mix v. Murphy* 2003 NBQB 395.

[94] This subtle point is not a factor in the immediate case because TGP was aware that Cassels Brock was asserting a right to be paid from the settlement proceeds that TGP was holding.

[95] For the circumstances of the case at bar, the circumstance that the common law charging lien is an aspect of the court's inherent jurisdiction is particularly significant because of the Court of Appeal's holding in *Guillemette v. Doucet*, *supra* that a superior court has an inherent jurisdiction to review lawyers' accounts entirely apart from any statutory authority and that the inherent jurisdiction is not subject to a time limit.

[96] The significance to the case at bar is that the charging lien is not subject to a limitation period. This was also the holding of Justice Veit of the Alberta Court of Queens' Bench in *Re Cochard*, *supra* at para. 70. Similarly, in *Merchant Law Group v. McLeod & Co.*, *supra* at para. 50, Justice Rawlins stated:

> It is clear from the authorities, including Atkinson, that the charging lien is not subject to any statute of limitations. Nevertheless, the equitable nature of the Court's intervention means that equitable defences may be raised. For example, if there has been excessive delay in bringing the application, the defence of laches may apply.

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[97] These authorities thus support Cassels Brock's first argument that its claim to a charging order is not statute-barred. These authorities also support Cassels Brock's second argument that relies on s. 16 (1) of the *Limitations Act*, which, to repeat, provides that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought.

[98] *Re Tots and Teens Sault Ste. Marie*, *supra* is authority that a charging order is intrinsically declaratory relief. The facts of the case were that Mr. Lang successfully defended two clients who had been sued for damages. The action was dismissed, and the clients were awarded costs of $852.70, which were recovered by the sheriff levying execution. However, Mr. Lang's clients became bankrupt, and the moneys recovered for costs were assigned to their trustee in bankruptcy and not paid to Mr. Lang. He applied under former Rule 696, and the issue was whether the charging order would give Mr. Lang the status of a secured creditor in his clients' bankruptcies. Justice Henry answered that question yes.

[99] Justice Henry reasoned that there were two kinds of charging order: (1) the statutory charging order prescribed by what was then Rule 696 of the *Rules of Practice* and what is now s. 34 of the *Solicitors Act*; and (2) the charging lien that was a manifestation of the inherent jurisdiction of common law courts and courts of equity.

[100] Justice Henry reasoned that Mr. Lang's Application, although procedurally under Rule 696, did not substantively rely on Rule 696, but rather relied on the court's inherent jurisdiction. It was undoubtedly the case that before his clients' bankruptcies had Mr. Lang applied for a charging order (under either the statutory or the court's inherent jurisdiction), he would have been entitled to an order of the court. However, this did not occur because the funds recovered by the sheriff did not come into existence until after the bankruptcies. By the time Mr. Lang notified the trustee of his claim and initiated proceedings, the question became: "What then is the situation where the fund comes into existence as property of the bankrupt subsequent to the bankruptcy, and that property comes into the hands of the trustee?" Justice Henry provided his answer at para. 26, where he stated:

> … I have reached the conclusion that the fund at the time it was created in the hands of the Sheriff was impressed with the inchoate right of the solicitor to apply to the Court and have a declaration that it is charged as security for his costs. This was an inherent right to invoke the equitable jurisdiction of the Court to exercise its discretion in his favour by way of declaring that the fund is charged as security for his claim. As I see it, the role of the Court is to declare, not to create, the security and even though the bankruptcy has occurred, it is in my opinion still open to the proper Court, in the exercise of its discretion, as I have said, to decide if the lien shall or shall not be recognized. If the Court makes such a declaration it has the effect, as I see it, of holding that the lien attached to the fund at the moment it was created. If it had been created prior to the bankruptcy, there would be no question that the fund would stand charged; the fund having been created after the bankruptcy may, in my

> opinion, in the same way be made the subject of a charge by way of security, unless of course the Court comes to the conclusion that it would offend the principles of equity, either by reason of the conduct of the solicitor or unfairness to the creditors, to refuse to exercise the discretion in the solicitor's favour. On the view that I take of the matter, the lien in law attached to the fund as an inchoate right, the crystallization of the lien requiring only the pronouncement of the Court to reveal it.

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[101] For present purposes, the three points to note from Justice Henry's decision in *Re Tots and Teens Sault Ste. Marie* about a charging lien made under the court's inherent jurisdiction are: first, the charging lien creates the proprietary interest of a secured creditor; second, subject to being declared, the charging lien is an inchoate interest that pre-dates the court's declaration; and third, the charging lien is intrinsically declaratory in nature. The last point supports Cassel Brock's argument that a charging lien comes within s. 16 (1) (a) of the *Limitations Act, 2002* and is not subject to any limitation period.

[102] Applying the above analysis, I, therefore, conclude for the case at bar, that Cassels Brock would be entitled to a charging lien or a charging order and thus it has a proprietary interest in the funds being held by TGP. I also conclude that the claim to a charging order or charging lien is not statute-barred under the *Limitations Act*, 2002.

8. Chronological Analysis

[103] Turning to a chronological analysis of the facts of the case at bar and beginning with the final account dated June 23, 2008, it created a debt or contractual claim that Cassels Brock could have enforced by action or by assessment under the *Solicitors Act*. Ani-Wall could have had the account assessed under the *Solicitors Act*.

[104] However, in June 2008, rather than suing to have the account paid or having the account assessed under the *Solicitors Act*, Cassels Brock agreed to accept Mr. Thomas' personal undertaking that the account would be paid from what was anticipated to be a successful mediation producing a settlement. Relying on Mr. Thomas' personal undertaking, Cassels Brock gave up the opportunity to assert a solicitor's lien against Ani-Walls' file material.

[105] Mr. Thomas was incorrect in his belief that he had a professional obligation to give his personal undertaking. TGP's professional responsibilities as the successor lawyer was only to be satisfied that Cassels Brock had withdrawn or been discharged by Ani-Wall, which was the case.

[106] Mr. Thomas may have felt honour bound out of loyalty to his former firm to collect Ani-Walls' outstanding invoice, and it may be - but I do not know from the record for this Application – that he had an obligation as a departing partner of Cassels Brock to collect his receivables under his partnership agreement, but these moral or contractual obligations were not matters of the *Rules of Professional Conduct* and Mr. Thomas was under no obligation to give a personal undertaking to his former firm.

[107] As for binding Ani-Wall to an agreement to pay the outstanding bill from the anticipated settlement funds, Mr. Thomas was incorrect in his belief that he could unilaterally bind Ani-Wall to pay the Cassels Brock account from the anticipated settlement proceeds. Mr. Thomas, and Cassels Brock for that matter, would need a signed or confirmed direction from Ani-Wall to bind it to an equitable assignment.

[108] The settlement moneys were the property of Ani-Wall, and Mr. Thomas had no unilateral right to allocate his clients' property. While there was nothing improper in Mr. Thomas giving a personal undertaking, which was a matter personal to him, absent instructions and a clear indication that Ani-Wall and not Mr. Thomas were to be responsible, his personal undertaking could not bind Ani-Wall.

