COURT FILE NUMBER	**2001-06997**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF BOW RIVER ENERGY LTD.

BRIEF OF LAW AND ARGUMENT OF THE APPLICANT, 2270943 ALBERTA LTD., FOR AN APPLICATION TO BE HEARD ON OCTOBER 29, 2020 AT 10:00 A.M. BEFORE THE HONOURABLE MADAM JUSTICE D. L. SHELLEY
Volume II of II

BORDEN LADNER GERVAIS LLP
Matti Lemmens
1900, 520 3rd Ave. S.W.
Calgary, AB T2P 0R3
Telephone: (403) 232-9511
Facsimile: (403) 266-1395
Email: MLemmens@blg.com
File No. 446071.000002

Solicitors for the Applicant, 2270943 Alberta Ltd.

BENNETT JONES LLP
Keely Cameron
4500, 855 2 Street S.W.
Calgary, AB T2P 4K7
Email: cameronk@bennettjones.com
Telephone: (403) 298-3324

Solicitor for the Monitor, BDO Canada Limited

MLT AIKINS LLP
Ryan Zahara
2100, 222 – 3 Ave. S.W.
Calgary, AB T2P 0B4
Email: rzahara@mltaikins.com
Telephone: (403) 693-5420

Solicitor for the Alberta Energy Regulator and the Orphan Wells Association

CASSELS, BROCK & BLACKWELL LLP
Jeffrey Oliver / Danielle Maréchal
Suite 3810, Bankers Hall West
888 3 Street S.W.
Calgary, AB T2P 5C5
Email: joliver@cassels.com
Email: dmarechal@cassels.com
Telephone: (403) 351-2921
Telephone: (403) 351-2922

Solicitors for Bow River Energy Ltd.

Tab 15

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FILED

MAY 03 2019

CALGARY, ALBERTA

COURT FILE NUMBER	**1901-05089**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF STRATEGIC OIL & GAS LTD. AND STRATEGIC TRANSMISSION LTD.**
DOCUMENT	**FIRST SUPPLEMENTAL REPORT OF THE MONITOR MAY 3, 2019**
ADDRESS FOR SERVICE AND CONTRACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MONITOR** KPMG Inc. Suite 3100, Bow Valley Square II 205 - 5th Ave SW Calgary, Alberta T2P 4B9 Neil Honess/Cameron Browning Tel: (403) 691-8014/(403) 691-8413 neilhoness@kpmg.ca cbrowning@kpmg.ca **COUNSEL** Torys LLP 525 – 8th Avenue SW 46th Floor - Eighth Avenue Place East Calgary, Alberta T2P 1G1 Kyle Kashuba Tel: (403) 776-3744 kkashuba@torys.com

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Listing of Appendices

1. INTRODUCTION AND PURPOSE OF REPORT

1. On April 10, 2019 Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. (together, "**Strategic**" or the "**Company**") sought and obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") pursuant to an order granted by this Honourable Court (the "**Initial Order**").

2. The Initial Order granted, *inter alia*, a stay of proceedings against Strategic until and including May 6, 2019 (the "**Initial Stay Period**") and appointed KPMG Inc. as Monitor (the "**Monitor**"). The proceedings commenced by the Company under the CCAA will be referred to herein as the "**CCAA Proceedings**".

3. In addition to the stay of proceedings, the Initial Order granted various relief including, among other things, (i) the KERP Charge, (ii) the Administration Charge, (iii) the Directors' Charge, and (iv) Interim Lender's Charge (collectively, the "**Charges**").

4. Further background on the CCAA Proceedings, including a summary of the activities of the Company and the Monitor since granting the Initial Order was previously provided in the Monitor's first report dated April 29, 2019 (the "**First Report**").

5. This is the Monitor's first supplemental report (the "**First Supplemental Report**") to the Court and should be read in conjunction with the First Report. The First Supplemental Report has been filed to advise this Honourable Court and provide the Monitor's summary and comments with respect to:

    a) The Company's proposed sale and investment solicitation process ("**SISP**") which includes a "stalking horse" process in respect of one parcel of assets;

    b) The Company's revised cash flow projection (the "**Revised Cash Flow Projection**") for the week of April 29, 2019 to September 30, 2019 (the "**Revised Forecast Period**");

    c) Strategic's revised application for an extension to the Initial Stay Period up to and including September 30, 2019 (the "**Revised Stay Extension**"); and

    d) The Monitor's recommendations.

6. Further background and information regarding the Company and these CCAA Proceedings can be found on the Monitor's website at http://home.kpmg/ca/strategic (the "**Monitor's Website**").

7. In preparing this First Supplemental Report and making the comments herein, the Monitor has been provided with, and has relied upon certain unaudited, draft and/or internal financial information, Company records, Company prepared financial information and projections, discussions with management (the "**Management**") and employees, and information from other third party sources (collectively, the "**Information**").

8. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CAS**") pursuant to the *Chartered Professional Accountants Handbook*, and accordingly the Monitor expresses no opinion or other form of assurance in respect of the Information.

9. Some of the information referred to in this this First Supplemental Report consists of forecasts and projections, which were prepared based on Management's estimates and assumptions. Such estimates and assumptions are, by their nature, not ascertainable and as a consequence no assurance can be provided regarding the forecasted or projected results. Indeed, the reader is cautioned that the actual results will likely vary from the forecasts or projections, even if the assumptions materialize, and the variations could be significant.

10. The information contained in this Report is not intended to be relied upon by any prospective purchaser or investor in any transaction with the Company.

11. Capitalized terms not otherwise defined herein are as defined in the Company's application materials, including the First Affidavit of Remi Anthony (Tony) Berthelet sworn April 9, 2019 (the "**First Berthelet Affidavit**") and the Second Affidavit of Remi Anthony (Tony) Berthelet (the "**Second Berthelet Affidavit**") sworn April 29, 2019. The First Supplemental Report should be read in conjunction with the First Report, and the First and the Second Berthelet Affidavits, as certain information has not been included herein to avoid unnecessary duplication.

12. Unless otherwise stated, all monetary amounts noted herein are expressed in Canadian dollars.

2. SALE AND INVESTMENT SOLICITATION PROCESS

Overview

13. The Company and its counsel, with the assistance of the Monitor, has developed a detailed and comprehensive SISP to market the Company's assets in an open and transparent manner designed to maximize the realizations. A copy of the SISP is attached at **Appendix "A"**.

14. The Company's assets consist of the following parcels:

    a) Marlowe Muskeg – a light oil Devonian aged reservoir located in northern Alberta with production of approximately 1,300 barrels of oil equivalent per day ("**boe/d**") (the "**Marlowe Assets**");

    b) Cameron Hills, Bistcho, & Larne – assets located in Northern Alberta and North West Territories where current production is shut-in (the "**Cameron Hills Assets**");

    c) Conrad & Taber – assets located in southern Alberta with two wells with limited current production (the "**Conrad Assets**");

    d) Certain potential tax pools (the "**Tax Pools**"); and

    e) Zama – a 10% non-operated working interest in the Zama area in Northern Alberta, with a related party owning the remaining 90% and 50% working interest in certain Shekilie assets in Northern Alberta, with the same related party owning the other 50% (together, the "**Zama Parcel**").

15. The Marlowe Assets, Cameron Hills Assets, Conrad Assets and the Tax Pools comprise the Company's core assets (collectively, the "**Core Assets**").

16. As part of the negotiation of the SISP, the Company intends, upon approval of this Honourable Court, to enter into a fully binding conditional purchase and sale agreement dated May 3, 2019 (the "**Stalking Horse Sale Agreement**") (attached as **Appendix "B"**) between the Company and GMT Exploration Zama Inc. (the "**Stalking Horse Bidder**") pursuant to which the Stalking Horse Bidder will make an offer to purchase the Zama Parcel.

SISP Details

17. An overview of the SISP is provided below. Capitalized terms not defined herein are defined in the SISP.

    a) The Company shall publish notice of the SISP in *The Globe & Mail*, and such other print and social media outlets as determined appropriate;

    b) The Company has, with the assistance of the Monitor, produced a document outlining the opportunity (the "**Teaser**") and shall make the Teaser available to any and all identified potential interested parties;

    c) In order to participate in the SISP and ultimately be considered for qualification as a qualified bidder ("**Qualified Bidder**"), an interested party must deliver to the Company:

        i. A duly executed Confidentiality Agreement ("**CA**");

        ii. A letter setting forth the identity of the party, contact information, and full disclosure of the direct and indirect owners of the party and their principals;

        iii. Written acknowledgement of receipt of a copy of the Court order approving the SISP and agreeing to accept and be bound by the provisions contained therein;

    d) Once an interested party has satisfied all of the requirements above, they will be deemed a potential bidder ("**Potential Bidder**") and be provided access to Strategic's virtual data room that contains due diligence materials and information relating to the Company and its property; and

    e) The SISP will be conducted on an "as is, where is" basis.

18. Except in respect of an offer regarding the Zama Parcel, the following further provisions of the SISP apply:

    a) The bid deadline for written offers to be received is July 26, 2019 (the **"Bid Deadline"**);

    b) An offer submitted by a Potential Bidder will be considered a qualified bid ("**Qualified Bid**") only if the offer complies with all of the requirements outlined in sections 5.1 or 5.2 of the SISP;

c) Immediately following the Bid Deadline, all Qualified Bids will be reviewed and assessed as to their likelihood of successful completion;

d) In the event that there are no Qualified Bid or none of the Qualified Bids received were likely to be successful, the SISP will be deemed to be immediately terminated and Strategic shall apply to the Court for advice and direction;

e) Subsequent to the Bid Deadline, Strategic will provide all Qualified Bids not eliminated to the Alberta Energy Regulator (the "**AER**") for AER's review;

f) Upon completion of the AER's review, and any further negotiations or clarifications that may be conducted Strategic, with the consent of the Monitor, will identify the Successful Bid(s). Any Qualified Bidder who made a Successful Bid is a "**Successful Bidder**";

g) Upon notifying a Qualified Bidder that it is a Successful Bidder, Strategic and the Successful Bidder will promptly move to finalize the sale; and

h) Strategic shall apply to the Court as soon as practicable for approval by this Honourable Court of a proposed sale.

Stalking Horse Process

19. The terms of the Stalking Horse Sale Agreement are summarized below:

a) The Stalking Horse Bidder will pay $1.5 million for the Zama Parcel (the "**Stalking Horse Bid**") comprised of a deposit of $1.2 million (the "**Stalking Horse Deposit**"), and the balance of $300,000 due upon closing. The deposit shall bear interest at a rate of one percent (1%) per month from the date on which the Stalking Horse Deposit is paid to the Company until the Sale Agreement is closed or is terminated;

b) The Stalking Horse Bidder will receive a first priority charge on the Zama Parcel and its proceeds if the Stalking Horse Bidder is not the final purchaser (the "**Stalking Horse Charge**"). The beneficiaries of the Administration Charge and the Directors' Charge have agreed to the issuance and priority of the Stalking Horse Charge;

c) A potential purchaser of the Zama Parcel ("**Competing Bidder**") will be required to submit its offer no later than noon Calgary time, Friday, June 21, 2019;

d) For a Competing Bidder to have a superior bid to the Stalking Horse Bid (a "**Superior Bid**"), the Superior Bid must exceed the Stalking Horse Bid by the minimum of the sum of:

i. $75,000 fee payable to the Stalking Horse Bidder (the "**Break Fee**"); and

ii. The incremental increase amount of $150,000.

e) The Stalking Horse Bidder is in possession of a right of first refusal ("**ROFR**") on the Zama Parcel and will have the opportunity, but not the obligation, to match the Superior Bid if it chooses to do so; and

f) In the event that either: (a) there is no Superior Bid, (b) the ROFR is exercised, or (c) the Superior Bid cannot satisfy the conditions of the AER, then Strategic, the Monitor, and the Stalking Horse Bidder shall close the Stalking Horse Bid as soon as is practicable thereafter such and the Zama Parcel will vest in the Stalking Horse Bidder in accordance with the terms of the vesting order approved by this Honourable Court with no further court application necessary.

The Monitor's Observations on the SISP

20. The Monitor is of the view that the proposed SISP, including the Stalking Horse Bid, is appropriate for the following reasons:

a) The Company's assets will be widely exposed to the market through the SISP for a reasonable period of time;

b) The timeline is sufficient to allow interested parties to perform due diligence and to submit offer;

c) The identification of potential bidders and initial contact with prospective candidates will be accompanied by an advertising campaign in the national media to increase exposure of the assets offered for sale, and an introduction to the sales process;

d) The majority shareholder of the Company is supportive of the proposed SISP process;

e) The AER has remained apprised of developments related to the CCAA Proceedings and the SISP process and the Monitor understands that, while the AER continues to consider the details of the SISP, the AER has expressed no issues with the SISP to date;

f) The Stalking Horse Bidder provides the Company with additional funds to extend the SISP marketing period which should maximum shareholder value;

g) The valuation of the Stalking Horse Bid is appropriate as:

   i. The Zama Parcel was previously marketed by the Company and attracted no bids;

   ii. The Monitor is advised that the Stalking Horse Bid is fair and reasonable and represents fair market value for these assets based on recent comparable transactions in the area and the Company's current position;

   iii. The Stalking Horse Bidder is currently carrying costs in excess of $2 million in relation to the Zama Parcel;

   iv. The Stalking Horse Bid sets a fair "base level"; and

   v. The Zama Parcel has limited commercial opportunity without significant additional spend;

h) The truncated marketing period for the Stalking Horse Bid assets is reasonable in consideration to the following:

   i. Zama Parcel is a non-core asset and unlikely to be of significant interest to parties interested in the remaining Core Assets;

   ii. The Stalking Horse Bidder holds the remainder of the working interest in the Zama Parcel;

   iii. The Zama Parcel is not a complex asset and subsequently will require less time for interested parties to obtain the necessary due diligence; and

i) It is the Monitor's opinion that the Break Fee is reasonable and within the conventional range usually expected in comparable agreements.

3. REVISED CASH FLOW PROJECTION

21. The Company, in consultation with the Monitor, has prepared a Revised Cash Flow Projection for the Revised Forecast Period. A copy of the Revised Cash Flow Projection is attached as **Appendix "C"**.

22. As summarized below, the cash balance will be sufficient to fully complete the SISP.

STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD. SUMMARY OF KEY SISP DATES IN THE REVISED CASH FLOW PROJECTION FOR THE WEEKS OF APRIL 29 TO SEPTEMBER 30, 2019				
Unaudited ($000's CAD)	**Stalking Horse Bid Deadline**	**Bid Deadline**	**Ultimate Closing Date**	**Revised Stay Extension**
	21-Jun	**26-Jul**	**6-Sep**	**30-Sep**
Cash Receipts				
Production revenue, net of oil royalties and transportation	1,737	3,554	1,781	1,740
Sale to Stalking Horse Bidder	1,500	-	-	-
Other receipts	20	10	-	-
Total Cash Receipts	3,257	3,564	1,781	1,740
Cash Disbursements				
Royalties	16	18	16	9
Property taxes	220	118	263	110
Operating expenditures	2,414	1,310	1,568	1,181
Capital & regulatory expenditures	465	497	114	394
Payroll	295	295	197	197
Severance costs	7	-	-	-
General & administrative costs	320	138	157	110
Interest and taxes	467	-	450	-
Contingency	800	500	600	400
Total Cash Disbursements	5,004	2,877	3,366	2,400
Cash Flow From Operations	**(1,747)**	**687**	**(1,584)**	**(660)**
Restructuring Fees	1,050	275	225	225
Net Change in Cash	**(2,797)**	**412**	**(1,809)**	**(885)**
Opening cash	4,580	1,783	2,194	385
Stalking Horse Deposit	-	-	-	-
Ending Cash	**1,783**	**2,194**	**385**	**(500)**
Stalking Horse Bid				
Opening balance	-	-	-	-
Deposit	(1,200)	-	-	-
Closing balance	(300)	-	-	
Ending Stalking Horse Bid	(1,500)	-	-	-
Key Employee Retention Plan				
Opening cash	1,256	1,004	753	753
Scheduled payment	251	251	-	753
Total Restricted Cash	1,004	753	753	-

23. The Revised Cash Flow Projection indicates the following through the Revised Forecast Period:

a) At the Stalking Horse Bid Deadline for the Zama Parcels ending June 21, 2019, the Company forecasts an ending cash balance of approximately $1.78 million;

b) At the Bid Deadline for the Core Assets ending July 26, 2019, the Company forecasts an ending cash balance of approximately $2.19 million; and

c) At the Ultimate Close Date of September 6, 2019, the Company forecasts an ending cash balance of approximately $385,000.

24. At the end of the Revised Stay Extension, the Company is forecasting a negative ending cash balance of approximately $500,000. However, the Monitor would note the following in this regard:

a) The Revised Cash Flow Projection extends for a significant period of time and therefore the forecast is likely to vary as this period elapses;

b) The Revised Cash Flow Projection consists of conservative estimates including a significant contingency during the period which may not be required and which, if not spent, could favourably impact the cash balance at the end of the Revised Extension Period; and

c) In the event there is any material adverse change in the Revised Cash Flow Projection, the Monitor will immediately report the same to this Honourable Court.

25. A summary of the major assumptions made by Strategic in preparing the Revised Cash Flow Projection are as described in the First Report.

26. The significant assumptions used by Strategic's Management to prepare the Revised Cash Flow Projection are generally consistent with the cash flow statement provided in the initial application materials with the only adjustments being for timing of receipts and disbursements and updated forecast oil and gas pricing.

27. Based on our review, nothing has come to the Monitor's attention that causes us to believe that, in all material respects:

a) The hypothetical assumptions are not consistent with the purpose of the Revised Cash Flow Projection;

b) As at the date of this Report, the probable assumptions developed by Management are not suitably supported and consistent with the plans of the Company or do not provide a

reasonable basis for the Revised Cash Flow Projection, given the hypothetical assumptions; or

c) The Revised Cash Flow Projection does not reflect the probable and hypothetical assumptions.

4. *THE COMPANY'S REVISED REQUEST FOR AN EXTENSION OF THE STAY PERIOD*

28. The Initial Order provided for the Initial Stay Period to May 6, 2019. In its application dated April 29, 2019, the Company sought an extension to June 5, 2019. However, the Company now seeks to revise the extension stay period to September 30, 2019 to allow the SISP to be executed.

29. It is the Monitor's view that the Revised Stay Extension is necessary to allow Strategic to continue its restructuring efforts and complete the proposed SISP, subject to approval by this Honourable Court. Although the Company does show a cash shortfall by the end of the Revised Stay Extension, the Monitor is of the view that the Revised Stay Extension is appropriate in the circumstances of the Company's restructuring efforts, given the terms of the SISP and the current market conditions and the intention to conclude the SISP prior to the end of the Revised Stay Extension.

5. CONCLUSIONS AND RECOMMENDATIONS

30. Based on the foregoing, the Monitor respectfully recommends that this Honourable Court make an order approving:

a) An extension of the stay until and including September 30, 2019;

b) The Stalking Horse Bid and the corresponding Stalking Horse Charge; and

c) The Company's SISP.

This Report is respectfully submitted this 3rd day of May, 2019.

KPMG Inc.

In its capacity as Monitor of
Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.
and not in its personal or corporate capacity.

Per: Neil Honess
Senior Vice President

APPENDIX "A"

SALE AND INVESTMENT SOLICITATION PROCESS

Sale and Investment Solicitation Package

Strategic Oil & Gas Ltd.
Strategic Transmission Ltd.

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ARTICLE 1
INTRODUCTION

1.1 **Background**. On April 10, 2019, Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. (**"STL"**, together with Strategic Oil & Gas Ltd., "**Strategic**"), obtained protection from the Alberta Court of Queen's Bench (the "**Court**") under the provisions of the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**") pursuant to the provisions of an Initial Order (the "**Initial Order**").

1.2 **SISP**. On May 6, 2019, the Court approved Strategic advancing a sale and investor solicitation process in accordance with the terms and conditions set forth herein (the "**SISP**").

1.3 **SISP Process Generally**. This SISP describes, among other things, the process by which the SISP will be conducted, the criteria to become a Qualified Bidder, accessing due diligence information, the requirements to make a Qualified Bid, and the review, acceptance and approval process that then follows.

ARTICLE 2
INTERPRETATION

2.1 **Defined Terms**. Capitalized terms used herein shall have the meanings ascribed to such terms, including the following:

"**AER**" means Alberta Energy Regulator;

"**Bid Deadline**" means July 26, 2019;

"**Business**" means the business being carried on by Strategic;

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary;

"**Confidentiality Agreement**" means a confidentiality agreement in form and substance satisfactory to Strategic, providing generally that all information is proprietary and confidential for the benefit of Strategic, subject to certain exceptions including the ability of the signatory to communicate with the Monitor and the Lender;

"**Lender**" means, GMT Capital Corp., as agent for and on behalf of the holders of the outstanding 12% Senior Secured Notes due May 27, 2020 of Strategic Oil & Gas Ltd.;

"**Monitor**" means KPMG Inc., in its capacity as monitor appointed pursuant to the Initial Order;

"**Notice**" means a summary of the Teaser suitable for publication in print media and on-mediums;

"**Offer**" means a credible, reasonably certain and financially viable offer for acquisition of all or any part of the Property or for an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization proposal in respect of the Strategic);

"**Property**" means the undertakings, property and assets of Strategic or any portion thereof;

"**Regulatory Requirements**" means the terms, conditions, and other requirements as may be stipulated by the AER from time to time;

"**ROFR**" means the right of first refusal that the Stalking Horse Bidder may exercise in respect of any Competing Bid in respect of the Zama Parcel;

"**Sale**" means the acquisition of all or any part of the Property;

"**Stalking Horse Bid**" means the offer to purchase the Zama Parcel by the Stalking Horse Bidder pursuant to the terms and conditions of a purchase and sale agreement between Strategic Oil & Gas Ltd., and the Stalking Horse Bidder dated as of May 3, 2019;

"**Stalking Horse Bidder**" means GMT Exploration Zama Inc., a corporation incorporated under the laws of the Province of British Columbia and extra-provincially registered to do business in the Province of Alberta, and who is related to the Lender;

"**Teaser**" means a notice describing this SISP, and containing such other relevant information which Strategic and the Monitor consider relevant, including a summary description of this purchase/investment opportunity and an invitation for interested parties to submit bids/proposal in accordance with the terms hereof;

"**Ultimate Closing Date**" means September 6, 2019; and

"**Zama Parcel**" means the "Assets", as described in the Stalking Horse Bid.

ARTICLE 3
SISP PROCESS

3.1 **Notice and Teaser**. As soon as reasonably practicable after Court approval of this SISP, and in any event within 3 Business Days following such approval, Strategic, with the assistance of the Monitor, shall cause the Notice to be published in the Globe & Mail. Strategic and the Monitor shall also be at liberty to publish the Notice in such other print and social media outlets as they deem appropriate. Strategic, with the assistance of the Monitor, shall also circulate the Teaser to such parties as they reasonably believe may be interested in participating in the SISP.

3.2 **Qualifying as a Potential Bidder**. In order to participate in the SISP and ultimately be considered for qualification as a Qualified Bidder pursuant to Article 5, below, an interested party must deliver to Strategic at the address specified in Schedule "A" hereto (by delivery or email), the following material:

(a) a duly executed Confidentiality Agreement;

(b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder, full disclosure of the direct and indirect owners of the Potential Bidder and their principals; and

(c) a written acknowledgement of receipt of a copy of the Court order approving the SISP (including this SISP) and agreeing to accept and be bound by all of the provisions of this SISP.

3.3 **Potential Bidder**. Once an interested party has satisfied all of the requirements described in the previous subsection they will be deemed to be a "**Potential Bidder**", and will be promptly notified of such classification by the Monitor.

ARTICLE 4
DUE DILIGENCE

4.1 **Access**. Forthwith upon being designated as a Potential Bidder, Strategic and the Monitor shall provide the Potential Bidder with access to an electronic data room maintained by Strategic in this regard. Both Strategic and the Monitor shall provide Potential Bidders with further access to such due diligence materials and information relating to the Business and the Property as is reasonably practicable.

4.2 **No Representation or Warranties**. Neither Strategic nor the Monitor makes any representation or warranty as to the information contained in the Teaser or the information to be provided through the due diligence process or otherwise, except to the extent otherwise contemplated under any definitive sale or investment agreement with a Successful Bidder executed and delivered by Strategic.

4.3 **No Additional Information**. Neither Strategic nor the Monitor shall be required to produce any abstract of title, title deeds or documents, or copies thereof or any evidence as to title, other than what is already in Strategic's possession.

ARTICLE 5
BIDDING

5.1 **Requirement for a Qualified Bid**. Except in respect of an Offer regarding the Zama Parcel, which is governed by Article VIII hereof, an Offer submitted by a Potential Bidder will be considered a "**Qualified Bid**" only if the Offer complies with all of the following:

(a) it includes a letter stating that the Offer is irrevocable until the earlier of (i) the closing of a transaction with a Successful Bidder (as defined below), and (ii) 20 Business Days following the Bid Deadline; provided, however, that if such Offer is selected as a Successful Bid (as defined below), it shall remain irrevocable until the closing of the Successful Bid or Successful Bids, as the case may be;

(b) it includes a duly authorized and executed:

(i) in the case of an Offer involving an acquisition of Property, a purchase and sale agreement specifying the purchase price, expressed in Canadian dollars (the "**Purchase Price**") in as close a form as practicable to the form of purchase and sale agreement attached hereto as marked as Schedule "B" (accompanied by a blackline demonstrating the changes to the form attached hereto);

(ii) in the case of an Offer involving an investment into the Business or alternative transaction (including, without limitation, a restructuring or recapitalization

proposal in respect of the Strategic), an agreement setting forth the terms and conditions of such investment or alternative transaction, and

(iii) and in the case of either (i) or (ii) above, such ancillary agreements as may be required by the Potential Bidder together with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed forms of order(s) for Court approval thereof;

(c) it includes evidence sufficient to allow Strategic and the Monitor to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the transaction contemplated by the Offer, which evidence could include but is not limited to evidence of a commitment for all required funding and/or financing from a creditworthy bank or financial institution and/or its direct and indirect owners' or principals (in which case information regarding such owners' and principals' financial and other capability shall be included);

(d) it is not conditioned on (i) the outcome of unperformed due diligence by the Potential Bidder and/or (ii) obtaining any financing of any kind and includes an acknowledgement and representation that the Potential Bidder has had an opportunity to conduct any and all required due diligence prior to making its Offer;

(e) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Offer, including information regarding the Potential Bidder's direct and indirect owners and their principals, and the terms of any such participation;

(f) it includes an acknowledgement and representation that the Potential Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Offer; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by Strategic or the Monitor, or any of their respective advisors, except as expressly stated in the Offer; (iii) is a sophisticated party capable of making its own assessments in respect of making its Offer; and (iv) has had the benefit of independent legal advice in connection with its Offer;

(g) the Offer is on an "as is, where is", "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by either Strategic or the Monitor, or any of their respective agents, except to the extent specifically set forth therein;

(h) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of authorization and approval from the Potential Bidder's board of directors (or comparable governing body) with respect to the Offer;

(i) in the case of an Offer involving an acquisition of Property, it provides for a refundable deposit (the "**Deposit**"), to be made in the form of a wire transfer (to a trust account maintained by Strategic's counsel, Dentons Canada LLP ("**Dentons**")), in an amount

equal to 10% of the proposed gross purchase price, to be held and dealt with in accordance with this SISP;

(j) it provides for closing of the Offer by no later than the Ultimate Closing Date;

(k) if the Potential Bidder is an entity newly formed for the purpose of the transaction, the Offer shall include an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to Strategic and the Monitor;

(l) it includes evidence, in form and substance reasonably satisfactory to Strategic and the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;

(m) it contains responses to the Regulatory Requirements;

(n) it is otherwise compliant with, and not contrary to, the rules set forth in this SISP;

(o) it contains other information reasonably requested by Strategic or the Monitor; and

(p) it is received by no later than the Bid Deadline.

5.2 **Qualified Bids.** Any Offer submitted by a Potential Bidder that complies with each and every requirement of subsection 5.1 of this SISP shall hereinafter be referred to as a "**Qualified Bid**" (and all such bids, the "**Qualified Bids**") and each Potential Bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "**Qualified Bidder**".

5.3 **Deemed Qualified Bids.** Notwithstanding subsection 5.1 and 5.2 hereof, either Strategic or the Lender, with the consent of Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Bids.

5.4 **Restructuring or Recapitalization Proposals.** Potential Bidders in respect of any restructuring or recapitalization proposal shall be encouraged to discuss indicative particulars thereof with Strategic and the Monitor early in the process to facilitate the likelihood of an Offer thererfor becoming a Qualified Bid.

ARTICLE 6
SELECTION OF THE SUCCESSFUL BID OR SUCCESSFUL BIDS

6.1 **Review of Qualified Bids**. Immediately following the Bid Deadline, Strategic, the Lender, and the Monitor will assess all Qualified Bids received, if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be consummated and whether proceeding with this SISP is in the best interests of Strategic. Such assessments will be made as promptly as practicable after the Bid Deadline.

6.2 **No Qualified Bids.** In the event that either: (a) no Qualified Bid was received, or (b) none of the Qualified Bids received were likely, in the view of Strategic or the Monitor, acting reasonably, to

be consummated, this SISP shall be deemed to be immediately terminated and Strategic shall apply to the Court for advice and direction.

6.3 **AER.** Immediately following the Bid Deadline, Strategic will provide all Qualified Bids not eliminated under clause 6.2 (b) of this SISP to the AER for AER's review. AER will provide Strategic and the Monitor with any deficiencies or concerns surrounding each Qualified Bids response to Regulatory Requirements within 2 weeks of AER's receipt of such Qualified Bid.

6.4 **Further Negotiations**. Immediately following the Bid Deadline Strategic, and the Lender with the assistance of the Monitor, may select Qualified Bids for further negotiation and/or clarification of any terms or conditions of such Qualified Bids, including the amounts offered, before identifying the highest or otherwise best Qualified Bid(s) (the "**Successful Bid(s)**") received, as the case may be.

6.5 **Determining Successful Bid(s)**. Upon completion of the AER's review pursuant to subsection 6.3, above, and any further negotiations or clarifications that may be conducted pursuant to subsection 6.4 above, Strategic, and the Lender with the consent of the Monitor, will identify the Successful Bid(s). Any Qualified Bidder who made a Successful Bid is a "**Successful Bidder**". Strategic will notify any such Qualified Bidder that it is a Successful Bidder.

ARTICLE 7
APPROVAL HEARING

7.1 **Finalization of Successful Bids.** Forthwith upon notifying a Qualified Bidder that it is a Successful Bidder, Strategic and the Successful Bidder will promptly finalize the definitive agreements in respect of any Successful Bidder, conditional upon approval of the Court (the "**Definitive Agreements**").

7.2 **Court Approval**. Strategic shall apply to the Court as soon as practicable after completion of the Definitive Agreements for: (i) an order approving the Successful Bid(s) and authorizing Strategic to enter into any and all necessary agreements with respect to the Successful Bid; and (ii) any order that may be required vesting title to Property in the name of a Successful Bidder (the "**Approval Hearing**").

7.3 **Closing**. Closing(s) shall occur as soon as practicable after the Successful Bid(s) are approved by the Court.

7.4 **Rejection of unsuccessful Bids**. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or Successful Bids, as the case may be.

ARTICLE 8
STALKING HORSE PROCEDURE

8.1 **Capitalized Terms**. All capitalized terms used in this Article 8 not otherwise defined in this SISP shall have the meaning ascribed to such terms in the Stalking Horse Bid.

8.2 **Stalking Horse Bid**. The Stalking Horse Bid shall be utilized by Strategic and the Vendor as a "stalking horse bid" to elicit a superior offer for the Zama Parcel. The Stalking Horse Bid may be utilized by the Strategic and the Monitor in conjunction with their continuing efforts to sell the

Zama Parcel on terms and conditions that are (a) no less favourable, (b) no more burdensome or conditional, and (c) except for purchase consideration greater than the Purchase Price, substantially similar to the Stalking Horse Bid.

8.3 **Inclusion in this SISP**. The Stalking Horse Bid shall be included in this SISP insofar as Articles III and IV are concerned.

8.4 **Competing Bids**. A potential purchaser (**"Competing Bidder"**) who wishes to acquire the Zama Parcel shall submit its offer – in the form of an executed purchase and sale agreement in substance substantially similar to the Stalking Horse Bid – to the Monitor no later than noon, Calgary time, on Friday, June 21, 2019, which offer shall provide:

(a) a deposit payable by certified cheque, bank draft or wire transfer of not less than 25% of the competing bid's total consideration,

(b) a closing time of not later than 5 Business Days following the Court granting a vesting order contemplated in subsection 8.10 hereof,

(c) a period of time to remain available for acceptance (and be irrevocable) until the Monitor has determined the Superior Proposal (as defined below), and

(d) a cash purchase price in excess of the Purchase Price ($1,500,000) by an amount equal to at least the sum of the Break Fee and $150,000;

whereupon it shall be considered a **"Competing Bid"** under Article 8 of this SISP.

8.5 **Blackline Copy**. The Competing Bid must be accompanied by a blacklined copy of the Competing Bid as against the Stalking Horse Bid, showing any and all variations between the Competing Bid and the Stalking Horse Bid.

8.6 **Financial Wherewithal**. The Competing Bid must be made by one or more bidders who can demonstrate, in the aggregate, the financial ability to consummate the transactions contemplated by the Competing Bid on the terms specified therein to the satisfaction of Strategic and the Monitor.

8.7 **Superior Proposal**. The Competing Bid that offers the highest consideration for the Zama Parcel, and is otherwise acceptable to Strategic and the Monitor, shall be deemed to be the "Superior Proposal" for the purposes of Article 8 of this SISP.

8.8 **ROFR**. Forthwith upon determining the Superior Proposal the Monitor shall forthwith submit such proposal to the Stalking Horse Bidder to determine whether the Stalking Horse Bidder will exercise its ROFR: The Stalking Horse Bidder will advise Strategic and the Monitor within 5 Business Days whether it intends to exercise the ROFR.

8.9 **AER Review**. In the event that the Stalking Horse Bidder does not exercise the ROFR, then the Superior Proposal shall be submitted to the AER for its review and the AER will advise Strategic and the Monitor within 10 Business Days whether the Superior Proposal is acceptable or, if not, what conditions would be required to render it acceptable. Strategic and the Monitor will work with the Competing Bidder under the Superior Proposal, who will have 5 Business Days to satisfy the conditions set forth by the AER.

8.10 **Court Approval**. Forthwith upon a Superior Proposal obtaining approval from the AER as contemplated under the previous subsection, Strategic shall bring an application for approval of the Court to close the Superior Proposal. The Superior Proposal shall close forthwith after Court Approval and the proceeds of sale, to the extent necessary to repay the Deposit, Accrued Interest, and the Break Fee, shall be directed to the Stalking Horse Bidder to discharge the obligations secured by the Stalking Horse Charge.