[109] If a written direction had been given by Ani-Wall to Cassels Brock, it might have constituted an equitable assignment of the proceeds from the settlement once they came into existence, but this did not occur in the case at bar. Ani-Wall's direction was simply to transfer the file from one firm to another and no equitable assignment could have been created at the time of the file's transfer.

[110] I appreciate that in the case at bar Cassels Brock gave up its solicitor's lien in exchange for Mr. Thomas' undertaking, but that was its decision, and the decision did not create a contract or equitable assignment with Ani-Wall. If Cassels Brock wished an equitable assignment giving it a proprietary interest in the settlement funds, then it ought to have obtained a written direction signed by Ani-Wall and not an oral undertaking from Mr. Thomas.

[111] Thus, in the spring of 2009 when the settlement funds were received by TGP, there was no equitable assignment but Cassels Brock had an outstanding account receivable and claim for payment in contract. However, in my opinion, Cassels Brock's claim in contract is now statute-barred under the *Limitations Act, 2002*. Nevertheless, for the reasons set out above, its claim for a charging lien or charging order is not statute-barred.

[112] In other words, with respect to its contract claim, I disagree with Cassel Brock's argument that the law firm did not discover its claim until the fall of 2011, and it is my view that the elements of s. 5 of the *Act* (Discovery) were satisfied around March 2009 with respect to any action to enforce payment of the final account.

[113] However, I agree with both of Cassel Brock's arguments that its entitlement to a charging lien or a charging order are not subject to any limitation period. I am further satisfied that Cassels Brock is entitled to a charging lien or charging lien in the circumstances of this case. It was never disputed that Cassel Brock's work was instrumental in recovering the settlement proceeds.

[114] Putting Cassels Brock's claim for a charging lien or charging order aside, for what it is worth, I do disagree with Cassels Brock's "what's bad for the goose is bad for the gander" argument that if its contractual claim is statute-barred, so is Ani-Wall's claim to the funds being in trust. In my opinion, Ani-Wall's circumstances or situation under the *Limitations Act, 2002* claim is different from Cassels Brock's circumstances

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with respect to its contract claim. Ani-Walls' claim to the funds is not statute-barred. Ani-Wall has a proprietary interest in the settlement funds and it did not know, that is, it did not discover that TGP would absolutely refuse to follow instructions to release those funds to Ani-Wall, until TGP brought this Application in 2012. In contrast, Cassels Brock knew or ought to have known that it should enforce its contract claim by March 2009, and its contract claim (but not its charging lien or charging order claim) is statute-barred.

[115] Ani-Wall's claim, however, is subject to the charging lien or charging order. The result of this long analysis is that Cassels Brock is entitled to the funds being held by TGP.

G. CONCLUSION

[116] For the above reasons, I conclude that Cassels Brock has a charging lien against the funds being held by TGP and its claim for a charging lien or charging order is not statute-barred. Therefore, this Application should be granted.

[117] However, as noted in the introduction there are two terms to granting this Application.

[118] The first term is that TGP should pay Ani-Walls' costs of this Application, because Mr. Thomas should not have purported to bind Ani-Wall to an equitable assignment of the settlement funds without having obtained instructions to do so. Had he obtained instructions, then Ani-Wall and Cassels Brock would have addressed Cassels Brock's claim to a solicitor's lien and Ani-Walls' claim that it had been overcharged. This acrimonious Application would not have been necessary.

[119] If the parties cannot agree, I will fix the scale of costs and the amount of them by receiving written submissions beginning with Ani-Wall's submissions within 20 days of the release of these Reasons for Decision followed by TGP's submissions within a further 20 days.

[120] As noted above, I am satisfied that there are special circumstances that would justify ordering an assessment now that Ani-Wall will be paying the final account from the funds being held by TGP. Had the transfer of the file been managed properly and if there still was a genuine dispute about the fees being charged by Cassels Brock, then Ani-Wall would have had an unfettered right to have the final account assessed. It is commonly the case that a charging order is coupled with an assessment of the lawyer's account. In the case at bar, there should be an assessment, if Ani-Wall wishes to pursue the matter further. Therefore, I order that within twenty days, Ani-Wall may obtain an appointment with an assessment officer for an assessment of Cassel Brock's accounts.

[121] Order accordingly.

Perell, J.

Released: April 12, 2012

2012 ONSC 2182 (CanLII)

CITATION: Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc. 2012 ONSC 2182
COURT FILE NO.: 12-CV-443677
DATE: April 12, 2012

2012 ONSC 2182 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Thomas Gold Pettingill

Applicant

- and -

Ani-Wall Concrete Forming Inc. and Cassels Brock & Blackwell LLP

Respondents

REASONS FOR DECISION

Perell, J.

Released: April 12, 2012.

TAB 5

Budinsky et al. v. The Breakers East Inc. (No. 2)
Rowntree v. The Breakers East Inc.

[Indexed as: Budinsky v. The Breakers East Inc.]

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15 O.R. (3d) 198
[1993] O.J. No. 1984
Action No. M2215/910

Ontario Court (General Division),
Ground J.
September 3, 1993

Construction liens -- Priorities -- Trust established by s. 9 of Construction Lien Act having priority over charging order for solicitor's fees and disbursements -- Construction Lien Act, R.S.O. 1990, c. C.30, s. 9 -- Solicitors Act, R.S.O. 1990, c. S.15, s. 34(1).

Professions -- Barristers and solicitors -- Liens -- Charging order -- Charging order having priority over security interest under Personal Property Security Act -- Charging order not having priority over trust claim under Construction Lien Act or over terms of receivership order -- Personal Property Security Act, R.S.O. 1990, c. P.10 -- Construction Lien Act, R.S.O. 1990, c. C.30 -- Solicitors Act, R.S.O. 1990, c. S.15, s. 34(1).

Professions -- Barristers and solicitors -- Liens -- Charging order -- Ontario Court (General Division) not having jurisdiction to make charging order about costs of appeal to Court of Appeal for Ontario -- Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 2, 10 -- Solicitors Act, R.S.O. 1990, c. S.15, s. 34(1).

Personal property security -- Priorities -- Charging order

under Solicitors Act having priority over security interest under Personal Property Security Act -- Personal Property Security Act, R.S.O. 1990, c. P.10 -- Solicitors Act, R.S.O. 1990, c. S.15, s. 34(1).

In earlier proceedings, 14 purchasers of condominium units applied for an order rescinding their respective agreements of purchase and sale. In those proceedings, DD, a law firm, acted for the vendor. The purchasers' application was dismissed with costs, and the purchasers' appeal to the Court of Appeal was dismissed with costs.

Before the release of the Court of Appeal's decision, upon the motion of two secured lenders, the vendor was placed into receivership by court order. The secured lenders held, among other securities, assignments of the agreements of purchase and sale, and this security interest had been registered under the Personal Property Security Act ("PPSA") well before the purchasers' application and appeal. Several lien claimants had claims against the vendor under the Construction Lien Act.