8.11 **Closing of the Stalking Horse Bid**. In the event that either: (a) there is no Superior Proposal, (b) the ROFR is exercised, or (c) the Competing Bidder under the Superior Proposal cannot satisfy the conditions of the AER, then Strategic, the Monitor, and the Stalking Horse Bidder shall close the Stalking Horse Bid as soon as is practicable after such event and the Zama Parcel will vest in the Stalking Horse Bidder in accordance with the terms of the Order approving this SISP.

ARTICLE 9
GENERAL PROVISIONS

9.1 **Deposits**. All Deposits shall be retained by Dentons and invested in an interest-bearing trust account. If there is a Successful Bid, the Deposit (plus accrued interest) paid by the Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the purchase price to be paid by the Successful Bidder upon closing of the approved transaction and will be non-refundable. If a Successful Bidder fails to comply with any provision contained in its Successful Bid, the Deposit and all other payments made in connection with the Purchase Price shall be forfeited as liquidated damages The Deposits (plus applicable interest) of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within ten Business Days after the date on which Qualified Bids are deemed rejected in accordance with subsection 7.4. If there is no Successful Bid, all Deposits shall be returned to the bidders within 10 Business Days of the date upon which the SISP is terminated in accordance with these procedures.

9.2 **Right to Reject Offers**. The highest or any Offer will not necessarily be accepted. Neither Strategic nor the Monitor has any obligation to conclude a sale arising out of this process and they reserve the right and unfettered discretion to reject any Offer received.

9.3 **Taxes**. All applicable federal and provincial taxes are payable by the Qualified Bidder (unless an exemption certificate is produced), not Strategic.

9.4 **No Assignment**. No Qualified Bid or Successful Bid may be assigned by the Qualified Bidder to any third party without the prior written consent of Strategic and the Lender, and such consent may be unreasonably withheld.

9.5 **Time of the Essence**. All stipulations as to time in this SISP are strictly of the essence.

9.6 **No Commissions**. Neither Strategic nor the Monitor shall be required to pay any finder's fees, commissions, expenses or other compensation to any agents, consultants, advisors, or other intermediaries in respect of any Qualified Bid or Successful Bid, unless expressly agreed to separately and in writing and consented to by the Lender.

9.7 **Applicable Law**. The laws of the Province of Alberta shall govern this SISP. Strategic and each Qualified Bidder agree that the Court shall have the exclusive jurisdiction to determine any and all

disputes under this SISP and any transaction contemplated hereunder hereby attorn to the jurisdiction of the Court.

ARTICLE 10
ADDITIONAL APPROVALS

10.1 **Additional Approvals**. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

ARTICLE 11
ONGOING SUPERVISION

11.1 **Standing**. At any time during the SISP, Strategic, the Monitor, or the Lender may apply to the Court for advice and directions with respect to the terms and condition of the SISP.

SCHEDULE "A"

Address of Strategic

Strategic Oil & Gas Ltd.
1100, 645 - 7th Avenue S.W.
Calgary, AB T2P 4G8
Attention: Tony Berthelet

E-mail: tberthelet@sogoil.com

SCHEDULE "B"

Form of PSA:

APPENDIX "B"

STALKING HORSE BID PURCHASE AND SALE AGREEMENT

STRATEGIC OIL & GAS LTD.

- and -

GMT EXPLORATION ZAMA INC.

PURCHASE AND SALE AGREEMENT

May 3, 2019

PURCHASE AND SALE AGREEMENT

THIS AGREEMENT is made as of the 3rd day of May, 2019

BETWEEN:

STRATEGIC OIL & GAS LTD., a corporation incorporated under the laws of Alberta ("**Vendor**")

OF THE FIRST PART

- and –

GMT EXPLORATION ZAMA INC., a corporation incorporated under the laws of British Columbia ("**Purchaser**")

OF THE SECOND PART

WHEREAS on April 10, 2019, Vendor and its wholly-owned subsidiary, Strategic Transmission Ltd., commenced proceedings under the *Companies' Creditors' Arrangement Act* (Canada), R.S.C. 1985, c. C-36;

AND WHEREAS Vendor intends, with the assistance of the Monitor, to undertake a sale and investment solicitation process pursuant to which interested parties may submit proposals to make an investment in, or purchase assets from, Vendor, in accordance with the SISP Procedures (as defined herein);

AND WHEREAS Vendor has agreed to sell and convey to Purchaser, and Purchaser has agreed to purchase and receive from Vendor, upon and subject to the terms and conditions of this Agreement (including requisite Court approvals as contemplated hereby), all of Vendor's interest in and to the Assets (as defined herein);

AND WHEREAS the parties intend that this Agreement and the Transaction herein constitute the "Stalking Horse Purchase" as contemplated by the SISP Procedures;

NOW THEREFORE, in consideration of the premises and the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Agreement (including the recitals above and each Schedule), unless the context otherwise requires or unless otherwise defined herein, the following words and phrases shall have the meanings set forth below:

(a) "**Abandonment and Reclamation Obligations**" means all past, present and future obligations and liabilities to:

(i) abandon, close, decommission, dismantle and remove all Tangibles, including all structures, foundations, buildings, pipelines, equipment, tanks and other facilities located in or on the Lands or used or previously used in respect of Petroleum Substances produced or previously produced from the Lands; and

(ii) restore, remediate and reclaim the surface and subsurface locations of the Tangibles, and any lands used to gain access thereto, including such obligations relating to wells, pipelines and other facilities that were abandoned or decommissioned prior to the Closing Date and were located on the Lands or on other lands but used or previously used in respect of Petroleum Substances produced or previously produced from the Lands,

all in accordance with generally accepted oil and gas industry practices in Alberta and in compliance with all Applicable Laws;

(b) "**Accrued Interest**" means an amount equal to interest accrued on the Deposit pursuant to Section 2.6;

(c) "**AER**" means the Alberta Energy Regulator;

(d) "**Agreement**" means this Purchase and Sale Agreement between the Parties, including the Schedules attached hereto and forming a part hereof;

(e) "**Applicable Laws**" means, in relation to any Person, asset, transaction, event or circumstance, all (i) statutes (including regulations made thereunder), (ii) judgments, decrees and orders of courts of competent jurisdiction, (iii) rules, regulations, orders, ordinances and official directives of Government Authorities, and (iv) terms and conditions of all permits, licenses or other governmental or regulatory approvals or authorization, in each case which are in effect at the relevant time and are applicable to such Person, asset, transaction, event or circumstance;

(f) "**Assets**" means the Petroleum and Natural Gas Rights, the Tangibles and the Miscellaneous Interests;

(g) "**Break Fee**" means the fee payable to Purchaser as provided for in Section 3.1(c);

(h) "**Business Day**" means any day other than a Saturday, Sunday or statutory holiday in the Province of Alberta or the State of Colorado, or any day on which banks in Calgary, Alberta or Denver, Colorado are not open for the transaction of commercial business;

(i) "**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended,

(j) "**CCAA Proceedings**" means the proceedings commenced by Vendor and its wholly-owned subsidiary, Strategic Transmission Ltd., in the Court pursuant to the CCAA (Court File No. 1901-05089);

(k) "**Claims**" means any and all rights or claims that may be asserted or made against Vendor or against the Assets of every nature of kind whatsoever and howsoever arising, including any and all encumbrances, liens, charges, pledges, mortgages and security interests, but excluding Permitted Encumbrances;

(l) "**Closing**" means completion of the purchase by Purchaser and sale by Vendor of the Assets and transfer from Vendor to Purchaser of possession, beneficial ownership and risks of the Assets, and completion of all other transactions and matters incidental thereto as are contemplated herein to occur contemporaneously with such purchase and sale, all subject to and in accordance with the terms and conditions of this Agreement;

(m) "**Closing Date**" means the fifth (5th) Business Day following the date upon which the Stalking Horse Procedures provide that Vendor and Purchase shall or may proceed to Closing, or such other Business Day as the Parties may agree in writing;

(n) "**Court**" means the Court of Queen's Bench of Alberta, presiding in Action No. 1901-05089;

(o) "**Deposit**" means the deposit provided for in Section 2.5;

(p) "**Environmental Liabilities**" means all liabilities in respect of the environment that relate to the Assets or which arise in connection with the ownership thereof or operations pertaining thereto, including liabilities related to or arising from:

(i) transportation, storage, use or disposal of toxic or hazardous substances;

(ii) release, spill, escape emission, leak, discharge, migration or disposal of toxic or hazardous substances; or

(iii) pollution or contamination of, or damage to, the environment;

including liabilities to compensate Third Parties for damages and Losses resulting from the items described in clauses (i), (ii) and (iii) above (including damage to property, personal injury and death) and obligations to take action to prevent or rectify damage to or otherwise protect the environment and, for purposes of this Agreement, "the environment" includes the air, the surface and subsurface of the earth, bodies of water (including rivers, streams, lakes and aquifers) and plant and animal life (including humans);

(q) "**Facilities**" means all field facilities, whether or not solely located on or under the surface of the Lands (or lands with which the Lands are pooled) and that are, or have been, used for production, gathering, treatment, compression, transportation, injection, water disposal, measurement, processing, storage or other operations respecting the Leased Substances, including any applicable battery, separator, compressor station, gathering system, pipeline, production storage facility or warehouse;

(r) "**Governmental Authority**" means any federal, national, provincial, territorial, municipal or other government, any political subdivision thereof, and any ministry,

sub-ministry, agency or sub-agency, court, board, regulatory body, bureau, office, or department, including any government-owned entity, having jurisdiction over a Party, the Assets or the Transaction;

(s) "**GST**" means the goods and services tax payable pursuant to the GST Legislation;

(t) "**GST Legislation**" means Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, and the regulations thereunder;

(u) "**Interim Period**" means the period from and after the date of this Agreement until the earlier of the Closing Date and the date on which this Agreement is terminated;

(v) "**Lands**" means the lands set forth and described in Schedule "A", and the Petroleum Substances within, upon or under such lands (subject to the restrictions and exclusions identified in Schedule "A" and in the Title Documents as to Petroleum Substances and geological formations);

(w) "**Leased Substances**" means all Petroleum Substances, rights to or in respect of which are granted, reserved or otherwise conferred by or under the Title Documents (but only to the extent that the Title Documents pertain to the Lands);

(x) "**Losses**" means all losses, costs, claims, damages, expenses and liabilities that a Party suffers, sustains, pays or incurs, including reasonable legal fees on a solicitor and his own client basis but notwithstanding the foregoing shall not include any liability for indirect or consequential damages including business loss, loss of profit, economic loss, punitive damages or income tax liabilities;

(y) "**Miscellaneous Interests**" means all property, assets, interests and rights pertaining or ancillary to the Petroleum and Natural Gas Rights and the Tangibles (other than the Petroleum and Natural Gas Rights and the Tangibles), or either of them, but only to the extent that such property, assets, interests and rights pertain to the Petroleum and Natural Gas Rights and the Tangibles, or other of them, including any and all of the following:

(i) all contracts, agreements, books, records, files, maps and documents to the extent that they relate to the Petroleum and Natural Gas Rights or the Tangibles, including the Title Documents and any rights of Vendor in relation thereto;

(ii) all subsisting rights to carry out operations relating to the Lands or the Tangibles, and without limitation, all easements and other permits, licenses and authorizations pertaining to the Tangibles;

(iii) the Surface Interests;

(iv) geological, geochemical and mineralogical data, reports and findings and archive samples, and all core or liquid samples and cuttings;

(v) all proprietary raw and processed seismic data owned, in the possession or control of or legally transferable by Vendor;

(vi) all engineering information, to the extent relating to the Petroleum and Natural Gas Rights or the Tangibles which Vendor has in its custody or has access, excluding any such information which is subject to confidentiality restrictions; and

(vii) the Wells, including the entire wellbores and any and all casing;

(z) "**Monitor**" means KPMG Inc., in its capacity as monitor appointed in the CCAA Proceedings, and not in its personal capacity;

(aa) "**Parties**" means the parties to this Agreement and includes their respective successors and permitted assigns, and "**Party**" means any one of them;

(bb) "**Permitted Encumbrances**" means, as of a particular time, any of the following:

(i) easements, rights of way, servitudes or other similar rights in land, including rights of way and servitudes for highways and other roads, railways, sewers, drains, gas and oil pipelines, gas and water mains, electric light, power, telephone, telegraph and cable television conduits, poles, wires and cable;

(ii) the right reserved to or vested in any Governmental Authority by the terms of any Title Document, lease, license, franchise, grant or permit or by any Applicable Law, to terminate any such Title Document, lease, license, franchise, grant or permit, or to require annual or other periodic payments as a condition of the continuance thereof;

(iii) the right reserved to or vested in any Governmental Authority to levy taxes on Petroleum Substances or the income or revenue therefrom;

(iv) governmental requirements and limitations of general application respecting production rates from Wells or operations on in respect of the Lands;

(v) rights reserved to or vested in any Governmental Authority to control or regulate any of the Assets in any manner;

(vi) liens granted in the ordinary course of business to a public utility or Governmental Authority in connection with operations on or in respect of the Lands;

(vii) the express or implied reservations, limitations, provisos and conditions in any original grants from the Crown of any of the Lands or interests therein, and statutory exceptions to title;

(viii) all adverse claims, encumbrances and other burdens identified in Schedule "A";

(ix) the terms and conditions of the Title Documents;

provided that, the following items must be identified in Schedule "A" to quality as a "Permitted Encumbrance" hereunder: (A) any overriding royalty, net profits interest, net carried interest or other adverse claim applicable to the Petroleum and Natural

Gas Rights for which Purchaser will have any obligation for payment; (B) any existing potential alteration of Vendor's interests in the Assets because of a payout conversion or farmin, farmout or other similar agreement; and (C) any security interest which would not be a Permitted Encumbrance under the preceding paragraphs of this definition;

(cc) "**Person**" means an individual, corporation, limited or unlimited liability company, body corporate, partnership (limited or general), trust, unincorporated organization, joint venture, Governmental Authority or other entity, and includes the heirs, executors, administrators or other legal representatives of an individual;

(dd) "**Petroleum and Natural Gas Rights**" means all rights to and in respect of the Leased Substances and the Title Documents (but only to the extent that the Title Documents pertain to the Lands), including the interests set out and described in Schedule "A";

(ee) "**Petroleum Substances**" means any of crude oil, crude bitumen and products derived therefrom, synthetic crude oil, petroleum, natural gas, natural gas liquids, and any and all other substances related to or produced in conjunction with any of the foregoing, whether liquid, solid or gaseous, and whether hydrocarbons or not, including sulphur and hydrogen sulphide;

(ff) "**Purchase Price**" shall have the meaning ascribed to that term in Section 2.2;

(gg) "**Representatives**" means, with, respect to any Party, the directors, officers, servants, agents, advisors (including legal counsel), employees and consultants of that Party;

(hh) "**Sales Taxes**" means all transfer, sales, excise, stamp, license, production, value-added and other like taxes, assessments, charges, duties, fees, levies or other governmental charges of any kind, including additions by way of penalties, interest and other amounts with respect thereto, including GST;

(ii) "**SISP Order**" means an order to be granted by the Court in the CCAA Proceedings authorizing and approving (A) the SISP Procedures, (B) this Agreement, (C) the sale and vesting of the Assets in favour of the Purchaser, free and clear of all Claims, pursuant to Closing in accordance with the Stalking Horse Procedures, and (D) the Stalking Horse Charge, which order shall be substantially in the form attached as a schedule to the motion filed by Vendor in the CCAA Proceedings concurrently with the execution and delivery of this Agreement, and in any event in form and substance acceptable to each of Vendor, Purchaser and the Monitor;

(jj) "**SISP Procedures**" means the sale and investment solicitation process appended to the SISP Order, with such changes thereto as are acceptable to each of Vendor, Purchaser and the Monitor;

(kk) "**Specific Conveyances**" means all conveyances, assignments, notices, transfers, novations, registrations and other documents, instruments or records relating to the Assets reasonably required or desirable, in accordance with normal oil and gas industry practices, to convey, assign and transfer the Assets to

Purchaser and to novate Purchaser in the place and stead of Vendor with respect to the Assets;

(ll) **"Stalking Horse Charge"** means a first priority charge on the Assets, and on any proceeds from the sale thereof that are realized by Vendor from completion of a Superior Proposal, which charge shall: (i) be security for payment by Vendor to Purchaser of the Deposit, Accrued Interest and the Break Fee in accordance with this Agreement, (ii) be exempt from any claim of, or regulatory obligation imposed by, the AER that is unrelated to the Assets, and (iii) otherwise have the terms set out in the SISP Order;

(mm) **"Stalking Horse Procedures"** means the provisions of the SISP Procedures applicable to this Agreement and the Transaction herein;

(nn) **"Superior Proposal"** has the meaning ascribed thereto in the SISP Procedures;

(oo) **"Surface Interests"** means Vendor's interest in and to all rights to enter upon, use, occupy and enjoy the surface of the Lands and any lands upon which the Tangibles are located and any lands used to gain access to or otherwise use or exercise rights in respect of the Petroleum and Natural Gas Rights and the Tangibles or conduct operations in respect thereof, whether the same are held by right of way or otherwise;

(pp) **"Tangibles"** means the Facilities and any and all other tangible depreciable property and assets located in, upon or in the vicinity of the Lands or lands pooled or unitized therewith, including the Wells, and which are used in connection therewith or with production, gathering, processing, transmission, measurement or treatment operations relating to the Leased Substances and the Petroleum and Natural Gas Rights, or any of them;

(qq) **"Third Party"** means any Person other than the Parties;

(rr) **"Title Documents"** means, collectively, any and all certificates of title, leases, reservations, permits, licences, assignments, trust declarations, operating agreements, royalty agreements, gross overriding royalty agreements, participation agreements, farm-in agreements, sale and purchase agreements, pooling agreements and any other documents and agreements granting, reserving or otherwise conferring: (i) rights to explore for, drill for, produce, take, use or market Petroleum Substances; (ii) rights to share in the production of Petroleum Substances; (iii) rights to share in the proceeds from, or measured or calculated by reference to the value or quantity of, Petroleum Substances which are produced; (iv) Surface Interests; and (v) rights to acquire any of the rights described in items (i) to (iv) of this definition; but only if the foregoing pertain in whole or in part to Petroleum Substances within, upon or under the Lands;

(ss) **"Transaction"** means the transaction for the purchase and sale of the Assets as contemplated by this Agreement;

(tt) **"Vendor's interest"** means all of the right, title, estate and interest of Vendor, whether absolute or contingent, legal or beneficial, present or future, vested or not, and whether or not an "interest in land"; and

(uu) "**Wells**" means the well described in Schedule "B", including the facilities, well equipment and casing related to such well, and any other well located in or upon the Lands, whether producing, suspended, capped, previously abandoned or used as water source, service, injection, observation, delineation or disposal wells.

1.2 Interpretation

Unless the context otherwise requires, the following rules of construction shall apply to this Agreement:

(a) the headings in this Agreement are inserted for convenience or reference only and shall not affect the meaning, interpretation or construction of this Agreement;

(b) all documents executed and delivered pursuant to the provisions of this Agreement are subordinate to the provisions hereof, and the provisions hereof shall govern and prevail in the event of a conflict;

(c) any reference to a statute shall include and shall be deemed to be a reference to such statute and to the regulations made pursuant thereto, and all amendments made thereto and in force at the date hereof;

(d) whenever the singular or masculine or neuter is used in this Agreement, the same shall be construed as meaning plural or feminine or referring to a body politic or corporate, and *vice versa*, as the context requires;

(e) the words "hereto", "herein", "hereof", "hereby", "hereunder" and similar expressions refer to this Agreement and not to any particular provision of this Agreement;

(f) reference to any Article, Section or Schedule means a Article, Section or Schedule of this Agreement unless otherwise specified;

(g) if any provision of a Schedule hereto conflicts with or is at variance with any provision in the body of this Agreement, the provisions in the body of this Agreement shall prevail to the extent of the conflict;

(h) "include" and derivatives thereof shall be read as if followed by the phrase "without limitation";

(i) all references to currency shall mean Canadian dollars, unless otherwise specifically stated;

(j) where a term is defined herein, a capitalized derivative of such term shall have a corresponding meaning unless the context otherwise requires;

(k) terms and expressions that are not specifically defined in this Agreement, but which have generally accepted meanings in the custom and usage of the petroleum and natural gas industry in Western Canada as of the date of this Agreement, will have such generally accepted meanings when used in this

Agreement unless the contrary is specified or provided for elsewhere in this Agreement; and

(l) wherever any payment to be made or action to be taken under this Agreement is required to be made or taken on a day other then a Business Day, such payment must be made or action taken on the next Business Day and time periods within or following which any payment is to be made or any act is to be done under this Agreement will be calculated by excluding the day on which the period commences and including the day on which such period ends.

1.2 Schedules

The following schedules are attached to and form part of this Agreement:

SCHEDULE "A"	Land Schedule
SCHEDULE "B"	Well Schedule
SCHEDULE "C"	Form of General Conveyance
SCHEDULE "D"	Form of Officer's Certificate

1.3 Interpretation if Closing does not Occur

If Closing does not occur, each provision of this Agreement which presumes that Purchaser has acquired the Assets shall be construed as having been contingent upon Closing having occurred.

ARTICLE 2
PURCHASE AND SALE; CLOSING

2.1 Purchase and Sale

Vendor hereby agrees to sell and convey to Purchaser, and Purchaser hereby agrees to purchase and receive from Vendor, all of Vendor's interest in and to Assets, all in accordance with and subject to the terms and conditions set forth in this Agreement.

2.2 Purchase Price

The aggregate consideration to be paid by Purchaser to Vendor as the purchase price for the Assets hereunder is One Million Five Hundred Thousand Canadian dollars ($1,500,000) (the "**Purchase Price**"), to be satisfied as follows:

(a) payment by Purchaser of the Deposit as provided in Section 2.5;

(b) the amount of Accrued Interest payable by Vendor to Purchaser to and including the Closing Date shall be set off against the Purchase Price; and

(c) at Closing, Purchaser shall deliver (or cause to be delivered) to Vendor payment of the balance of the Purchase Price, net of the Deposit and Accrued Interest, by bank draft, certified cheque or wire transfer.

2.3 Purchase Price Allocation

The Parties shall allocate the Purchase Price among the Assets as follows:

Petroleum and Natural Gas Rights:	$	1,425,000
Tangibles:		74,999
Miscellaneous Interests:		1.00
TOTAL:	$	1,500,000

2.4 Assumption of Abandonment and Reclamation Obligations

In determining the Purchase Price and the fair market value of the Assets, the Parties have taken into account Purchaser's assumption of responsibility for Abandonment and Reclamation Obligations associated with the Assets, as provided herein, and the release of Vendor of any responsibility therefor.

2.5 Deposit

Purchaser shall pay to Vendor, within three (3) Business Days after the date on which the SISP Order is granted, a deposit in the amount of One Million Two Hundred Thousand Canadian Dollars ($1,200,000) (the **"Deposit"**), which amount shall be immediately available to Vendor for general corporate purposes in accordance with the cash flow forecasts filed by Vendor in the CCAA Proceedings and thereafter dealt with in accordance with the following:

(a) if Closing occurs, the Deposit shall be applied as partial payment of the Purchase Price; or

(b) if this Agreement is terminated, Vendor shall promptly repay to Purchaser the full amount of the Deposit plus Accrued Interest.

2.6 Interest on Deposit

The Deposit shall bear interest at the rate of one percent (1%) per month from the date on which the Deposit is paid to Vendor until (and including): (i) if Closing occurs, the Closing Date or (ii) if for any reason Closing does not occur, the date on which the Deposit is repaid to Purchaser as provided in Section 2.5.

2.7 Closing

Subject to the satisfaction or waiver of the conditions to Closing as set out in Article 5 below, Closing of the purchase and sale of the Assets as provided for herein shall take place on the Closing Date at the offices of Purchaser's solicitors, Bennett Jones LLP, located at 4500 Bankers Hall East, 855 - 2nd Street S.W., Calgary, Alberta, whereupon possession, risk and beneficial ownership of the Assets shall pass from Vendor to Purchaser.

2.8 Closing Deliveries – Vendor

On the Closing Date (and subject, for certainty, to the satisfaction or waiver of the conditions to Closing in favour of Vendor as set out in Article 5 below), Vendor shall deliver to Purchaser:

(a) a certified copy of the SISP Order;

(b) the General Conveyance in the form attached as Schedule "C", duly executed by Vendor;

(c) the Officer's Certificate substantially in the form attached as Schedule "D", duly executed by Vendor;

(d) the Specific Conveyances, duly executed by Vendor;

(e) a receipt for the Purchase Price; and

(f) such other documentation as may be specifically referenced herein or as may reasonably be required by Purchaser.

2.9 Closing Deliveries – Purchaser

On the Closing Date (and subject, for certainty, to the satisfaction or waiver of the conditions to Closing in favour of Purchaser as set out in Article 5 below), Purchaser shall deliver to Vendor:

(a) the balance of the Purchase Price, net of the Deposit and Accrued Interest, by bank draft, certified cheque or wire transfer;

(b) the General Conveyance in the form attached as Schedule "C", duly executed by Purchaser; and

(c) the Officer's Certificate substantially in the form attached as Schedule "D", duly executed by Purchaser.

2.10 Specific Conveyances

Vendor shall prepare the Specific Conveyances at its cost. At a reasonable time prior to Closing, Vendor shall provide for Purchaser's review all Specific Conveyances and it shall be Purchaser's responsibility to ensure that the Specific Conveyances are accurate, complete and in registerable form. The Parties shall execute such Specific Conveyances at or before Closing. No Specific Conveyance shall confer or impose upon either Party any greater right or obligation than as contemplated in this Agreement. Promptly after Closing, Purchaser shall register in the applicable registry all registrable Specific Conveyances, and shall bear all costs incurred respect thereof and in preparing and registering any further assurances required to convey the Assets to Purchaser. Insofar as Specific Conveyances are in the form of electronically recorded transfers with the relevant Governmental Authority, the Parties shall use reasonable efforts to complete such transfers on the Closing Date.

2.11 Title Documents and Miscellaneous Interests

As soon as practicable following Closing, and in any event no later than five (5) Business Days thereafter, Vendor shall deliver to Purchaser the Title Documents and any other agreements and documents that are in Vendor's possession to which the Assets are subject and such contracts, agreements, records, books, documents, licenses, reports and data comprising Miscellaneous Interests which are now in the possession of Vendor or of which Vendor gains possession before Closing. Vendor shall deliver original documents, except where it does not have originals, in which case Vendor will deliver copies of all documents and instruments described in this Section 2.11.

2.12 Sales Taxes

(a) Each of Purchaser and Vendor is registrant for GST purposes and will continue to be a registrant at the Closing Date in accordance with the provisions of the GST Legislation. Their respective GST registration numbers are:

Vendor: 12656 7031 RT0001

Purchaser: 77313 9316 RT0001

(b) The Parties acknowledge that the Purchase Price is exclusive of any applicable Sales Taxes. Purchaser shall be solely responsible for all Sales Taxes that may be imposed by any Governmental Authority under Applicable Laws and which pertain to Purchaser's acquisition of the Assets or to the registration of any Specific Conveyances necessitated hereby. Except where Vendor is required under Applicable Law to collect or pay such Sales Taxes, Purchaser shall pay such Sales Taxes directly to the appropriate Governmental Authority or other entity within the required time period and shall file all necessary documentation with respect to such Sales Taxes when due. Vendor will do and cause to be done such things as are reasonably requested to enable Purchaser to comply with such obligation in a timely manner.

(c) The Parties acknowledge and agree that: (i) no GST is exigible on the Petroleum and Natural Gas Rights; and (ii) the Tangibles are comprised solely of real property and, accordingly, Purchaser shall self-assess any GST exigible on the Tangibles in accordance with the GST Legislation.

ARTICLE 3
COVENANTS

3.1 SISP Procedures

This Agreement and the Transaction herein shall constitute the "Stalking Horse Bid" for the purposes of the SISP Procedures. Provided that the SISP Order is granted, the obligation of Purchaser to purchase the Assets and the obligation of Vendor to sell the Assets pursuant hereto is subject to the Stalking Horse Procedures and the satisfaction of all applicable conditions therein. Notwithstanding the foregoing, the Parties hereby acknowledge and agree as follows:

(a) Vendor shall make application to the Court for the SISP Order as soon as reasonably practicable after execution of this Agreement, and in connection therewith prepare and file all required materials and serve such Third Parties as the CCAA, the Court and Purchaser may require.

(b) Provided that the SISP Order is granted, Vendor shall comply with the procedures and timelines set out therein and in the Stalking Horse Procedures and shall not waive any provision of, or apply to the Court to amend, or consent to any application by any Person for the amendment of, the Stalking Horse Procedures without the prior written consent of Purchaser.

(c) In the event that a Superior Proposal is approved by the Court and is completed, Vendor shall immediately pay to Purchaser a fee in the amount of Seventy Five Thousand Canadian Dollars ($75,000) (the "**Break Fee**").

(d) Upon the completion of a Superior Proposal, (i) this Agreement shall automatically terminate; and (ii) Vendor and Purchaser shall have no further obligations to the other Party with respect to this Agreement or the Transaction herein except as provided in Section 7.1.

3.2 Court Filings

During the Interim Period, Vendor shall: (i) deliver to Purchaser copies of all pleadings, motions, applications, affidavits, notices, statements, schedules, reports and other papers proposed to be filed by Vendor with the Court and which relate, in whole or in part, to this Agreement or to Purchaser, prior to their filing; (ii) provide Purchaser with a reasonable opportunity to review and comment thereon; and (iii) reasonably and in good faith consider any comments provided by Purchaser.

3.3 Maintenance of Assets

(a) During the Interim Period, Vendor shall, to the extent that the nature of its interest permits, and subject to the Title Documents, maintain the Assets in a proper and prudent manner in accordance with good oil and gas industry practices and in material compliance with all Applicable Laws and perform and comply with all covenants and conditions contained in the Title Documents and any other agreements and documents to which the Assets are subject, it being acknowledged that insofar as Vendor is not operator its obligation under this paragraph extends only to what would be expected of a non-operator in similar circumstances.

(b) During the Interim Period, Vendor shall not, without the prior written consent of Purchaser: (i) sell, transfer, dispose of, surrender or abandon, or mortgage or otherwise encumber, any of the Assets; or (ii) agree to amend or terminate any Title Documents or enter into any new agreement or commitment relating to the Assets.

3.4 Post-Closing Transition

Following Closing, Vendor shall hold title to the Assets in trust for Purchaser, as bare legal trustee, until all necessary notifications, registrations and other steps required to transfer such title to Purchaser have been completed. Until Purchaser is fully novated in and to the Assets, into the Title Documents and any other agreements and documents to which the Assets are subject, as applicable, Vendor shall, in a timely manner (i) forward to Purchaser any Third Party notices and communications received in respect of the Assets, and respond to such notices and communications as Purchaser may reasonably request, and (ii) act as Purchaser's agent as Purchaser reasonably and lawfully directs in respect thereof.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES

4.1 Vendor's Representations and Warranties

Vendor hereby represents, warrants and covenants to and with Purchaser that:

(a) ***Corporate Standing.*** Purchaser is, and at the Closing Date will be, a corporation duly organized, validly existing and in good standing under the laws of the Province of Alberta.

(b) ***Requisite Authority.*** Vendor has all requisite power and authority to enter into this Agreement, to sell the Assets on the terms and conditions contemplated hereby, and to otherwise perform its obligations under this Agreement.

(c) ***No Conflicts.*** The consummation of the Transaction will not violate, nor be in conflict with, the provisions of any agreement or instrument to which Vendor is a party or is bound, or any Applicable Law.

(d) ***Execution of Documents.*** This Agreement has been, and all other documents (including the General Conveyance) executed and delivered by Vendor pursuant hereto will at the time of Closing be, duly authorized, executed and delivered by Vendor. This Agreement does, and such other documents (including the General Conveyance) will at the time of Closing, constitute legal, valid and binding obligations of Vendor enforceable against Vendor in accordance with their respective terms, subject to bankruptcy, insolvency, preference, reorganization, moratorium and other similar laws affecting creditor's rights generally and the discretionary nature of equitable remedies and defences.

(e) ***Tax Resident.*** Vendor is a resident of Canada within the meaning of the *Income Tax Act* (Canada).

4.2 Purchaser's Representations and Warranties

Purchaser hereby represents, warrants and covenants to and with Vendor that:

(a) ***Corporate Standing.*** Purchaser is, and at the Closing Date will be, a corporation duly organized, validly existing and in good standing under the laws of the Province of British Columbia, and is duly registered as an extra-provincial corporation under the laws of the Province of Alberta.

(b) ***Requisite Authority.*** Purchaser has all requisite power and authority to enter into this Agreement, to purchase the Assets on the terms and conditions contemplated hereby, and to otherwise perform its obligations under this Agreement.

(c) ***No Conflicts.*** The consummation of the Transaction will not violate, nor be in conflict with, the provisions of any agreement or instrument to which Purchaser is a party or is bound, or any Applicable Law.

(d) ***Execution of Documents.*** This Agreement has been, and all other documents (including the General Conveyance) executed and delivered by Purchaser pursuant hereto will at the time of Closing be, duly authorized, executed and delivered by Purchaser. This Agreement does, and such other documents (including the General Conveyance) will at the time of Closing, constitute legal, valid and binding obligations of Purchaser enforceable against Purchaser in accordance with their respective terms, subject to bankruptcy, insolvency,

preference, reorganization, moratorium and other similar laws affecting creditor's rights generally and the discretionary nature of equitable remedies and defences.

(e) ***Finders' Fees.*** Purchaser has not incurred any liability, contingent or otherwise, for brokers' or finders' fees in respect of this Transaction for which Vendor shall have any obligation or liability.

(f) ***Tax Resident.*** Purchaser is a resident of Canada within the meaning of the *Income Tax Act* (Canada).

(g) ***Regulatory Requirements.*** Purchaser meets all qualification requirements of all Government Authorities and under Applicable Law to purchase and hold the Assets.

4.3 Limitation of Vendor's Representations and Warranties

(a) Vendor makes no representations or warranties except as expressly set forth in Section 4.1 and, in that regard, Purchaser acknowledges and agrees that the Assets are sold on an "as is-where is" basis and that there are no representations, warranties or conditions, whether express or implied (by law or by equity) with respect to the Assets including the merchantability of the Assets, the quality or fitness for any particular purpose of the Assets, or the conformity of the Assets to any descriptions. Purchaser acknowledges that it has conducted its own independent inspection of the Assets and is satisfied with the Assets in all respects. All conditions and warranties provided for in the *Sale of Goods Act* (Alberta) and any similar legislation shall not apply to this Agreement and are deemed to be waived by Purchaser.

(b) Without limiting the generality of the foregoing, Vendor disclaims all liability for any representation, warranty, statement or information made or communicated, orally or in writing, to Purchaser or any of its Representatives with respect to the Assets or the Transaction, and the Parties agree that there are no collateral agreements, conditions, representations or warranties of any nature whatsoever made by Vendor, express or implied, at law or in equity, with respect to the Assets or the Transaction.