DD applied for an order under the Solicitors Act that it was entitled to a charge for its fees and disbursements on the costs awarded by the Court of Appeal, the deposits paid by the purchasers, and the closing proceeds.

Held, the application should be granted in part.

The Court of Appeal for Ontario is a separate and distinct court, and the statutory authority of the Ontario Court (General Division) under s. 34(1) of the Solicitors Act to make a charging order applies only to proceedings in the General Division. The Ontario Court (General Division) does not have any inherent jurisdiction to make a charging order about costs incurred in proceedings before another court.

DD was entitled to a charge on the deposits and on the proceeds of sale. Although ownership or title of the deposits and of the sale proceeds had not been in issue in the proceedings, the result of the successful defence of the purchasers' application was that the deposits and sale proceeds

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did not have to be returned and these funds were salvaged for the benefit of the vendor.

Further, DD satisfied the onus on it of showing a prima facie case that without the charging order it was unlikely that it would be able to collect its fees and disbursements. To obtain a charging order it is not necessary for a solicitor to show that the solicitor cannot recover from the client.

DD's charge or solicitor's lien had priority to the charge of the secured lenders under the PPSA. The lenders would take the benefit of the results of the dismissal of the purchasers' applications, and what was preserved by DD's defence was in the nature of a salvage order that attached to the property recovered or preserved. DD's charge, however, was subject to and did not have priority over the trust established by s. 9 of the Construction Lien Act, and it did not have priority over the fees and expenses of the court-appointed receiver as provided for in the receivership order.

Cases referred to

Bloomaert v. Dunlop, [1930] 2 D.L.R. 30, 24 Sask. R. 261, [1930] 1 W.W.R. 270 (C.A.); Canadian Imperial Bank of Commerce v. Gray (1987), 59 O.R. (2d) 414, 16 C.P.C. (2d) 181 (S.C.); Delta Finance Co. v. Byers, [1932] 1 W.W.R. 827, 26 Alta. L.R. 300, [1932] 3 D.L.R. 139 (C.A.); George & Asmussen Ltd. v. MCM Projects Inc. (1992), 9 O.R. (3d) 382 (Gen. Div.); Ginter v. Chapman (1969), 67 W.W.R. 632, 4 D.L.R. (3d) 89 (B.C.S.C.); Greer v. Young (1883), 24 Ch. D. 545, 52 L.J. Ch. 915, 49 L.T. 224, 31 W.R. 930 (C.A.); Hubbard v. Everyman's Saving & Mortgage Ltd. (1985), 59 C.B.R. (N.S.) 251, 62 A.R. 81 (Q.B.); L & D Cartage & Development Co. v. Sterling Construction Co., [1963] 2 O.R. 420, 39 D.L.R. (2d) 726 (H.C.J.); Phillipps & Scarth v. London Guarantee & Accident Co., [1927] 2 W.W.R. 570, 36 Man. R. 584, [1927] 4 D.L.R. 77 (C.A.); Rees, Newsham & Weir v. Stanek (1982), 16 Sask. R. 288 (Q.B.); Saskatoon (City) v. Shinkaruk (No. 2) (1988), 39 L.C.R. 193, 69 Sask. R. 93, 40 M.P.L.R. 281 sub nom. Saskatoon (City) v. Shinkaruk (Q.B.) [affd (1989), 42 L.C.R. 79, 75 Sask. R. 65 (C.A.), leave to appeal to S.C.C. refused (1989),

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82 Sask. R. 160n, 104 N.R. 318n sub nom. Shinkaruk v. New Community Savings & Credit Union Ltd.]; Scholey v. Peck, [1893] 1 Ch. 709, 62 L.J. Ch. 658, 68 L.T. 118, 41 W.R. 508, 3 R. 245; Striemer v. Nagel (1911), 17 W.L.R. 189 (Man. K.B.); Tots & Teens Sault Ste. Marie Ltd. (Re) (1975), 11 O.R. (2d) 103, 65 D.L.R. (3d) 53, 21 C.B.R. (N.S.) 1 sub nom. Tots & Teens Sault Ste. Marie Ltd. v. McFarland (S.C.); Wellman v. Jerome (1967), 63 D.L.R. (2d) 530 (Sask. Q.B.)

Statutes referred to

Bankruptcy Act, R.S.C. 1970, c. B-3
Condominium Act, R.S.O. 1990, c. C.26
Construction Lien Act, R.S.O. 1990, c. C.30, s. 9
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 2, 10
Legal Profession Act, R.S.B.C. 1960, c. 214, s. 109
Personal Property Security Act, R.S.O. 1990, c. P.10
Solicitors Act, R.S.O. 1990, c. S.15, s. 34

APPLICATION for a charging order under the Solicitors Act, R.S.O. 1990, c. S.15, s. 34(1).

Kenneth Hood, for moving party, Dale and Dingwall.

Ted Kerzner, for Montreal Trust Co.

Howard Shankman, for Plan Electric Co.

Robert Wright, for Coopers & Lybrand Ltd.

GROUND J.: -- This is a motion brought by the law firm of Dale and Dingwall, formerly Woolley, Dale and Dingwall ("D & D"), for an order that D & D is entitled to a charge on:

(a) costs awarded by Mr. Justice Borins and by the Court of Appeal for Ontario (the "Court of Appeal"), in earlier proceedings in this matter, which costs were directed to be paid by the applicants to the respondent;

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(b) the deposits paid by the applicants to the respondent in connection with the purchase of condominium units by the applicants from the respondent; and

(c) the proceeds from the closings of sales of condominium units from the respondent to the applicants,

for the fees, costs, charges and disbursements of D & D in these proceedings in the amount of $83,906.82 exclusive of interest. The motion is also brought for an order that the costs of this motion be assessed on a solicitor-and-client basis and added to the amount for which the charge is granted.

The issue with respect to the costs awarded by Mr. Justice Borins has been resolved between the parties and the motion is proceeding with respect only to the Court of Appeal costs, the deposit moneys and the sale proceeds on the closings.

Facts

1. D & D was retained by the respondent to defend an application brought by 13 purchasers of condominium units in a development owned by the respondent. The applicants were seeking rescission of their agreements of purchase and sale and the return of their deposits. A further application was brought by another purchaser, Alan Rowntree, for the same relief and the two proceedings were heard together. The applications were heard by Mr. Justice Borins in December 1991 and he dismissed the majority of the applications and denied the relief requested with respect to rescission of the agreements of purchase and sale. He fixed costs payable by the applicants to the respondent in the amount of $15,085.02 plus interest. The applicants appealed the decision of Mr. Justice Borins to the Court of Appeal. The appeals were argued in April 1992 and the Court of Appeal dismissed the applicants' appeals with costs. Such costs have not been assessed or agreed to by the applicants as of the date of this motion.