(c) Purchaser acknowledges and confirms that it is familiar with the condition of the Assets, including the past and present use of the Lands and the Tangibles, and is not relying upon any representation or warranty of Vendor as to the condition, environmental or otherwise, of the Assets, except only as expressly set forth in Section 4.1.

4.4 Survival

The representations and warranties set forth in Sections 4.1 and 4.2, respectively, shall be true and correct as of the date hereof and on the Closing Date, and shall survive Closing for the benefit Purchaser and Vendor, respectively; provided that no claim in respect of such representations and warranties shall be made or be enforceable unless written notice of such claim is given by the Party making the claim to the other Party within twelve (12) months of the Closing Date. There shall not be any merger of any covenant, representation or warranty in any assignment, conveyance, transfer

or document delivered pursuant hereto, notwithstanding any rule of law, equity or statute to the contrary, and all such rules are hereby waived.

ARTICLE 5
CLOSING CONDITIONS

5.1 Mutual Closing Conditions

The respective obligations hereunder of Purchaser to complete the purchase of the Assets from Vendor, and of Vendor to complete the sale of the Assets to Purchaser, pursuant to this Agreement is subject to the satisfaction of the following conditions precedent:

(a) the SISP Order shall have been obtained on or before May 10, 2019;

(b) on the Closing Date, the SISP Order shall be in full force and effect;

(c) on the Closing Date, there shall not be in effect any order, ruling or decree, whether temporary, preliminary or permanent, of any court or other Governmental Authority, or any Applicable Law, that restrains, enjoins or prohibits consummation of the Transaction as provided herein, and no demand therefor or action or proceeding to make, obtain or enact the same shall have been made or instituted by or before any Governmental Authority; and

(d) without limiting the foregoing, the AER shall have consented to the SISP Order and, in particular, the inclusion of the Stalking Horse Charge therein.

The foregoing conditions are for the mutual benefit of the Parties and may be waived by either Party (with respect to such Party) in its sole discretion, by written notice to the other Party, in whole or in part, at any time, without prejudice to any other rights such waiving Party may have.

If any of the foregoing conditions has not been satisfied or waived at or before the date stipulated, either Party may terminate this Agreement by written notice to the other Party. If either Party terminates this Agreement pursuant to this Section 5.1, Vendor shall forthwith return and pay the Deposit plus Accrued Interest to Purchaser, and Purchaser and Vendor shall be released and discharged from all obligations hereunder except as provided in Section 7.1.

5.2 Vendor's Closing Conditions

The obligation hereunder of Vendor to complete the sale of the Assets to Purchaser pursuant to this Agreement is subject to the satisfaction at or before the Closing Date of the following conditions precedent:

(a) Vendor shall have received the Deposit as provided in Section 2.5;

(b) all representations and warranties of Purchaser contained in this Agreement shall be true and correct in all material respects on the Closing Date;

(c) Purchaser shall have, in all material respects, timely performed and satisfied all obligations required by this Agreement to be performed and satisfied by Purchaser at or before Closing;

(d) Vendor shall have received a certificate from a senior officer of Purchaser substantially in the form attached hereto as Schedule "D" dated as of the Closing Date;

(e) Purchaser shall have tendered payment of the balance of the Purchase Price to Vendor as provided in Section 2.2; and

(f) Purchaser shall have executed and tabled for delivery to Vendor all Specific Conveyances and the General Conveyance.

The foregoing conditions are for the exclusive benefit of Vendor and may be waived by Vendor in its sole discretion, by written notice to Purchaser, in whole or in part, at any time, without prejudice to any other rights Vendor may have.

If any of the foregoing conditions has not been satisfied or waived at or before the Closing Date, Vendor may terminate this Agreement by written notice to Purchaser. If Vendor terminates this Agreement pursuant to this Section 5.2, Vendor shall forthwith return and pay the Deposit plus Accrued Interest to Purchaser, and Purchaser and Vendor shall be released and discharged from all obligations hereunder except as provided in Section 7.1.

5.3 Purchaser's Closing Conditions

The obligation hereunder of Purchaser to complete the purchase of the Assets from Vendor pursuant to this Agreement is subject to satisfaction at or before the Closing Date of the following conditions precedent:

(a) the Closing Date shall be not later than July 31, 2019;

(b) the (i) provisions of the SISP Order relating to this Agreement and the Transaction herein and (ii) Stalking Horse Procedures shall not have been amended otherwise than with the prior written consent of Purchaser;

(c) all representations and warranties of Vendor contained in this Agreement shall be true and correct in all material respects on the Closing Date;

(d) Vendor shall have, in all material respects, timely performed and satisfied all obligations required by this Agreement to be performed and satisfied by Purchaser at or before Closing;

(e) Purchaser shall have received a certificate from a senior officer of Vendor substantially in the form attached hereto as Schedule "D" dated as of the Closing Date;

(f) Vendor shall have executed and tabled for delivery to Purchaser all Specific Conveyances and the General Conveyance; and

(g) the terms or conditions on which the AER shall have consented to the SISP Order and, in particular, the inclusion of the Stalking Horse Charge therein, shall be acceptable to Purchaser.

The foregoing conditions are for the exclusive benefit of Purchaser and may be waived by Purchaser in its sole discretion, by written notice to Vendor, in whole or in part, at any time, without prejudice to any other rights Purchaser may have.

If any of the foregoing conditions has not been satisfied or waived at or before the Closing Date, Purchaser may terminate this Agreement by written notice to Vendor. If Purchaser terminates this Agreement pursuant to this Section 5.3, Vendor shall forthwith return and pay the Deposit plus Accrued Interest to Purchaser, and Purchaser and Vendor shall be released and discharged from all obligations hereunder except as provided in Section 7.1.

5.4 Satisfaction of Conditions

Each Party covenants to proceed diligently and in good faith and use all reasonable efforts to fulfill and cause to be satisfied the conditions precedent for its benefit, as set out in this Article 5, insofar as fulfilment and satisfaction is within its control or influence.

ARTICLE 6
PURCHASER LIABILITY AND INDEMNIFICATION

6.1 Post-Closing Liability

Except with respect to Environmental Liabilities as provided for in Section 6.2, provided that Closing has occurred, Purchaser shall:

(a) be liable and responsible for any Losses that Vendor may suffer, sustain, pay or incur; and

(b) indemnify and save harmless Vendor from and against all Losses, actions, proceedings and demands brought against Vendor or which it may suffer, sustain, pay or incur,

as a result of any matter resulting from, attributable to or connected with the Assets and occurring or accruing on or after the Closing Date, except any Losses to the extent that they either are reimbursed (or reimbursable) by insurance maintained by Vendor or are caused by Vendor.

6.2 Environmental Liabilities; Abandonment and Reclamation Obligations

Purchaser acknowledges that, insofar as the environmental condition of the Assets is concerned, it will acquire the Assets pursuant hereto on an "as is, where is" basis. Purchaser acknowledges that it is familiar with the condition of the Assets, including the past and present use of the Lands and the Tangibles, that Vendor has provided Purchaser with a reasonable opportunity to inspect the Assets at the sole cost, risk and expense of Purchaser (insofar as Vendor could reasonably provide such access) and that Purchaser is not relying upon any representation or warranty of Vendor as to the environmental condition of the Assets, Environmental Liabilities or Abandonment and Reclamation Obligations. Provided that Closing has occurred, Purchaser shall:

(a) be liable and responsible for any Losses that Vendor may suffer, sustain, pay or incur; and

(b) indemnify and save harmless Vendor from and against all Losses, actions, proceedings and demands brought against Vendor or which it may suffer, sustain, pay or incur

as a result of any matter resulting from, attributable to or connected with any Environmental Liabilities or any Abandonment and Reclamation Obligations. Once Closing has occurred, Purchaser shall be solely responsible for all Environmental Liabilities and all Abandonment and Reclamation Obligations (whether occurring or accruing before, on or after the Closing Date), and hereby releases Vendor from any claims Purchaser may have against Vendor with respect to all such liabilities and responsibilities. Without restricting the generality of the foregoing, Purchaser shall be responsible for all Environmental Liabilities and Abandonment and Reclamation Obligations (whether occurring or accruing before, on or after the Closing Date) in respect of all Wells and Facilities.

6.3 Third Party Claims

The following procedures shall be applicable to any claim by Vendor for indemnification pursuant to this Agreement from Purchaser in respect of any Losses in relation to a Third Party (a "**Third Party Claim**"):

(a) Promptly upon any Third Party Claim being made or commenced against Vendor, and in any event within ten (10) Business Days thereafter, Vendor shall provide written notice thereof to Purchaser. The notice shall describe the Third Party Claim in reasonable detail and indicate the estimated amount, if practicable, of the indemnifiable Losses that have been or may be sustained by Vendor in respect thereof. If Vendor does not provide notice to the Purchaser within such ten (10) Business Day period, then such failure shall only lessen or limit Vendor's rights to indemnity hereunder to the extent that the defence of the Third Party Claim is prejudiced by such lack of timely notice.

(b) If Purchaser acknowledges to Vendor in writing that Purchaser is responsible to indemnify Vendor in respect of the Third Party Claim pursuant hereto, Purchaser shall have the right to do either or both of the following:

(i) assume carriage of the defence of the Third Party Claim using legal counsel of its choice and at its sole cost; and/or

(ii) settle the Third Party Claim, provided Purchaser pays the full monetary amount of the settlement and the settlement does not impose any restrictions or obligations on Vendor.

(c) Each Party shall co-operate with the other Party in the defence of the Third Party Claim, including making available to the other Party and its Representatives whose assistance, testimony or presence is of material assistance in evaluating and defending the Third Party Claim.

(d) Vendor shall not enter into any settlement, consent order or other compromise with respect to the Third Party Claim without the prior written consent of the Purchaser (which consent shall not be unreasonably withheld or delayed), unless Vendor waives its rights to indemnification in respect of the Third Party Claim.

(e) Upon payment of the Third Party Claim, Purchaser shall be subrogated to all rights or claims Vendor may have relating thereto. Vendor shall give such further assurances and co-operate with the Purchaser to permit the Purchaser to pursue such subrogated rights or claims as reasonably requested by it.

(f) If Purchaser has paid any amount pursuant to the indemnification obligations herein and Vendor is subsequently reimbursed such amount (or any portion thereof) from any source in respect of the Third Party Claim from any Third Party, Vendor shall promptly pay the reimbursed amount (including any interest thereon actually received) to Purchaser.

ARTICLE 7
GENERAL

7.1 Termination

Notwithstanding any termination of this Agreement, whether pursuant to Section 3.1(d) or as permitted under Section 5.1, Section 5.2 or Section 5.3, the provisions of Section 2.5 (Deposit), Section 2.6 (Interest on Deposit), paragraph (c) of Section 3.1 (SISP Procedures) and this Article 7 shall survive and remain in full force and effect.

7.2 Confidentiality and Public Announcements

Each Party shall keep confidential all information obtained from the other Party in connection with the Assets and shall not disclose any information concerning this Agreement and the Transaction herein without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however, that nothing herein shall prevent a Party from disclosing information: (i) to any Governmental Authority or the public if required by Applicable Law (including, for purposes of this Section 7.2, the rules of any applicable stock exchange); or (ii) pursuant to the CCAA Proceedings.

7.3 Further Assurances

Each Party will, from time to time and at all times after Closing, without further consideration, do such further acts and deliver all such further assurances, deeds and documents as shall be reasonably required to fully perform and carry out the terms of this Agreement.

7.4 Governing Law

This Agreement shall in all respects be governed by and construed and enforced in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein, without giving effect to any conflict of laws principles thereunder that would otherwise require the application of the laws of another jurisdiction, and shall be treated as a contract made in the Province of Alberta. Each Party irrevocably submits to and accepts the jurisdiction of the Court (and any court of appeal therefrom) in respect of all matters arising out of this Agreement.

7.5 Time

Time shall be of the essence of this Agreement.

7.6 Addresses

Any notice or other communication required to be given under this Agreement shall be given in writing and shall be deemed sufficiently given if delivered personally or by recognized commercial courier service, or if transmitted by confirmed facsimile transmission or by electronic mail with receipt confirmed by the recipient, addressed as follows:

(a) if to Vendor:

Strategic Oil & Gas Ltd.
1100, 645 - 7th Avenue S.W.
Calgary, AB T2P 4G8
Attention: Tony Berthelet
Fax: (403) 767-9122
E-mail: tberthelet@sogoil.com

with copy to (which shall not constitute notice to Vendor):

Dentons Canada LLP
15th Floor, 850 - 2nd Street S.W.
Calgary, Alberta T2P 0R8
Attention: David Mann
E-mail: david.mann@dentons.com

(b) if to Purchaser:

GMT Exploration Zama Inc.
1560 Broadway, Suite 2000
Denver, CO 80202
Attention: Philip G. Wood – Vice President, Land
Fax: (303) 586-9284
E-mail: pwood@gmtexploration.com

with copy to (which shall not constitute notice to Purchaser):

Bennett Jones LLP
4500, 855 - 2nd Street S.W.
Calgary, Alberta T2P 4K7
Attention: Colin Perry
Fax: (403) 265-7219
E-mail: perryc@bennettjones.com

or at such other address, facsimile number or electronic mail address as may from time to time be substituted by the addressee by notice given as herein provided. Any notice or other communication so delivered or transmitted shall be deemed to have been given on (i) in the case of personal or courier delivery, the date of actual delivery, (ii) in the case of confirmed facsimile transmission, on the date of transmission, and (iii) in the case of electronic mail, on the date on which the recipient confirms receipt; except that if such date is not a Business Day, or if the personal or courier delivery, or facsimile or electronic mail transmission, occurs after 4:00 p.m. (local time of addressee), then the notice or other communication shall be deemed to have been given on the next following Business Day.

Sending a copy of a notice to a Party's legal counsel as contemplated above is for information purposes only and does not constitute delivery of the notice to that Party. The failure to send a copy of a notice to legal counsel does not invalidate delivery of that notice to a Party.

7.7 Entire Agreement

This Agreement, and any instrument or other document contemplated hereby and delivered in connection herewith, constitutes the entire agreement between the Parties with respect to the matters herein and supersedes all prior agreements, understandings, negotiations and discussions regarding the subject matter hereof. There are no covenants, promises, representations, warranties, conditions or agreements (express, implied or collateral) between the Parties regarding the subject matter of this Agreement except as specifically set forth herein.

7.8 Waiver

No failure on the part of any Party in exercising any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or remedy preclude any other or further exercise thereof or the exercise of any right or remedy in law or in equity or by statute or otherwise conferred. No waiver by any Party of any breach (whether actual or anticipated) of any of the terms, conditions, representations or warranties contained herein shall take effect or be binding upon that Party unless the waiver is expressed in writing under the authority of that Party. Any waiver so given shall extend only to the particular breach so waived and shall not limit or affect any rights with respect to any other or future breach.

7.9 Amendment

This Agreement shall not be varied in its terms, or amended by oral agreement or by representations or otherwise than by written instrument signed by both Parties.

7.10 Invalidity of Provisions

In case any of the provisions of this Agreement should be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

7.11 Successors and Assigns

This Agreement shall be binding upon and shall enure to the benefit of the Parties and their respective successors and permitted assigns. Neither Party shall be entitled to assign or transfer (in whole or in part) this Agreement or any rights or obligations hereunder without the prior written consent of the other Party.

7.12 Counterparts; Electronic Signatures

This Agreement may be executed and delivered in counterpart and transmitted by facsimile or other electronic means, and all such executed counterparts, including electronically transmitted copies of such counterparts, shall together constitute one and the same agreement.

[remainder of page intentionally left blank – signature pages follow]

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

STRATEGIC OIL & GAS LTD.

By: _____
Name:
Title: AARON THOMPSON, C
CHIEF FINANCIAL OFFICER

GMT EXPLORATION ZAMA INC.

By: _____
Name:
Title:

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

STRATEGIC OIL & GAS LTD.

By: _____
Name:
Title:

GMT EXPLORATION ZAMA INC.

By: _____
Name: Philip G. Wood
Title: Vice President, Land

SCHEDULE "A"

THE FOLLOWING COMPRISES SCHEDULE "A" ATTACHED TO AND FORMING PART OF THE PURCHASE AND SALE AGREEMENT DATED MAY 3, 2019 BETWEEN STRATEGIC OIL & GAS LTD. AND GMT EXPLORATION ZAMA INC.