D & D acted for the respondent throughout both the applications and the appeals, and D & D has rendered accounts

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to the respondent for its fees and disbursements in the amount of $83,906.82 exclusive of interest. The respondent has not complained about the quantum of the accounts or the services rendered and was intending to pay the accounts out of the deposit funds being held in trust by D & D pending final closing of the various agreements of purchase and sale. Between the date of the hearing of the appeals and the release of the reasons by the Court of Appeal, Coopers and Lybrand Limited was appointed receiver of the respondent's assets by an order of Mr. Justice Stach. The receiver was appointed on the motion of Montreal Trust Company of Canada and Montreal Trust Company (collectively "MTC") which had provided, respectively, a construction loan and a letter of guarantee in connection with the construction of the condominium project, and had received as security an assignment of the agreements of purchase and sale and security agreements covering, among other things, choses in action and personal property related to the condominium project. The security was given in 1988 and was registered under the Personal Property Security Act, R.S.O. 1990, c. P.10 (the "PPSA").

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A number of lien claimants, represented on this motion by Plan Electric Co. ("Plan"), have filed claims pursuant to the Construction Lien Act, R.S.O. 1990, c. C.30 (the "CLA").

Issues

Six principal issues arise on this motion as follows:

1. Do I, as a judge of the Ontario Court of Justice (General Division), have jurisdiction, under s. 34 of the Solicitors Act, R.S.O. 1990, c. S.15 (the "Solicitors Act"), to grant a charging order in respect of costs awarded by the Court of Appeal on the appeal of an earlier order of Borins J. in this matter?

2. In order to grant a charging order charging "the property recovered or preserved through the instrumentality of the solicitor", must the proceeding have been one in which title to or ownership of the property was in issue?

3. Whether any charging order which might be granted to D & D takes priority over the first charges on the assets of the respondent previously granted to MTC.

4. If the property recovered or preserved is subject to a trust in favour of the lien claimants under the CLA, is a charging order in favour of D & D subject to the rights of the beneficiaries of that trust?

5. Whether any charging order which might be granted to D & D takes priority over the charges in favour of the receiver for expenditures and money borrowed.

6. In order to be entitled to a charging order, must D & D satisfy the Court that, without the charging order, D & D will not be paid or that there is a strong probability of the client depriving D & D of its fees?

Reasons

I propose to deal with the various issues arising on this motion in the order set out above.

1. Counsel for MTC has submitted that the statutory authority in the Solicitors Act for making a charging order applies only to proceedings in the Ontario Court of Justice (General Division). Subsection 34(1) of the Solicitors Act provides as follows:

> 34(1) Where a solicitor has been employed to prosecute or defend a proceeding in the Ontario Court (General Division), the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding.

It is submitted that, under the Courts of Justice Act, R.S.O. 1990, c. C.43 (the "CJA"), the Court of Appeal is established as a separate court and that, accordingly, the references in s.

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34(1) of the Solicitors Act to "the court" must refer only to the Ontario Court of Justice (General Division) and the references to "the proceeding" must refer only to the proceeding in such court.

It is further submitted that there is no statutory authority for granting a charging order with respect to Court of Appeal costs and that any such authority would have to be inherent and, accordingly, would be inherent in the court before which such proceedings were taken and could only be granted by the Court of Appeal.

I am satisfied that the effect of the CJA and in particular ss. 2 and 10 thereof, is that the Court of Appeal is constituted as a separate and distinct court. Sections 2 and 10 of the CJA provide as follows:

> 2(1) The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.
>
> (2) The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario.
>
> . . . . .
>
> 10(1) The Ontario Court of Justice is continued under the name Ontario Court of Justice in English and Cour de justice de l'Ontario in French.
>
> (2) The Ontario Court shall consist of two divisions, the General Division and the Provincial Division.

In my view, s. 34(1) of the Solicitors Act must be interpreted as statutory authority only for the Ontario Court of Justice (General Division) granting a charge on solicitors' fees, costs, charges and disbursements incurred in proceedings before the Ontario Court of Justice (General Division).

I have been cited no authority for the proposition that, in

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the absence of statutory authority, there is an inherent jurisdiction in a court to grant a charging order with respect to solicitors' fees, costs, charges and disbursements incurred in proceedings before another court.

In Ginter v. Chapman (1969), 67 W.W.R. 632, 4 D.L.R. (3d) 89 (B.C.S.C.), the solicitor was granted a charging order with respect to costs on an appeal but the relevant section, s. 109 of the Legal Profession Act, R.S.B.C. 1960, c. 214, referred to "any cause or matter in any Court of Justice" (emphasis added).

In Wellman v. Jerome (1967), 63 D.L.R. (2d) 530, the Saskatchewan Court of Queen's Bench was prepared to grant a charging order for the costs of the trial and of the appeal to the Saskatchewan Court of Appeal. The point regarding the portion of the costs relevant to the Court of Appeal proceedings does not appear to have been argued and the court cites no statutory authority under which the charging order for the Court of Appeal costs was granted. The court does, however, refer to Bloomaert v. Dunlop, [1930] 2 D.L.R. 30, 24 Sask. R. 261 (C.A.). Tucker J. quoted at p. 538 the following passage from that case [at p. 35]:

> There can be no doubt that the proceedings taken by the solicitors on behalf of the plaintiffs resulted in the recovery of the moneys which are now in Court. Sec. 28 of the Solicitors Act, 1860 (Imp.), c. 127, is as follows: --
>
> > In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be pending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or

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solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding.

The quoted excerpt from Bloomaert v. Dunlop would seem to stand for the proposition that a court judge before whom any proceeding has been heard may grant a solicitor a charge upon property recovered or preserved for the solicitor's costs, charges and expenses in connection with such proceeding. It does not seem to me to be authority for the proposition that a judge of one court may grant a charging order on costs of a proceeding in another court.

In Rees, Newsham and Weir v. Stanek (1982), 16 Sask. R. 288 (Q.B.), the solicitor was granted a charging order for the costs of the action in the lower court and in the Court of Appeal. The decision does not cite any authority for the court granting a solicitor's charging order with respect to costs awarded in proceedings in another court.

Although there is a lack of strong authority on either side of this issue, it would appear to me that, on balance, the courts have not recognized any inherent jurisdiction in one court to grant a charging order, with respect to costs incurred in proceedings before another court, in a situation where the jurisdiction of the first court has been codified by statute similar to the provisions found in s. 34(1) of the Solicitors Act.

Accordingly, I find that I have no jurisdiction to grant a charging order with respect to the costs granted in the proceedings before the Ontario Court of Appeal.

2. The second issue which must be determined is whether, in order to grant a charging order in respect of the deposits and proceeds on closing, I must find that the proceeding in respect of which the charging order is sought was a proceeding in which title to, or ownership of, the deposits or the proceeds of closings were in issue. It seems to me to be clear that the proceedings both before Justice Borins and before the Court of Appeal related to applications by the applicants for a declaration that their agreements of purchase and sale of the

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condominium units were void or that they were entitled to rescission of such agreements based upon inadequate disclosure under the provisions of the Condominium Act, R.S.O. 1990, c. C.26. If the applicants had been successful in these proceedings, the deposits would have been returned to the applicants and there would have been no proceeds of closings to be dealt with. It appears to me that, in plain language, the result of the successful defence of such applications at the trial and appeal levels, was that the deposits were preserved for the benefit of the respondent and that the possibility of the receipt of some proceeds of sale was also preserved for the benefit of the respondent.

In Ginter v. Chapman, supra, money had been paid into court as security for the successful plaintiff's costs in order to stay proceedings to collect taxed costs pending an appeal. The appeal was successful and the parties were ordered to pay their own costs of appeal and at trial. The solicitor was granted a charge under s. 109 of the Legal Professions Act which provided for a charge on "property which is recovered or preserved therein through his services". The court held that the money had been preserved by the solicitor's services in successfully prosecuting the appeal and that s. 109 was not limited to property which was the direct subject matter of the litigation.

Aikins J. stated at p. 92:

> On examining s. 109 I can see nothing in that section which limits its application to the subject-matter of the case on which a solicitor is engaged. The section does not say, as it might have, "property which is claimed in the case which is recovered or preserved" or contain other suitable language indicating that a solicitor might have a charge only against property which was directly the subject-matter in dispute in the case. Putting it slightly differently, the section simply says that a solicitor shall be deemed to have a charge on property preserved or recovered in any case in which he is employed and the property is preserved or recovered through his services, without limiting the solicitor's right to a charge to the direct subject-matter of the proceeding. I can see no reason in principle why in the absence of any

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restrictive language in the section itself, the section should be construed restrictively so that a solicitor would not be entitled to a charge when, as in the present case, money has been paid into Court, which, although not directly the subject-matter of the action, was necessarily and properly paid in and which has in fact been preserved for clients by the services rendered by their solicitor.

(Emphasis added)

In the present case, as stated above, the result of successful applications by the applicants would have been that the deposits would have been returned to the applicants and no proceeds of sale would ever come into existence. Accordingly, although title to and ownership of the deposits and the proceeds was not an issue directly in dispute in the applications, the result of the successful defence of the application was that the deposits and the potential proceeds of sale were salvaged for the benefit of the respondent and the applicants were not entitled to recover or claim title to the deposits. These were direct results of the decisions of Borins J. and the Court of Appeal on the applications.

Accordingly, I find that D & D is entitled to a charging order with respect to the deposits paid by the applicants in these proceedings and on any proceeds of sale resulting from closings pursuant to the agreements of purchase and sale entered into by the applicants.

3. With respect to the ranking of the charging order vis--vis the secured charges against the assets of the respondent in favour of MTC, counsel for MTC has submitted that, if the court grants a charging order in favour of D & D with respect to the deposits and the proceeds, such charge should rank behind the security granted to MTC in connection with the construction loan and letter of guarantee. It is his position that the court's ability to declare a charge in favour of a solicitor does not extend to putting the solicitor ahead of a secured creditor whose security predates the commencement of the solicitor's work, and whose security was actually, as well as constructively, known to the solicitor before undertaking

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the work for which the solicitor seeks to have a charge recognized; recognition of the "lien" merely makes the solicitor a secured creditor, whose priority should be ranked subsequently to prior secured creditors.

Counsel for D & D submits that the solicitor's lien created by s. 34 of the Solicitors Act is a "charge on the property recovered or preserved through the instrumentality of the solicitor", and accordingly is in the nature of a salvage order attached to the property recovered or preserved and not to the interest of the client in that property. He further submits that MTC has clearly benefited from the success of D & D in the earlier proceedings in this matter in that the deposits paid by the applicants and any ultimate proceeds of sale on the closing of the agreements of purchase and sale with the applicants have been preserved and the interest of MTC in such deposits and proceeds by virtue of its secured charges has also been preserved.

Having reviewed the authorities, I am of the view that the solicitor's lien in our case should rank in priority to the secured charge of MTC with respect to the deposits and proceeds of sale.

In L & D Cartage & Development Co. v. Sterling Construction Co., [1963] 2 O.R. 420, 39 D.L.R. (2d) 726 (H.C.J.), the solicitors for the plaintiff recovered a judgment against the defendant and the defendant paid the amount into court. The plaintiff had secured creditors, namely, a bank which held a general assignment from the plaintiff and a company claiming a mechanics' lien as a supplier. At p. 429 O.R., p. 729 D.L.R., Spence J. stated as follows:

> The difficulty which, however, is presented to the creditors is that such a fund may well be considered a salvage fund and the lien and the charging order to which the solicitor is prima facie entitled has always been treated as a salvage order. In Scholey v. Peck, Re Metcalfe and Sharpe (1893), 68 L.T. 118, Romer J. (as he then was), said at p. 120:
>
> > Since the conclusion of the arguments I have considered the

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cases then cited and bearing on the point I have to decide. From them it appears that what is recovered by the solicitor is to be treated as being in the nature of salvage, and that he is to be paid for his services on that theory. Sect. 28 authorises a charge not merely on the plaintiff's interest, but on all property recovered in the action, whether for his benefit or that of others. In the present case the property was undoubtedly preserved by means of the action. In my opinion the case is really governed by Greer v. Young.

In Scholey v. Peck, [1893] 1 Ch. 709 at p. 711, 62 L.J. Ch. 658, Romer J. stated:

Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of Greer v. Young. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the Plaintiff, but also against the mortgagee, who is taking the benefit of the action, and over whose mortgage they must have priority.

In Greer v. Young (1883), 24 Ch. D. 545 at p. 555, 52 L.J. Ch. 915 (C.A.), Cotton L.J. stated:

First, it was said, that there was no power to charge any property except the property of the person who had employed the solicitor. But that is contrary to the words of the section, which does not say "upon the property of the person who employed him," but "upon the property recovered or preserved." Undoubtedly the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff or of the defendant which is recovered in the action, and to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff, or defendant. But to say that the Court has only power to charge the interest of the plaintiff or the defendant would be to repeal the Act.

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The reasoning is applicable to the case at bar. Section 34 of the Solicitors Act, like the section considered in Greer v. Young, supra, does not limit the property subject to the charge to that of the person who employed the solicitor. Rather, it refers to "the property recovered or preserved through the instrumentality of the solicitor".