Land Schedule

see the following attachments

Exhibit A.1 – Zama Lands	(5 pages)
Exhibit A.2 – Shekilie Lands	(1 page)

Exhibit A.1 - Zama Lands

Agreement Number	Agreement Type	Lessee/Licensee	Legal Description	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Sale Date	Issue Date	Current Expiry Date	Sale Type	Horizontal Rights (Short Name)	WI GMT	WI SOG
5171201961	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	114-05W6: NW Sec 32	1	64.00	158.15	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from SURF to BSMT	90%	10%
5171201971	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	114-06W6: SW Sec 34	1	192.00	474.44	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from SURF to BSMT	90%	10%
			114-06W6: SE Sec 34												
			114-06W6: SW Sec 35												
5171201981	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	115-05W6: NE Sec 4	1	64.00	158.15	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from SURF to BSMT	90%	10%
5171201991	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	115-05W6: NW Sec 4	2	64.00	158.15	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from base of SUL PT to BSMT	90%	10%
5171202001	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	115-05W6: NE Sec 9	1	64.00	158.15	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from base of SL PT to BSMT	90%	10%
5171202001	5 Year P&NG Lease (Northern)	Windfall Resources LTD.	115-05W6: SE Sec 18	1	64.00	158.15	Posted	5 years	12/20/2017	12/21/2017	12/21/2022	Lease	P&NG from base of SL PT to BSMT	90%	10%
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-04W6: SW Sec 19	1	1536.00	3795.54	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
			115-04W6: SE Sec 19												
			115-04W6: NE Sec 19												
			115-04W6: SE Sec 29												
			115-04W6: NW Sec 29												
			115-04W6: NE Sec 29												
			115-05W6: Sec 1												
			115-05W6: SW Sec 11												
			115-05W6: SE Sec 11												
			115-05W6: NW Sec 11												
			115-05W6: Sec 13												
			115-05W6: SW Sec 14												
			115-05W6: NW Sec 14												
			115-05W6: NE Sec 14												
			116-05W6: Sec 1												
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-04W6: Sec 5	2	1024.00	2530.36	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of BLSKY-BULLH to BSMT	90%	10%
			115-04W6: Sec 6												
			115-04W6: Sec 8												
			115-04W6: Sec 17												
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-04W6: SW Sec 29	3	960.00	2372.21	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to BSMT	90%	10%
			115-04W6: SW Sec 30												
			115-04W6: SE Sec 30												
			115-04W6: NE Sec 30												
			115-04W6: Sec 31												
			115-05W6: Sec 23												
			115-05W6: SW Sec 26												
			115-05W6: SE Sec 26												
			115-05W6: NE Sec 26												
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-04W6: Sec 7	4	2048.00	5060.72	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SUL PT to BSMT	90%	10%
			115-04W6: Sec 18												
			115-04W6: SW Sec 20												
			115-04W6: SE Sec 20												
			115-04W6: NW Sec 20												
			115-04W6: Sec 32												
			115-05W6: Sec 12												
			115-05W6: Sec 24												
			115-05W6: Sec 25												
			115-05W6: Sec 35												
			116-04W6: SW Sec 6												
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-05W6: NW Sec 26	5	64.00	158.15	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to base of SUL PT	90%	10%
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-05W6: NW Sec 26	5			Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	116-04W6: NW Sec 6	6	64.00	158.15	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of MUSKEG to BSMT	90%	10%
5417120229	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-04W6: NW Sec 19	7	320.00	790.74	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%
			115-04W6: NE Sec 20												
			115-04W6: NW Sec 30												
			115-05W6: NE Sec 11												
			115-05W6: SE Sec 14												

Agreement Number	Agreement Type	Lessee/Licensee	Legal Description	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Sale Date	Issue Date	Current Expiry Date	Sale Type	Horizontal Rights (Short Name)	WI SMT	WI SOG
5417120230	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-06W6: Sec 27 115-06W6: SE Sec 34 115-06W6: NW Sec 34 115-06W6: NE Sec 34 116-05W6: SW Sec 6 116-05W6: SE Sec 6 116-05W6: NE Sec 6 116-06W6: SE Sec 1 116-06W6: SE Sec 11 116-06W6: NE Sec 11 116-06W6: SW Sec 12 116-06W6: Sec 14 116-06W6: NE Sec 16 116-06W6: SW Sec 23 116-06W6: SE Sec 23 116-06W6: NE Sec 23	1	1408.00	3479.24	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
5417120230	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	116-06W6: NW Sec 15	2	64.00	158.15	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to base of SUL PT	90%	10%
5417120230	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-06W6: SW Sec 26 115-06W6: SE Sec 26 116-06W6: NW Sec 1 116-06W6: NE Sec 1 116-06W6: SE Sec 12 116-06W6: NW Sec 12 116-06W6: NE Sec 12	3	448.00	1107.03	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to BSMT	90%	10%
5417120230	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-06W6: NW Sec 35 115-06W6: NE Sec 35 116-06W6: SE Sec 2 116-06W6: NE Sec 2 116-06W6: SE Sec 10 116-06W6: NE Sec 10 116-06W6: SW Sec 13 116-06W6: NW Sec 13 116-06W6: NE Sec 13 116-06W6: SW Sec 15	4	640.00	1581.47	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SUL PT to BSMT	90%	10%
5417120230	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	115-06W6: NW Sec 26 115-06W6: NE Sec 26 115-06W6: SW Sec 34 115-06W6: SW Sec 35 115-06W6: SE Sec 35 116-06W6: SW Sec 1 116-06W6: SW Sec 2 116-06W6: NW Sec 2 116-06W6: SW Sec 10 116-06W6: NW Sec 10 116-06W6: SW Sec 11 116-06W6: NW Sec 11 116-06W6: SE Sec 13 116-06W6: SW Sec 16 116-06W6: SE Sec 16 116-06W6: NW Sec 16 116-06W6: NW Sec 23	5	1088.00	2688.51	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%

Exhibit A.1 - Zama Lands

Agreement Number	Agreement Type	Lessee/Licensee	Legal Description	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Sale Date	Issue Date	Current Expiry Date	Sale Type	Horizontal Rights (Short Name)	WI GNT	WI SOG
5417120231	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD.	116-04W6: Sec 4 116-04W6: Sec 10 116-04W6: SW Sec 16 116-04W6: NW Sec 16 116-04W6: NE Sec 16 116-04W6 SE Sec 19 116-04W6: NW Sec 19 116-04W6: Sec 21 116-04W6: SW Sec 22 116-04W6: SE Sec 29 116-04W6: NW Sec 29 116-04W6 SW Sec 31 116-04W6 SE Sec 31 116-04W6 P NW Sec 22 116-04W6: P NE Sec 22 116-04W6 P NE Sec 29 116-04W6: P NW Sec 31 116-04W6 P NE Sec 31 116-04W6 P SW Sec 32 116-04W6 P NW Sec 32 116-05W6: Sec 24	1	1927.70	4763.45	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
5417120231	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD	116-04W6 SW Sec 15 116-04W6: P SE Sec 22	2	119.10	294.30	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%
5417120231	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD	116-04W6: SW Sec 15 116-04W6 P SE Sec 22	2			Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to base of SL PT	90%	10%
5417120231	4 Year P&NG License (Northern)	Meridian Land Services (90) LTD	116-04W6: NW Sec 15 116-04W6: NE Sec 15 116-04W6: SW Sec 17 116-04W6: SE Sec 17 116-04W6: SW Sec 20 116-04W6: SE Sec 20 116-04W6: NE Sec 20	3	448.00	1107.03	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to BSMT	90%	10%
5417120231	4 Year P&NG License (Northern)		116-04W6: NE Sec 7 116-04W6: Sec 9 116-04W6: SW Sec 18 116-04W6: NW Sec 18 116-04W6: NE Sec 18 116-04W6: SW Sec 30 116-04W6: NW Sec 30 116-04W6: NE Sec 30 116-04W6: P SW Sec 28 116-04W6: P SE Sec 28 116-04W6: P NW Sec 28 116-04W6: P SE Sec 32	4	833.50	2059.62	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SUL PT to BSMT	90%	10%
5417120231	4 Year P&NG License (Northern)		116-04W6: SW Sec 7 116-04W6: SE Sec 7 116-04W6: NW Sec 7 116-04W6: SE Sec 16 116-04W6: NW Sec 17 116-04W6: NE Sec 17 116-04W6: SW Sec 19 116-04W6: NE Sec 19 116-04W6: NW Sec 20 116-04W6: SW Sec 29 116-04W6: SE Sec 30	5	704.00	1739.62	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%

Agreement Number	Agreement Type	Lessee/Licensee	Legal Description	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Sale Date	Issue Date	Current Expiry Date	Sale Type	Horizontal Rights (Short Name)	WI GMT	WI SOG
5417120231	4 Year P&NG License (Northern)		116-04W6: SE Sec 15	6	64.00	158.15	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to base of SUL PT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: NW, NE Sec 8 116-05W6: NW, SW, SE Sec 9 116-05W6: Sec 15 116-05W6: Sec 16 116-05W6: Sec 17 116-05W6: Sec 22 116-05W6: Sec 27 116-05W6: Sec 29 116-05W6: NE, SE, SW Sec 31 116-05W6: Sec 32 116-05W6: NE, SE, SW Sec 33 116-05W6: Sec 35 117-05W6: NW, P NE, SE, SW Sec 2 117-05W6: NE, SE, SW Sec 4 117-05W6: Sec 5 117-05W6: Sec 6 117-05W6: Sec 7 117-05W6: NW, SE, SW Sec 8	1	4158.80	10276.62	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: SW Sec 21 116-05W6: SE Sec 21 116-05W6: NW Sec 21	2	192.00	474.44	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: SW Sec 21 116-05W6: SE Sec 21 116-05W6: NW Sec 21	2			Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	NG EX in SL PT zone	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: NW Sec 33	3	64.00	158.15	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: NW Sec 33	3			Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to base of SL PT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: NW Sec 34 116-05W6: NE Sec 34	4	128.00	316.29	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to base of SUL PT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: SW Sec 34 116-05W6: SE Sec 34	5	128.00	316.29	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to base of SL PT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: Sec 28 117-05W6: Sec 3	6	512.00	1265.18	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of JEAN M to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: SE Sec 8 116-05W6: NE Sec 21 116-05W6: Sec 30 117-05W6: SW Sec 1 117-05W6: NW Sec 4 117-05W6: P SE Sec 1 117-05W6: P NW Sec 1	7	600.20	1483.13	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		117-05W6: SW Sec 17 117-05W6: Sec 18 117-05W6: P SW Sec 11 117-05W6: P SE Sec 11 117-05W6: P NW Sec 11 117-05W6: P NW Sec 17 117-05W6: P NE Sec 17	8	466.60	1152.99	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SUL PT to BSMT	90%	10%
5417120232	4 Year P&NG License (Northern)		116-05W6: SW Sec 8 116-05W6: NE Sec 9 117-05W6: NE Sec 8 117-05W6: SE Sec 17	9	256.00	632.59	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%

Agreement Number	Agreement Type	Lessee/Licensee	Legal Description	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Sale Date	Issue Date	Current Expiry Date	Sale Type	Horizontal Rights (Short Name)	WI GMT	WI SOG
5417120233	4 Year P&NG License (Northern)		116-06W6: Sec 32	1	2944.00	7274.78	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from SURF to BSMT	90%	10%
			116-06W6: Sec 34												
			116-06W6: SE Sec 36												
			117-06W6: Sec 4												
			117-06W6: Sec 5												
			117-06W6: Sec 8												
			117-06W6: NW Sec 9												
			117-06W6: NE Sec 9												
			117-06W6: Sec 10												
			117-06W6: Sec 11												
			117-06W6: SW Sec 14												
			117-06W6: NW Sec 14												
			117-06W6: NE Sec 14												
			117-06W6: Sec 15												
			117-06W6: Sec 16												
			117-06W6: Sec 17												
5417120233	4 Year P&NG License (Northern)		116-06W6: NE Sec 25	2	320.00	790.74	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SL PT to BSMT	90%	10%
			116-06W6: Sec 35												
5417120233	4 Year P&NG License (Northern)		116-06W6: NW Sec 36	3	576.00	1423.33	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of SUL PT to BSMT	90%	10%
			117-06W6: Sec 12												
			117-06W6: Sec 13												
5417120233	4 Year P&NG License (Northern)		116-06W6: SW Sec 25	4	448.00	1107.03	Posted	4 years	12/20/2017	12/21/2017	12/21/2021	License	P&NG from base of KEG R to BSMT	90%	10%
			116-06W6: SE Sec 25												
			116-06W6: NW Sec 25												
			116-06W6: SW Sec 36												
			116-06W6: NE Sec 36												
			117-06W6: SW Sec 9												
			117-06W6: SE Sec 9												
518100068	5 Year P&NG Lease (Northern)	Meridian Land Services (90) LTD	114-05W6: NW Sec 31	1	64.00	158.15	Posted	5 years	10/3/2018	10/4/2018	10/4/2023	Lease	P&NG from SURF to BSMT	90%	10%
518100069	5 Year P&NG Lease (Northern)	Meridian Land Services (90) LTD	115-06W6: SE Sec 11	1	64.00	158.15	Posted	5 years	10/3/2018	10/4/2018	10/4/2023	Lease	P&NG from base of SL PT to BSMT	90%	10%
518100070	5 Year P&NG Lease (Northern)	Meridian Land Services (90) LTD	115-06W6: SW Sec 11	1	64.00	158.15	Posted	5 years	10/3/2018	10/4/2018	10/4/2023	Lease	P&NG from base of SL PT to BSMT	90%	10%
518100071	5 Year P&NG Lease (Northern)	Meridian Land Services (90) LTD	115-06W6: NE Sec 11	1	64.00	158.15	Posted	5 years	10/3/2018	10/4/2018	10/4/2023	Lease	P&NG from base of SL PT to BSMT	90%	10%
					Hectares	Acres									
			Total Leasehold:		25,321.90	62,571.78									

Exhibit A.2 - Shekilie Lands

Agreement Number	Agreement Type	Lessee/Licensee	Tract Number	Area (ha)	Area (ac)	Agreement Status	Term	Issue Date	Original Expiry Date	Current Expiry Date	Sale Type	Legal Description	Rights (Short Name)	WI GMT	WI SOG
5415050117	4 Year P&NG License (Northern)	LEXTERRA LAND LTD	1	4864.00	12019.21	Active	4 years	2015-05-28	2019-05-28	2021-03-31	License	119-06W6: Sec 1 119-06W6: Sec 2 119-06W6: Sec 3 119-06W6: Sec 11 119-06W6: Sec 12 119-06W6: Sec 13 119-06W6: Sec 14 119-06W6: Sec 18 119-06W6: Sec 19 119-06W6: Sec 20 119-06W6: Sec 21 119-06W6: Sec 23 119-06W6: Sec 24 119-06W6: Sec 25 119-06W6: Sec 26 119-06W6: Sec 27 119-06W6: Sec 28 119-06W6: Sec 29 119-06W6: Sec 30	P&NG from SURF to BSMT	50%	50%
5415050118	4 Year P&NG License (Northern)	LEXTERRA LAND LTD.	1	7360.00	18186.95	Active	4 years	2015-05-28	2019-05-28	2021-03-31	License	119-06W6: Sec 31-36 120-06W6: Sec 1-4 120-06W6: SE Sec 5 120-06W6: N Sec 5 120-06W6: Sec 6 120-06W6: Sec 8-24	P&NG from SURF to BSMT	50%	50%
5415050118	4 Year P&NG License (Northern)	LEXTERRA LAND LTD.	2	64.00	158.15	Active	4 years	2015-05-28	2019-05-28	2021-03-31	License	120-06W6: SW Sec 5	P&NG from base of KEG R to BSMT	50%	50%
				Hectares	Acres										
		Total Leasehold:		12,288.00	30,364.31										

SCHEDULE "B"

THE FOLLOWING COMPRISES SCHEDULE "B" ATTACHED TO AND FORMING PART OF THE PURCHASE AND SALE AGREEMENT DATED MAY 3, 2019 BETWEEN STRATEGIC OIL & GAS LTD. AND GMT EXPLORATION ZAMA INC.

Well Schedule

Unique Well Identifier	Well Name	Licensee	AER Licence No.	Surface Location
100/15-21-116-04W6/0	GMTEXPLORATION HZ ZAMA 15-21-116-4	GMT EXPLORATION ZAMA INC	0493630	LSD 11-29-116-04 W6M

SCHEDULE "C"

THE FOLLOWING COMPRISES SCHEDULE "C" ATTACHED TO AND FORMING PART OF THE PURCHASE AND SALE AGREEMENT DATED MAY 3, 2019 BETWEEN STRATEGIC OIL & GAS LTD. AND GMT EXPLORATION ZAMA INC.

Form of General Conveyance

THIS GENERAL CONVEYANCE is made as of the _____ day of _____, 2019

BETWEEN:

STRATEGIC OIL & GAS LTD., a corporation incorporated under the laws of Alberta ("**Vendor**")

- and –

GMT EXPLORATION ZAMA INC., a corporation incorporated under the laws of British Columbia ("**Purchaser**")

WHEREAS Vendor wishes to sell, and Purchaser wishes to purchase, the Assets subject to and in accordance with the terms and conditions contained herein;

NOW THEREFORE, for the consideration provided in the Purchase and Sale Agreement between Vendor and Purchaser dated May 3, 2019 (the "**Purchase Agreement**") and in consideration of the premises hereto and the covenants and agreements hereinafter set forth and contained, the Parties covenant and agree as follows:

1. Definitions

In this General Conveyance, including the recitals hereto, the definitions set forth in the Purchase Agreement are adopted and incorporated herein by reference.

2. Conveyance

Pursuant to and for the consideration provided for in the Purchase Agreement, Vendor hereby sells, assigns, transfers, conveys and sets over to Purchaser the entire right, title, estate and interest of Vendor in and to the Assets, to have and to hold the same absolutely, together with all benefit and advantage to be derived therefrom.

3. Subordinate Document

This General Conveyance is executed and delivered by the Parties pursuant to the Purchase Agreement and the provisions of the Purchase Agreement shall prevail in the event of a conflict between the provisions of the Purchase Agreement and the provisions of this General Conveyance.

4. No Merger

The covenants, representations, warranties and indemnities contained in the Purchase Agreement are incorporated herein as fully and effectively as if they were set out herein, and there shall be no merger of any covenant, representation, warranty or indemnity contained in the Purchase Agreement by virtue of the execution and delivery hereof, any rule of law, equity or statute to the contrary notwithstanding.