The question of priority as between a solicitor's lien and the claims of creditors was thoroughly considered in the decision of the Saskatchewan Court of Queen's Bench in Saskatoon (City) v. Shinkaruk (No. 2) (1988), 39 L.C.R. 193, 69 Sask. R. 93, Goldenberg J. stated as follows at pp. 198-99:

> The decision of Wachowich J. in McCready Products Ltd. v. Sherwin-Williams Co. of Canada Ltd.; Field & Field v. Royal Bank of Canada (1986), 68 A.R. 342, 43 Alta. L.R. (2d) 269, is also to be noted. That was a case of conflict between a claim of solicitor's lien and creditors who held assignments. The claim of solicitor's lien was based on an Alberta Rule of Court. Wachowich J., however, considered a number of cases including Bloomaert and the decision of Greer v. Young (1883), 24 Ch. D. 545, cited therein, and also Babiak v. Assiniboine School Division No. 2 (1966), 55 D.L.R. (2d) 668, 55 W.W.R. 309.
>
> Mr. Justice Wachowich at pp. 349-50 A.R., pp. 280=-1 Alta. L.R., said:
>
>> These three respondents claim that the solicitor's lien cannot be attached to the fund due to the assignments made to them by McCready. Although at common law the solicitor's lien could attach only to the interest of the client in the fund, such is not the case with the statutory lien. The statutory lien is in the nature of salvage and both the wording of Rule 625(2) and case authority support the proposition that a solicitor's lien has priority over the claims of any creditor. The rule is well stated in Dallow v. Garrold; Ex Parte Adams (1884), 13 Q.B.C. 543, at p. 546:

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> But as a general rule it is clearly laid down by the cases that all persons of business when dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful.

(Emphasis added)

I am not aware of any authority for the proposition that the general rule that the solicitor's lien has priority over the claims of any creditor ought not to apply where the creditor's security predates the solicitor's work and was known to the solicitor before the solicitor undertook the work. Accordingly, I find that the charging order in favour of D & D has priority over the secured claims of MTC.

4. Counsel for Plan, representing lien claimants under the CLA, has submitted that any charge granted in favour of D & D on the deposits and proceeds is subject to the trust in favour of lien claimants created under the CLA.

Section 9(1) of the CLA provides as follows:

> 9(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> (a) the value of the consideration received by the owner as a result of the sale,
>
> less,
>
> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
>
> constitutes a trust fund for the benefit of the contractor.

In a situation where funds held by a solicitor's client are subject to a trust in favour of third parties, such as contractors under the CLA, the charging order would not be

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applicable to such funds: See George & Asmussen Ltd. v. MCM Projects Inc. (1992), 9 O.R. (3d) 382 (Gen. Div.); Striemer v. Nagel (1911), 17 W.L.R. 189 (Man. K.B.); Canadian Imperial Bank of Commerce v. Gray (1987), 59 O.R. (2d) 414, 16 C.P.C. (2d) 181 (S.C.); and Hubbard v. Everyman's Saving & Mortgage Ltd. (1985), 59 C.B.R. (N.S.) 251, 62 A.R. 81 (Q.B.).

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Counsel for D & D has relied upon the decision in L & D Cartage, supra, as authority for the proposition that the solicitor's charging order ought to take precedence over the trust for the lien claimants established pursuant to the CLA. In my view, L & D Cartage, supra, is distinguishable from the case at bar in that, in L & D Cartage, the solicitors appear to have in fact been acting on behalf of the creditors as well as the plaintiff. Counsel for D & D has also relied upon the decision in Re Tots & Teens Sault Ste. Marie Ltd. (1975), 11 O.R. (2d) 103, 65 D.L.R. (3d) 53 (S.C.). I view the ratio of that case as being that a solicitor's lien on the proceeds of litigation commenced prior to a bankruptcy is a secured claim under the Bankruptcy Act, R.S.C. 1970, c. B-3. The decision, in my view, does not deal with the priority as between trust monies held by the client and a solicitor's charging order. Accordingly, I hold that the general principle should apply that, to the extent that funds held by the respondent are subject to a trust established pursuant to s. 9 of the CLA, the charging order granted to D & D will not apply to such funds.

I am also unable to accept the submission of counsel for D & D that the legal accounts of D & D represented "reasonable expenses arising from the sale" within the meaning of cl. (b) of s. 9(1) of the CLA. The fees of D & D were incurred in defending applications brought for rescission of the agreements of purchase and sale and in no way arose from a sale by the respondent of its interest in premises. The reference in cl. (b) is clearly to legal fees and other costs and disbursements incurred by an owner in selling an interest in premises to a third party and this amount may be deducted from the consideration received by the owner in order to determine the amount constituting the trust fund for the benefit of the contractors. The whole premise of s. 9(1) of the CLA is directed towards the sale by the owner of premises to which a

construction lien is attached.

5. Counsel for the receiver submits that any charging order in favour of D & D should be subsequent in priority to the entitlement of the receiver with respect to its fees and expenses as provided by paras. 11 and 17 of the order of Mr. Justice Stach dated July 17, 1992 appointing the receiver (the "receivership order"), which read as follows:

> 11. THIS COURT ORDERS THAT any expenditure which shall be properly made or incurred by Coopers shall be allowed to it in passing its accounts and together with its remuneration shall form a charge on the assets, property and undertaking of The Breakers East Inc. in priority to all prior and subsequent encumbrances.
>
> 17. THIS COURT ORDERS THAT Coopers be and it is hereby empowered to borrow monies without personal liability from time to time as it may consider necessary, not exceeding the principal sum of $200,000.00 in the aggregate at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange for the purpose of taking possession of, receiving, protecting, preserving or realizing upon the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed and that as security for such borrowings and every part thereof, Coopers is authorized to pledge, assign or give security or securities on any such assets, property or undertaking but subject to the right of Coopers to be indemnified out of such assets, property and undertaking with respect to its liabilities, amounts and its own remuneration properly incurred and all of such amounts shall be a first charge on such assets, property and undertaking.

I accept the submission of counsel for the receiver that the charge granted by this order in favour of D & D shall, in view of the provisions of paras. 11 and 17 of the receivership order, be subsequent in priority to the charge granted by the receivership order in favour of the receiver with respect to

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any expenditure properly made or incurred by the receiver and any amounts borrowed by the receiver for purposes of the receivership.

6. The final issue to be determined on this motion is whether, in order to be entitled to a charging order, D & D must satisfy this court that, without the charging order, its fees and disbursements will not be paid, or that there is a strong probability of the firm not being able to collect its fees and disbursements.

Phillipps & Scarth v. London Guarantee & Accident Co., [1927] 2 W.W.R. 570, 36 Man. R. 584 (C.A.), stands for the proposition that the court will not interfere to enforce a common law lien for costs where it is not shown, prima facie, that the solicitor cannot collect costs from the client. It was held that a common law lien is given to a solicitor to protect the solicitor and not the client and the judge found that it would be inequitable and unjust that the solicitor should be entitled to the court's protection where the solicitor can collect costs from the client. The current state of the law is, in my view, most accurately set out in Delta Finance Co. v. Byers, [1932] 1 W.W.R. 827, 26 Alta. L.R. 300 (C.A.), where the court held that, although it was not incumbent upon a solicitor to show that he cannot recover his costs from his client in order to be entitled to a charging order, it would appear to be necessary for the solicitor to establish at least a prima facie case that it is unlikely that the solicitor will be able to collect his fees and disbursements from the client. In the case at bar, the evidence would seem to indicate that the ability of the respondent to pay the accounts of D & D is, at best, dubious, and that without charging order against the deposits and proceeds, it is unlikely that D & D will be successful in collecting payment of its accounts. D & D has satisfied the onus of establishing at least a prima facie case that without the charging order it is unlikely that it will be able to collect its fees and disbursements from the respondent.

Accordingly an order will issue granting to D & D a charge, to the extent of its accounts rendered to the respondent with respect to the earlier proceedings in this matter, against the

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deposits and the proceeds. The order will provide that such charge ranks in priority to the secured charges on the assets of the respondent created in favour of MTC but subsequent to the charges in favour of the receiver established pursuant to the order of Mr. Justice Stach and that such charge is not applicable to any funds received by the respondent which constitute a trust fund in favour of lien claimants pursuant to s. 9 of the CLA.

The order will further provide for the assessment of the accounts of D & D on a solicitor-and-client basis and that any payment to D & D pursuant to the charging order will be postponed until the passing of the accounts of the receiver, but that interest will accrue on the amount payable to D & D at the rates provided in the CJA.

I am prepared to accept submissions from any counsel on the question of costs.

Order accordingly.

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TAB 6

Royal Trust Co. v. Montex Apparel Industries Limited

[1972] 3 O.R. 132-138

ONTARIO
[COURT OF APPEAL]
AYLESWORTH AND KELLY, JJ.A.,
DONNELLY, J. (AD HOC)
11TH MAY 1972.

1972 CanLII 705 (ON CA)

Excise Tax -- Demand upon assignee -- Excise Tax Act, R.S.C. 1952, s. 50(9) -- Licensee corporation under administration of receiver and manager appointed by Court at request of trustee under powers in trust indenture -- Whether an assignee of corporation's book debts -- Whether a "person" bound by notice -- Whether trustee bound by notice served on receiver.

Section 50(9) of the Excise Tax Act, R.S.C. 1952, c. 100 (now R.S.C. 1970, c. E-13, s. 52 (10), gives power to the Minister to demand tax from any person who "has received from a licensee any assignment of any book debt". By s. 2(1)(c) of the Act "person" includes "legal representatives of such person". However, a receiver appointed by the Court is not a legal representative within the meaning of s. 2(1)(c) and therefore cannot be an assignee of a book debt under s. 50(9); further, the Minister must comply strictly with the statutory provisions in issuing and delivering the demand, and therefore a demand that is misaddressed is ineffective.

APPEAL from an order of Osler, J., [1972] 2 O.R. 673, 26 D.L.R. (3d) 405, declaring that the Minister of National Revenue has a claim under s. 50 of the Excise Tax Act(Can.) in priority to the claim of the appellant; CROSS-APPEAL by the Minister against certain other parts of the order.

Pierre Genest, Q.C., for appellant, plaintiff, Royal Trust Company.

P.A. Vita, for respondent, Attorney-General of Canada.

The judgment of the Court was delivered orally by

AYLESWORTH, J.A.:-- The Royal Trust Company appeals from the order of Osler, J., pronounced on March 8, 1972, declaring that the Minister of National Revenue has a claim under s. 50 of the Excise Tax Act, R.S.C. 1952, c. 100 [now R.S.C. 1970, c. E-13, s. 52], for the amount as agreed upon in priority to the claim of the appellant as trustee of Montex and of the Bank of Montreal. This is the only respect in which the Royal Trust Company takes issue with the order below save as to the consequential provision in that order declaring the necessity of getting the relevant certificate from the Minister.

The Minister of National Revenue, to whom I shall refer as the Minister and the Unemployment Insurance Commission cross-appealed from that part of the said order of Osler, J., declaring that these parties respectively are not entitled to priority over the trustee and the said bank, either for the amounts as agreed upon for employee deductions under s. 24, s-ss. (3) and (4) of the Canada Pension Plan, 1964-65 (Can.), c. 51 [now R.S.C. 1970, c. C-5], or for employee contributions claimed pursuant to s. 40, s-ss. (1) and (2) of the Unemployment Insurance Act, 1955 (Can.), c. 50 [now R.S.C. 1970, c. U-2 (repealed by s. 148(3) of and replaced by 1970=71-72, c. 48)]. At the conclusion of the argument for the cross-appellants the trustee respondent to such cross-appeals was not called upon. This Court, finding itself in agreeemnt with the disposition thereof as made below and with the reasons of Osler, J., in support of that disposition, dismissed the cross-appeals.

I turn, then, to the appeal by the trustee. The trustee is a

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mortgagee of the undertaking, property and assets of Montex Apparel Industries Limited, to which I have referred as Montex, and by action instituted on May 8, 1970, applied for the appointment of a receiver and interim receiver. The Court, under date of May 11, 1970, appointed J. Stanley Whitehead interim receiver and manager. The Bank of Montreal had a general assignment of book debts from Montex which had priority over the charge under the mortgage and promptly after the interim receiver was appointed by the Court, he entered into an agreement with the bank whereby the bank agreed not to enforce its security by way of assignment of book debts and, in fact, to forego that security in consideration of the receiver agreeing to pay the bank out of all of the assets realized in the receivership, not merely out of the assigned book debts, thereby ensuring the ability of the receiver to carry on the business and undertaking of Montex as authorized under the Court order, and further ensuring funds by way of receiver's certificates for such financing of the carrying-on of the business as might be required.

The Minister, under a notice to which reference shall be made in detail later, seeks, under the sections of the Excise Tax Act referred to and which also will be set out in detail later, to enforce payment from the receiver on the Minister's claims under the Act, in priority to the claims of the trustee appellant under the mortgage. Osler, J., affirmed the right so claimed by the Minister.

I reproduce the relevant statutory provisions of the Excise Tax Act as they stood at the relevant times. Section 50(9) reads:

> 50(9) When the Minister has knowledge that any person has received from a licensee any assignment of any book debt or of any negotiable instrument of title to any such debt, he may, by registered letter, demand that such person pay over to the Receiver General of Canada out of any moneys received by him on account of such debt after the receipt of such notice, a sum equivalent to the amount of any tax imposed by this Act upon the transaction giving rise to the debt assigned.

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Subsection (10) reads:

> (10) The person receiving any such demand shall pay the Receiver General according to the tenor thereof, and in default of payment is liable to the penalties provided in this Act for failure or neglect to pay the taxes imposed by Parts II to VI.

Section 2(1)(c) of that Act describes "person" as follows:

> (c) ...includes any body corporate or association, syndicate, trust or other body and the heirs, executors, and administrators thereof and the curators and assigns or other legal representatives of such person according to the law of that part of Canada to which the context extends;

It is not in dispute that the Crown sought and here seeks to uphold the validity of its notice and the effect of that notice on the ground that the receiver is, and I quote "the legal representative" of the trustee. The trustee, of course, by virtue of the mortgage is an assignee of Montex. The other words in s. 2(1)(c) are not resorted to in this appeal by the Minister as supporting his claim. The appellant not only takes issue with that submission, which was the ratio adopted by Osler, J., in affirming the Minister's claim to priority, but takes issue with the efficacy of the demand purported to have been issued and delivered under s. 50(9).