5. Governing Law

This General Conveyance shall be governed by and construed and enforced in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein, without giving effect to any conflict of laws principles thereunder that would otherwise require the application of the laws of another jurisdiction, and shall, in every regard, be treated as a contract made in the Province of Alberta. The Parties irrevocably attorn and submit to the jurisdiction of the courts of the Province of Alberta and courts of appeal therefrom in respect of all matters arising out of this Agreement.

6. Enurement

This General Conveyance shall be binding upon and shall enure to the benefit of each of the Parties and their respective administrators, trustees, receivers, successors and assigns.

7. Further Assurances

Each Party will, from time to time and at all times hereafter, at the request of the other Party but without further consideration, do all such further acts and execute and deliver all such further documents as shall be reasonably required in order to fully perform and carry out the terms hereof.

8. Counterpart Execution

This Agreement may be executed in counterpart and by facsimile or other electronic means and all such executed counterparts together shall constitute one and the same agreement.

[remainder of page intentionally left blank – signature pages follow]

IN WITNESS WHEREOF the Parties have executed this General Conveyance on the date first above written.

STRATEGIC OIL & GAS LTD.

By: _____
Name:
Title:

GMT EXPLORATION ZAMA INC.

By: _____
Name:
Title:

SCHEDULE "D"

THE FOLLOWING COMPRISES SCHEDULE "D" ATTACHED TO AND FORMING PART OF THE PURCHASE AND SALE AGREEMENT DATED MAY 3, 2019 BETWEEN STRATEGIC OIL & GAS LTD. AND GMT EXPLORATION ZAMA INC.

Form of Officer's Certificate

[VENDOR'S/PURCHASER'S] OFFICER'S CERTIFICATE

TO: **[Name of Vendor/Purchaser] [("Vendor")/("Purchaser")]**

RE: Purchase and Sale Agreement dated May 3, 2019 between Vendor and Purchaser (the "**Agreement**")

Unless otherwise defined herein, the definitions provided for in the Agreement are adopted and incorporated by reference in this certificate (the "**Certificate**").

I, **[Name]**, **[Position]** of **[Name of Vendor/Purchaser]**, hereby certify that, as of the date of this Certificate:

1. I am personally familiar, in my capacity as a senior officer of **[Vendor/Purchaser]**, with the matters hereinafter stated.

2. Each of the representations and warranties of **[Vendor/Purchaser]** contained in the Agreement was true and correct in all material respects when made and is true and correct in all material respects as of the Closing Date.

3. All obligations of **[Vendor/Purchaser]** contained in the Agreement to be performed at or before Closing have been timely performed and satisfied in all material respects.

4. This Certificate is made for and on behalf of **[Vendor/Purchaser]** and is binding upon it, and I am not incurring, and will not incur, any personal liability whatsoever with respect to this Certificate.

5. This Certificate is made with full knowledge that the **[Vendor/Purchaser]** is relying on the same for the Closing of the Transaction.

IN WITNESS WHEREOF I have executed this Certificate this ___ day of _____, 2019.

[NAME OF VENDOR/PURCHASER]

Per: _____
Name:
Title:

APPENDIX "C"

REVISED CASH FLOW PROJECTION

STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD.
REVISED CASH FLOW PROJECTION FOR THE WEEKS OF APRIL 29 TO SEPTEMBER 30, 2019
Unaudited (see the accompanying Notes to the Revised Cash Flow Projection)
$000's CAD

For the Week	Notes	Week 1 29-Apr	Week 2 6-May	Week 3 13-May	Week 4 20-May	Week 5 27-May	Week 6 3-Jun	Week 7 10-Jun	Week 8 17-Jun	Week 9 24-Jun	Week 10 1-Jul	Week 11 8-Jul	Week 12 15-Jul
Cash Receipts													
Production Revenue, net of oil royalties and transportation	1	-	-	-	-	1,737	-	-	-	1,854	-	-	-
Zama Parcel sale	2	-	-	-	-	-	-	-	1,500	-	-	-	-
Other receipts		-	-	-	10	-	-	-	10	-	-	-	-
Total Cash Receipts		-	-	-	10	1,737	-	-	1,510	1,854	-	-	-
Cash Disbursements													
Royalties	3	8	-	-	-	9	-	-	-	18	-	-	-
Property taxes		-	110	-	-	-	110	-	-	-	118	-	-
Operating expenditures	4	-	816	311	-	-	778	298	211	-	906	158	247
Capital & regulatory expenditures	5	-	-	-	230	-	-	-	235	-	-	-	-
Payroll	6	-	-	98	-	98	-	98	-	98	-	98	-
Severance costs	7	7	-	-	-	-	-	-	-	-	-	-	-
General & administrative costs	8	32	174	4	4	-	103	-	4	-	113	-	25
Interest and taxes	9	-	-	-	-	450	-	-	17	-	-	-	-
Contingency		100	100	100	100	100	100	100	100	100	100	100	100
Total Cash Disbursements		147	1,199	513	334	657	1,091	496	566	217	1,237	357	372
Cash Flow From Operations		(147)	(1,199)	(513)	(324)	1,080	(1,091)	(496)	944	1,637	(1,237)	(357)	(372)
Restructuring Fees	10	-	200	-	-	475	-	-	375	-	-	-	-
Net Change in Cash		(147)	(1,399)	(513)	(324)	605	(1,091)	(496)	569	1,637	(1,237)	(357)	(372)
Opening cash		4,580	4,433	4,233	3,720	3,396	4,001	2,910	2,414	1,783	3,420	2,183	1,826
Stalking Horse deposit	11	-	1,200	-	-	-	-	-	(1,200)	-	-	-	-
Ending Cash		4,433	4,233	3,720	3,396	4,001	2,910	2,414	1,783	3,420	2,183	1,826	1,455
Stalking Horse Bid	11												
Opening balance		-	-	(1,200)	(1,200)	(1,200)	(1,200)	(1,200)	(1,200)	-	-	-	-
Deposit		-	(1,200)	-	-	-	-	-	(300)	-	-	-	-
Closing		-	-	-	-	-	-	-	1,500	-	-	-	-
Ending Stalking Horse Bid		-	(1,200)	(1,200)	(1,200)	(1,200)	(1,200)	(1,200)	-	-	-	-	-
Key Employee Retention Plan	12												
Opening cash		1,256	1,256	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004
Scheduled payment		-	251	-	-	-	-	-	-	-	-	-	-
Total Restricted Cash		1,256	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004	1,004

For the Week	Notes	Week 13 22-Jul	Week 14 29-Jul	Week 15 5-Aug	Week 16 12-Aug	Week 17 19-Aug	Week 18 26-Aug	Week 19 2-Sep	Week 20 9-Sep	Week 21 16-Sep	Week 22 23-Sep	Week 23 30-Sep	Total 23 Weeks
Cash Receipts													
Production Revenue, net of oil royalties and transportation	1	1,700	-	-	-	-	1,781	-	-	-	1,740	-	8,812
Zama Parcel sale	2	-	-	-	-	-	-	-	-	-	-	-	1,500
Other receipts		10	-	-	-	-	-	-	-	-	-	-	30
Total Cash Receipts		1,710	-	-	-	-	1,781	-	-	-	1,740	-	10,342
Cash Disbursements													
Royalties	3	-	8	-	-	-	9	-	-	-	9	-	60
Property taxes		-	-	110	-	-	-	153	-	-	-	110	711
Operating expenditures	4	-	-	588	244	156	-	579	279	191	-	710	6,472
Capital & regulatory expenditures	5	497	-	-	114	-	-	-	394	-	-	-	1,470
Payroll	6	98	-	-	98	-	98	-	98	-	98	-	985
Severance costs	7	-	-	-	-	-	-	-	-	-	-	-	7
General & administrative costs	8	-	13	59	-	25	-	61	-	25	-	85	725
Interest and taxes	9	-	-	-	-	-	450	-	-	-	-	-	917
Contingency		100	100	100	100	100	100	100	100	100	100	100	2,300
Total Cash Disbursements		695	120	857	557	281	657	893	872	316	207	1,005	13,647
Cash Flow From Operations		1,015	(120)	(857)	(557)	(281)	1,124	(893)	(872)	(316)	1,533	(1,005)	(3,305)
Restructuring Fees	10	275	-	-	225	-	-	-	225	-	-	-	1,775
Net Change in Cash		740	(120)	(857)	(782)	(281)	1,124	(893)	(1,097)	(316)	1,533	(1,005)	(5,080)
Opening cash		1,455	2,194	2,074	1,217	434	153	1,278	385	(713)	(1,029)	504	4,580
Stalking Horse deposit	11	-	-	-	-	-	-	-	-	-	-	-	-
Ending Cash		2,194	2,074	1,217	434	153	1,278	385	(713)	(1,029)	504	(500)	(500)
Stalking Horse Bid	11												
Opening balance		-	-	-	-	-	-	-	-	-	-	-	-
Deposit		-	-	-	-	-	-	-	-	-	-	-	-
Closing		-	-	-	-	-	-	-	-	-	-	-	
Ending Stalking Horse Bid		-	-	-	-	-	-	-	-	-	-	-	-
Key Employee Retention Plan	12												
Opening cash		1,004	753	753	753	753	753	753	753	753	753	753	-
Scheduled payment		251	-	-	-	-	-	-	-	-	-	753	-
Total Restricted Cash		753	753	753	753	753	753	753	753	753	753	-	-

Notes

1 Production revenue is net of oil royalties. Estimated average is 1,260 boe/d for Q2 2019 (82% oil). Q2 pricing is the forward strip as of April 26 (WTI oil = US $63.41/bbl, AECO gas = $1.05/GJ).

2 Upon completion of a 45 day period, if no other superior bid is received, the Zama Parcel will be sold to the Stalking Horse purchaser in the amount of $1.5 million, consisting of a $1.2 million deposit received the week of May 6, 2019 and an additional $300,000 received in the closing week.

3 Natural gas & NGL royalties only, paid 90 days after the production period. Oil royalties are taken in kind.

4 Operating expense forecasts are based on historical operating costs for the Company's assets. The majority of operating costs are fixed.

5 Capital and minimum regulatory expenditures are based on estimated costs for capital projects which are required for regulatory compliance or safety purposes.

6 Payroll is for key permanent employees who are essential to the Company's field and office operations.

7 Staff reduction plan to occur in May 2019.

8 General and administrative expense forecasts are based on historical office expenses, excluding fees related to public company reporting and

9 Interest is paid on $15 million first lien financing at 12% on a quarterly basis, subject to further review. Interest also includes 1% per month payable on the Stalking Horse Deposit.

10 Estimated amounts.

11 Stalking Horse Deposit is related to the transaction described in Note 2 above.

12 Funds for the KERP are segregated from existing funds. Restricted cash is the KERP funding.

Tab 16

Most Negative Treatment: Check subsequent history and related treatments.

2013 BCCA 76
British Columbia Court of Appeal

Erschbamer v. Wallster

2013 CarswellBC 425, 2013 BCCA 76, [2013] B.C.W.L.D. 3224, [2013] B.C.W.L.D. 3305, 223 A.C.W.S. (3d) 866, 334 B.C.A.C. 120, 356 D.L.R. (4th) 634, 41 B.C.L.R. (5th) 160, 572 W.A.C. 120

Miriam Erschbamer and Robert Walker Bowe, Respondents (Plaintiffs) and Suzanne Marie Wallster, Appellant (Defendant)

Hall, Tysoe, D. Smith JJ.A.

Heard: January 17, 2013
Judgment: February 20, 2013
Docket: Vancouver CA039912

Counsel: M.E. Fancourt-Smith, M.A. De Vera, for Appellant
J.L. Straith, for Respondents

Subject: Civil Practice and Procedure; Property
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.v Nature of prior proceedings
XXII.23.a.v.E Miscellaneous
Real property
I Interests in real property
I.4 Restrictive covenants
I.4.e Modification and cancellation
I.4.e.iii Miscellaneous
Headnote
Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Nature of prior proceedings — Erroneous decision
Plaintiffs and defendant were neighbours — Dispute arose over restrictive covenant and easement registered against defendant's property for benefit of plaintiffs' property — Defendant brought petition seeking to have both restrictive covenant and easement cancelled, or modified pursuant to s. 35(2) of Property Law Act, but was unsuccessful — After being unsuccessful, defendant went forward with renovation of her house, and this led to commencement of second proceeding by plaintiffs — During second proceeding, plaintiffs brought application to strike numerous paragraphs of defendant's response to plaintiff's claim on basis of doctrine of res judicata or doctrine of abuse of process — Chambers judge struck portions of defendant's response — As result, two potential defences were struck, specifically defence that restrictive covenant was amended by conduct of original parties to covenant and defence that restrictive covenant should have been interpreted in accordance with by-laws in effect at time it was entered into — Defendant appealed — Appeal allowed in part — Potential interpretation defence should not have been struck by chambers judge — There was no need for interpretation of restrictive covenant to have been issue in first proceeding, and that issue was, in fact, not raised in first proceeding — Although plaintiff's affidavit mentioned that city approved initial plans and that height restriction in building code was four feet higher than restriction in covenant, plaintiff's affidavit did not raise issue of whether covenant should be interpreted in accordance with by-laws.

Real property --- Interests in real property — Restrictive covenants — Modification and cancellation — Miscellaneous
Res judicata — Interpretation of restrictive covenant defence — Plaintiffs and defendant were neighbours — Dispute arose over restrictive covenant and easement registered against defendant's property for benefit of plaintiffs' property — Defendant brought petition seeking to have both restrictive covenant and easement cancelled, or modified pursuant to s. 35(2) of Property Law Act, but was unsuccessful — After being unsuccessful, defendant went forward with renovation of her house, and this led to commencement of second proceeding by plaintiffs — During second proceeding, plaintiffs brought application to strike numerous paragraphs of defendant's response to plaintiff's claim on basis of doctrine of res judicata or doctrine of abuse of process — Chambers judge struck portions of defendant's response — As result, two potential defences were struck, specifically defence that restrictive covenant was amended by conduct of original parties to covenant and defence that restrictive covenant should have been interpreted in accordance with by-laws in effect at time it was entered into — Defendant appealed — Appeal allowed in part — Potential interpretation defence should not have been struck by chambers judge — There was no need for interpretation of restrictive covenant to have been issue in first proceeding, and that issue was, in fact, not raised in first proceeding.

Table of Authorities

Cases considered by *Tysoe J.A.*:

Angle v. Minister of National Revenue (1974), 1974 CarswellNat 375, 28 D.T.C. 6278, 1974 CarswellNat 375F, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397 (S.C.C.) — considered

Bjarnarson v. Manitoba (1987), 38 D.L.R. (4th) 32, 48 Man. R. (2d) 149, 21 C.P.C. (2d) 302, 1987 CarswellMan 193, [1987] 4 W.W.R. 645 (Man. Q.B.) — referred to

Bjarnarson v. Manitoba (1987), [1988] 1 W.W.R. 422, 45 D.L.R. (4th) 766, 50 Man. R. (2d) 178, 1987 CarswellMan 234, 21 C.P.C. (2d) 302 at 312 (Man. C.A.) — referred to

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2) (1966), [1967] 1 A.C. 853, [1967] R.P.C. 497, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125 (U.K. H.L.) — referred to

Cliffs Over Maple Bay Investments Ltd., Re (2011), 2011 CarswellBC 883, 2011 BCCA 180, 67 E.T.R. (3d) 1, [2011] 8 W.W.R. 266, 18 P.P.S.A.C. (3d) 11, 17 B.C.L.R. (5th) 60, 77 C.B.R. (5th) 1, 304 B.C.A.C. 116, 513 W.A.C. 116 (B.C. C.A.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

Doering v. Grandview (Town) (1975), *(*sub nom. *Grandview (Town) v. Doering)* [1976] 2 S.C.R. 621, 1975 CarswellMan 64, 1975 CarswellMan 87, *(*sub nom. *Grandview (Town) v. Doering)* [1976] 1 W.W.R. 388, *(*sub nom. *Grandview (Town) v. Doering)* 61 D.L.R. (3d) 455, 7 N.R. 299 (S.C.C.) — referred to

Henderson v. Henderson (1843), [1843-60] All E.R. Rep. 378, 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) — followed

Hoque v. Montreal Trust Co. of Canada (1997), *(*sub nom. *Hoque v. Montreal Trust Co.)* 162 N.S.R. (2d) 321, *(*sub nom. *Hoque v. Montreal Trust Co.)* 485 A.P.R. 321, 1997 CarswellNS 427, 1997 NSCA 153 (N.S. C.A.) — considered

Mohl v. University of British Columbia (2006), 265 D.L.R. (4th) 109, 52 B.C.L.R. (4th) 89, 2006 BCCA 70, 2006 CarswellBC 355, 222 B.C.A.C. 258, 368 W.A.C. 258 (B.C. C.A.) — distinguished

Petrelli v. Lindell Beach Holiday Resort Ltd. (2011), 2011 BCCA 367, 2011 CarswellBC 2331, [2012] 1 W.W.R. 720, 24 B.C.L.R. (5th) 4, 340 D.L.R. (4th) 733, 310 B.C.A.C. 196, 526 W.A.C. 196 (B.C. C.A.) — referred to

Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights) (2008), 80 B.C.L.R. (4th) 211, 2008 BCCA 176, 2008 CarswellBC 797, 70 Admin. L.R. (4th) 258, 255 B.C.A.C. 106, 430 W.A.C. 106 (B.C. C.A.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Wallster v. Erschbamer (2009), 2009 BCSC 1619, 2009 CarswellBC 3208, 88 R.P.R. (4th) 121 (B.C. S.C.) — referred to

Wallster v. Erschbamer (2011), 2011 BCCA 27, 2011 CarswellBC 106, 1 R.P.R. (5th) 163, 16 B.C.L.R. (5th) 72, 299 B.C.A.C. 21, 508 W.A.C. 21, 330 D.L.R. (4th) 204 (B.C. C.A.) — referred to

Statutes considered:

Property Law Act, R.S.B.C. 1996, c. 377

s. 35(2) — considered

s. 35(2)(b) — considered

Authorities considered:

Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2010)

APPEAL by defendant from decision of chambers judge, striking portions of defendant's amended response to civil claim.