With respect to the question as to whether or not the receiver is, as found by Osler, J., the legal representative of the appellant trustee, Osler, J., had this to say, and I quote [[1972] 2 O.R. 673 at pp. 678-9, 26 D.L.R. (3d) 405 at pp. 410-1]:

> In my view, this language [and, of course, the learned trial Judge is referring to the language of s. 2(1)(c) of the Excise Tax Act] would be sufficient to bind, for example, the executor or administrator or any person, even though the one so bound would derive his authority, partly in one case and wholly in the other, from the order of the Court. In the

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present case, the order made on May 11, 1970, provides that the receiver "...is hereby appointed Receiver and Manager on behalf of the plaintiff and all holders of first mortgage bonds of the defendant ...". The Receiver is therefore the legal representative of the plaintiff and even though the plaintiff is not bound by reason of the general law of agency, the proper construction of s. 52(10) of the Excise Tax Act and particularly of the word "person" therein is that the receiver is a person bound by the section.

The learned trial Judge went on as follows:

> There is another consideration that must be taken into account. The agreement under which the bank refrained from realizing upon its security under the Bank Act, 1966-67 (Can.), c. 87 [now R.S.C. 1970, c. B-1], and instead permitted the receiver to carry on the business of the defendant on condition that all amounts received by the receiver were applied in reduction of the bank loan, was made on May 8, 1970, three days before the receiver was appointed by the Court. In acting as agent for the bank, therefore, the receiver was proceeding by virtue of a private agreement and his authority was given to him by the parties and not by the Court. Therefore, when there came into his possession a claim addressed to him as an assignee of book debts owed to Montex, he was in fact not only the legal representative of the trustee, assignee, in the manner I have described, but also the agent of a second assignee, the bank, and so long as he continued to act as agent for the bank, the bank was bound by the demand.

Dealing first with the observations of the learned trial Judge as to the agreement with the bank, it is unfortunate that the factual situation in that regard was not made clear to Mr. Justice Osler by counsel for the trustee at the hearing before him. Counsel for the trustee appellant, however, in this Court was personally knowledgeable with respect to the facts and states to the Court unequivocally, as an officer thereof, that the inference apparently drawn by the learned trial Judge as to the date upon which the agreement was made with the bank from the affidavits filed in support of the application of the

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appointment of the receiver, is incorrect and that the agreement with the bank was not entered into until after the appointment of the receiver by the Court on May 11, 1970. We, of course, accept this unequivocal statement from counsel for the appellant trustee and that statement, of course, is accepted as factually correct by the respondent to the appeal.

Thus, with respect to the learned trial Judge, the second basis for his finding the receiver to have been bound by the notice delivered on behalf of the Minister is, in our view, without foundation on the facts of the case and we say no more about that.

As to the receiver being the "legal representative" of the trustee appellant, as that phrase appears in s. 2(1)(c) of the Excise Tax Act, with respect to the learned trial Judge, we disagree with the conclusion reached by him. The analogy referred to by him as to the position regarding an executor or administrator would not seem to be apposite. An executor or administrator is in law the legal representative of the deceased person and the assets or estate of that deceased person vests in that legal representative. We think, in the case at bar, that Montex, the debtor, so far as the analogy is apposite, is the party corresponding to the deceased and that the trustee appellant is more in the position of a cestui que trust or a beneficiary. Moreover the receiver derives his powers and authority wholly from the order of this Court appointing him. He is not subject to the control or direction of the appellant or of anyone, for that matter, except the Court which appointed him. If he can be said to be the legal representative of anyone, it would appear to us that person would be the debtor, Montex, and not the appellant trustee.

We therefore conclude that the Minister has not brought the receiver within the definition of "person" in the Act and that therefore the receiver is not an assignee of a book debt. Consequently any demand directed to the receiver as such assignee is, in our opinion, ineffective in law. This conclusion is sufficient to dispose of the appeal by the trustee but in addition to this ground we rely upon the facts also with respect to the delivery of the demand. The relevant

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sections of the Excise Tax Act create substantive rights in the Minister; that is to say, if the Minister complies with the statutory provisions in issuing and delivering the demand contemplated by those provisions and if the person to whom that demand is directed is an assignee of a book debt, as contemplated by the statute then, but not otherwise, the Minister has conferred upon him by the statute the extra right of being able to collect the debtor's debt to the Minister from a third party, that is to say, the assignee of the debtor's book debt.

It is abundantly apparent, of course, that corresponding to that right so conferred upon the Minister is an obligation imposed upon the assignee to make payment to the Minister and it is trite, I think, to observe that in the creation or attempted creation of such a right in the Minister, the Minister is bound to strict observance of the conditions precedent upon which that special right granted to the Minister depends. The form of notice adopted by the Minister and actually delivered in the case at bar makes it abundantly clear that it is a notice, personal to the assignee and to ono one else and, of course, that is the only type of notice contemplated by s. 50(9) and (10) of the Act. That notice in the case at bar was addressed not to J.S. Whitehead, the receiver, but to McDonald, Currie and Co., Chartered Accountants, Attn: Mr. J.S. Whiteside. While it is true that the receiver is a partner or associate of the named firm of chartered accountants, the demand was not directed either to him or, in its terms, to his attention, and on that ground also we would negate the Minister's claim for priority.

In the result the appeal by the trustee is allowed and para. 2 of the order below is deleted and in place thereof there will be substituted a declaration that the claim of the Minister under s. 50 of the Excise Tax Act as set out in Q. 2.A. as addressed to the Court, has not priority over the claims of the Royal Trust Company and of the receiver and manager from the undertaking property and assets of the defendant.

The following words appearing in para. 4 of the order below also shall be deleted:

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> ...but that before making such distribution the Receiver and Manager shall obtain a certificate from the Minister of National Revenue under section 49 of the Excise Tax Act with respect to moneys owing to the Minister of National Revenue pursuant to the demand made by him under section 50(9) and 50(10) of the Excise Tax Act.

and in that paragraph of the order below there shall be substituted the following words: "or under section 49 of the Excise Tax Act." We had the benefit of submissions by counsel on the question of costs, but we concluded that as this is a matter of general importance and in many facets thereof of first instance our order as to costs of this appeal should be in the like language adopted by Osler, J., with respect to the application before him. That is to say, our order as to costs of this appeal will be that the costs, both of the appellant trustee and of the Minister, shall be out of the funds in the hands of the receiver forthwith after taxation.

Appeal allowed; cross-appeal dismissed.

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DUCA FINANCIAL SERVICES CREDIT UNION LTD. and 2203284 ONTARIO LTD.
Applicant Respondent

Court File No.: CV-17-11827-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE
Proceeding commenced at

TORONTO

BRIEF OF AUTHORITIES
OF THE RECEIVER, MSI SPERGEL INC.

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators
95 Barber Greene Road, Suite 100
Toronto, ON M3C 3E9

LAWRENCE HANSEN
LSUC No. 41098W

SARA MOSADEQ
LSUC No. 67864K

Tel.: 416-449-1400
Fax: 416-449-7071

Lawyers for the receiver msi Spergel Inc.