***Tysoe J.A.*:**

1 This appeal arises from an order made in the second of two proceedings between the parties. The chambers judge struck portions of the defendant's amended response to civil claim on the basis of the doctrine of *res judicata* or the doctrine of abuse of process. The defendant asserts that the judge erred in striking any part of the amended response.

2 The parties are neighbours in North Vancouver, and the dispute between them involves a restrictive covenant and an easement registered against the defendant's property for the benefit of the owners of the plaintiffs' property. The restrictive covenant prohibits the owners of the defendant's property from erecting a dwelling or structure exceeding the height of a specified windowsill of the house on the plaintiffs' property. The easement grants a right of way over a 6.95 foot strip of the defendant's property and prohibits any obstruction to exist in the strip of land.

3 The defendant decided to renovate the house on her property. Plans were prepared, and the District of North Vancouver approved the plans and authorized the construction of the new house. These plans contemplated that the roof of the reconstructed house would be approximately four feet higher than the height limit in the restrictive covenant.

4 After obtaining the approval of the District of North Vancouver, the terms of the restrictive covenant were brought to the attention of the defendant and her designer, and they realized that the planned house would violate the restrictive covenant. The defendant entered into discussions with the plaintiffs and revised the plans so that the roof of the house would exceed the height restriction by only 16 inches. However, the plaintiffs were not prepared to agree to a modification of the restrictive covenant.

5 The defendant petitioned to the court to have both the restrictive covenant and the easement cancelled or modified pursuant to s. 35(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377. The focus of the submissions at the hearing of the petition was s. 35(2)(b), which permits modification or cancellation if "the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled".

6 In reasons for judgment indexed as 2009 BCSC 1619 (B.C. S.C.), the chambers judge dismissed the defendant's petition on the basis that she had failed to demonstrate the absence of a practical benefit to the plaintiffs in respect of both the restrictive covenant and the easement (he also briefly noted the defendant had not satisfied the criteria set out in the other clauses of s. 35(2)). An appeal to this Court was dismissed (2011 BCCA 27 (B.C. C.A.)).

7 After being unsuccessful in having the restrictive covenant and the easement cancelled or modified, the defendant went forward with a renovation of her house, and this led to the commencement of the second proceeding by the plaintiffs. In general terms, the plaintiffs assert that the renovated house violates the terms of both the restrictive covenant and the easement. This is denied by the defendant, who pleads, among other things, that she made further revisions to the plans such that the renovated house complies with the restrictive covenant and the easement. As I understand it from counsel's submissions at the hearing of this appeal, the main items of contention with respect to the renovated house are the chimneys, mechanical vents and eaves (although the notice of civil claim does allege that the defendant proceeded with a design of the new roof that blocks the plaintiffs' view to the west and south).

8 The plaintiffs applied before the chambers judge to strike numerous paragraphs of the defendant's amended response to their claim. The plaintiffs did not ultimately pursue the striking of all of the paragraphs sought in their application, and the chambers judge declined to strike other paragraphs. The two paragraphs that the judge struck from Part 1, "Division 2 - Defendant's Version of Facts", of the amended response were as follows:

> 3. In the alternative, the Restrictive Covenant and Easement were amended by the original parties thereto by the construction of the original house, related structures and mechanical elements on the Defendant's property. As a result, the Amended Plans and the resultant renovation of the single family residence located on the Defendant's Property comply fully with the terms of the Restrictive Covenant and Easement as amended.
>
> 4. In the further alternative, it was the intention of the original parties to the Restrictive Covenant that it was to be interpreted in accordance with the By-Laws prevailing in the District of North Vancouver from time to time. Specifically, but without limiting the generality of the foregoing, if the chimney and vents height exceed the lower window sill of the Plaintiff's west window south of the Plaintiff's chimney, this is in accordance with a specific exemption for chimneys and mechanical vents provided for in the bylaws of the District of North Vancouver.

9 One of the other paragraphs the plaintiffs sought to strike was para. 1 of "Part 3: Legal Basis" of the amended response, the relevant portion of which reads as follows:

> 1. The Defendant denies that it breached the Restrictive Covenant or Easement properly interpreted in accordance with its express words and the factual matrix at the time, including the existing structures and the prevailing District of North Vancouver Bylaws, or, alternatively, as amended by the parties.
>
> [Underlining added.]

The judge ordered that the words I have underlined be struck.

10 In his reasons for judgment, the judge made reference to several of the leading authorities on the doctrines of *res judicata* and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.); *Cliffs Over Maple Bay Investments Ltd., Re*, 2011 BCCA 180, [2011] 8 W.W.R. 266 (B.C. C.A.); *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 340 D.L.R. (4th) 733 (B.C. C.A.); and *Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights)*, 2008 BCCA 176, 80 B.C.L.R. (4th) 211 (B.C. C.A.).

11 The core reasoning of the chambers judge was contained in two paragraphs of his reasons for judgment, which I will reproduce in view of the fact that the reasons have not been published:

> [34] In regard to the paragraphs that contain the assertion that the original parties to the RC [restrictive covenant] and Easement amended these items by the construction of the original house, related structures and mechanical elements on the defendant's property, such that the resultant renovations fully comply with the terms of the amended RC and Easement, as well as the assertion that it was the intention of the original parties to the RC, that it was to be interpreted in accordance with the bylaws prevailing in the District of North Vancouver from time to time, including the chimney and vent height are, in my view, matters that reflect an attempt to relitigate the first proceeding in which a modification or cancellation was sought to specifically allow for the height of the house to exceed that as specified in the RC. I note in the first proceeding the materials submitted by Ms. Wallster included evidence asserting that the reference window was not the same as that when the RC was granted and that the height may have been changed to the prejudice of Ms. Wallster.
>
> [35] The proper time to argue that the RC had been somehow amended to allow, in essence, the recent construction, which exceeded the provisions in the RC, should have been raised in the first proceeding when the terms of the RC and Easement were clearly in issue and the height restriction was being challenged to either be not filed or cancelled. Similarly, the argument that it was the intention to interpret the document in accordance with the prevailing bylaw should have been sought at that time. The petition brought by the defendant was pursuant to s. 35 of the *Property Law Act*. The criteria set out in 35(2) were specified and would have encompassed these assertions.

Discussion

12 The general principles of the doctrine of *res judicata* were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

13 In *Cliffs Over Maple Bay*, Madam Justice Newbury set out the requirements of issue estoppel at para. 31(from *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.), at 935, as quoted with approval in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at 254):

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....

In the present case, it is not asserted that the issues the defendant wishes to raise as defences were questions decided in the first proceeding. Accordingly, it is not necessary to give further consideration to issue estoppel.

14 With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) at 319:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321 (N.S. C.A.), where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

15 Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 (from *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.), as summarized in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), at 34, aff'd (1987), 45 D.L.R. (4th) 766 (Man. C.A.)):

> 1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
>
> 3. The cause of action in the prior action must not be separate and distinct; and
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

16 Although it is referred to as cause of action estoppel, the principle applies to defences as well as claims. This is explained in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, Ontario: LexisNexis, 2010) at 137-38:

> While the plaintiff may not split a cause of action or pursue litigation by instalments, the defendant may not split the defence by turning around and, as the plaintiff in a subsequent action, sue on an issue which, if successful, would challenge the integrity of the previous judgment. This is what was attempted in *Henderson*.
>
> . . . . .
>
> In other words, a cause of action in a second action which could have been a defence in the first action, but was not raised, is barred ... The cloak of cause of action estoppel is woven the same for both the plaintiff and the defendant in subsequent proceedings.
>
> [Footnotes omitted.]

17 Hence, cause of action estoppel can apply in situations where the estopped litigant is the defendant in the first proceeding and the plaintiff in the second proceeding. Lange does not cite any authorities involving the converse situation that exists here, where the estopped litigant is the plaintiff (or petitioner) in the first proceeding and the defendant in the second proceeding. Nevertheless, it seems to me, as a matter of principle, that the converse must be true. A defendant should not be permitted to raise, as a defence, an issue which could have and should have been raised in a previous proceeding between the same parties. I do not accept the defendant's argument that cause of action estoppel is inapplicable simply because the party seeking relief in each of the two proceedings is different.

18 In the present case, the chambers judge struck two potential defences: (i) the restrictive covenant was amended by the conduct of the original parties to the covenant, and (ii) the restrictive covenant should be interpreted in accordance with the bylaws of the District of North Vancouver in effect at the time it was entered into.

19 I agree with the chambers judge that the amendment defence is an issue that could have and should have been raised in the first proceeding in which the defendant in this action sought to have the restrictive covenant cancelled or modified pursuant to s. 35(2)(b) of the *Property Law Act*. The court was being requested to assess whether the covenant had no practical benefit to the plaintiffs in this action. In order to make that assessment, the court needed to know what it was being asked to cancel or modify. If the covenant had been amended prior to the commencement of the proceeding, the court would have taken the amendment into account in assessing whether the covenant, as amended, had any practical benefit.

20 This is particularly the case in respect of the alternate relief in the first proceeding seeking the modification of the covenant. Although the focus of the proceeding was the cancellation of the covenant, the defendant had requested the alternate relief of having the covenant modified. If the court was to consider modifying the covenant, it needed to know whether it had previously been modified by way of an amendment.

21 In contrast, it is my view that the potential interpretation defence should not have been struck. There was no need, in all the circumstances, for the interpretation of the restrictive covenant to have been an issue in the first proceeding. The issue has arisen in the second action as a result of the allegations of the plaintiffs that the reconstructed house violates the restrictive covenant.

22 The plaintiffs assert that the issue was, in fact, raised in the first proceeding. With respect, I do not agree. All that was said in the affidavit relied upon by the plaintiffs in this regard was that the District of North Vancouver had approved the initial plans and that the height restriction in the relevant building code was four feet higher than the restriction in the covenant. The affidavit did not raise the issue of whether the covenant should be interpreted in accordance with the District's bylaws.

23 The reasoning of the chambers judge appears to be internally inconsistent with respect to the striking of the potential interpretation defence. I previously quoted the reasoning of the judge in para. 35 of his reasons. Earlier, he said:

> [32] Insofar as the impugned paragraphs deal with the interpretation of the RC and Easement, I am of the view that the plaintiffs have not persuaded me that those paragraphs should be struck. The question as to whether the actual construction

> that has occurred violates the RC was not before the court at the time of the first proceeding. The question is whether the vents and other alleged infractions constitute a structure, which I think Mr. Straith agreed was the issue in terms of the relevant work to be defined or interpreted.

I respectfully agree with this reasoning but, if applied, it would not have resulted in the striking of the potential interpretation defence contained in para. 4 of Part 1, Division 2, of the amended response. In addition, the chambers judge did not strike another paragraph of the amended response pleading that the District's bylaws at the time of the creation of the restrictive covenant contained exemptions in its height restrictions for chimneys and mechanical vents.

24 The only explanation for the judge's reasoning that comes to my mind is that he was concerned about the reference in para. 4 to the "intention of the original parties", which is similar to the reference in para. 3 to the assertion that the restrictive covenant had been "amended by the original parties". He may have thought it was being asserted that the original parties had agreed that the District's bylaws would provide exemptions under the restrictive covenant for chimneys and mechanical vents, and this is akin to an amendment of the restrictive covenant. However, I do not read para. 4 in this fashion. The purpose of interpreting a document is to determine the intention of the original parties, and I do not read para. 4 as asserting anything more than that the restrictive covenant should be interpreted in a manner consistent with the District's bylaws.

25 The defendant argues cause of action estoppel is inapplicable because the causes of action in the two proceedings are separate and distinct. She also points to the decision of this Court in *Mohl v. University of British Columbia*, 2006 BCCA 70, 265 D.L.R. (4th) 109 (B.C. C.A.), and says that cause of action estoppel is inapplicable because the nature of the two proceedings is fundamentally different.

26 In my opinion, the subject matters of the two proceedings are sufficiently similar for cause of action estoppel to apply. Both relate to the renovation of the defendant's home and the restrictive covenant benefitting the plaintiffs. In the first proceeding, the defendant was attempting to have the covenant cancelled or modified in order to permit her to reconstruct her house to a height prohibited by the covenant. In the second proceeding, the plaintiffs are alleging that the defendant reconstructed her house to a height that is prohibited by the covenant. Issues relating to the prior amendment of the covenant that should have been raised in the first proceeding should not be allowed to be raised in the second proceeding.

27 In *Mohl*, a student was given a failing grade by the university he was attending. He unsuccessfully pursued internal appeal procedures and then unsuccessfully applied for judicial review of the university's decision in the courts. He subsequently sued the university for breach of contract, breach of fiduciary duty and negligence. This Court concluded that cause of action estoppel did not apply because the judicial review proceeding was not an action for purposes of cause of action estoppel. The Court made the distinction between the court exercising its superintending power in the judicial review proceeding and the court adjudicating a dispute between parties in the second proceeding.

28 In my view, *Mohl* is clearly distinguishable from the present case. Here, the first proceeding was not an application for judicial review. The first proceeding did involve a dispute between the parties upon which the court adjudicated. It involved the same subject matter as the second proceeding; namely, the height of the defendant's reconstructed house and the restrictive covenant. I do not think anything turns on the fact that the first proceeding was commenced by way of a petition (as opposed to a writ of summons or notice of civil claim) and sought a statutory remedy rather than a remedy at common law.

29 Even if cause of action estoppel is not technically available in the circumstances of this situation, it was nevertheless open to the chambers judge to strike para. 3 of Part 1, Division 2, of the amended response as being an abuse of process. In his reasons, the judge referred to *Toronto v. C.U.P.E.*, the decision of the Supreme Court of Canada which held that the doctrine of abuse of process is available to prevent the relitigation of an issue in circumstances where the technical requirements of issue estoppel had not been met because the parties to the two proceedings were different.

30 Lange refers to the doctrine in this context as "abuse of process by relitigation". He confirms that, in addition to issue estoppel, it may be employed when the technical requirements of cause of action estoppel have not been met (at 215-16):

> Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in *Henderson*. To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process. In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings.
>
> [Footnotes omitted.]

31 As I have explained above, the issue of an amendment of the restrictive covenant by the original parties is an issue that ought reasonably to have been raised in the first proceeding. It would be an abuse of the court's process to allow the defendant to raise it as a defence in the second proceeding, and the striking of para. 3 of Part 1, Division 2, from the amended response is justified on this basis.

Conclusion

32 I would allow the appeal, in part, by setting aside the portions of the order of the chambers judge striking para. 4 of Part 1, Division 2, of the amended response and the words "and the prevailing District of North Vancouver Bylaws" from para. 1 of Part 3 of the amended response.

33 Although the defendant had some limited success on this appeal, I would order that the plaintiffs have the costs of this appeal on the basis that they succeeded in upholding the striking of the paragraph alleging that the restrictive covenant had been amended prior to the hearing of the first proceeding.

***Hall J.A.*:**

I agree:

***D. Smith J.A.*:**

I agree:

Appeal allowed in part.

Tab 17

2011 BCCA 180
British Columbia Court of Appeal

Cliffs Over Maple Bay Investments Ltd., Re

2011 CarswellBC 883, 2011 BCCA 180, [2011] 8 W.W.R. 266, [2011] B.C.W.L.D. 3598, [2011] B.C.W.L.D. 3599, [2011] B.C.W.L.D. 3613, [2011] B.C.W.L.D. 3669, [2011] B.C.W.L.D. 3757, [2011] B.C.W.L.D. 3796, [2011] B.C.W.L.D. 3800, [2011] W.D.F.L. 2644, 17 B.C.L.R. (5th) 60, 18 P.P.S.A.C. (3d) 11, 201 A.C.W.S. (3d) 521, 304 B.C.A.C. 116, 513 W.A.C. 116, 67 E.T.R. (3d) 1, 77 C.B.R. (5th) 1

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

In the Matter of the Business Corporations Act, R.S.B.C. 2002, c. 57

In the Matter of The Cliffs Over Maple Bay Investments Ltd.

Fisgard Capital Corporation and Liberty Holdings Excell Corp. (Appellants / Respondents on Cross-Appeal) and Century Services Inc., Lawson Lundell LLP (Respondents / Appellants on Cross-Appeal)

Prowse, Newbury, Chiasson JJ.A.

Heard: January 14, 2011
Judgment: April 14, 2011
Docket: Vancouver CA038042

Proceedings: reversing *Cliffs Over Maple Bay Investments Ltd., Re* (2010), 16 P.P.S.A.C. (3d) 237, 2010 BCSC 389, 2010 CarswellBC 726, 65 C.B.R. (5th) 241 (B.C. S.C. [In Chambers])

Counsel: G.J. Tucker, Z.J. Ansley for Appellant
M.I.A. Buttery, L. Williams for Respondent, Century Services Inc.
P. Roberts for Respondent, Lawson Lundell LLP

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles
Debtors and creditors
XIII Loans
XIII.1 General principles
Estates and trusts
II Trusts
II.5 Purpose trust
II.5.c Miscellaneous
Headnote
Debtors and creditors --- General principles — Loans
Advances.
Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Debtor attempted to develop property — Development failed and debtor entered protection under Companies' Creditors Arrangement Act — Debtor had obtained debtor-in-possession (DIP) financing from lender — DIP financing order was set aside on appeal, and Act was found to be improperly invoked — Solicitors claimed that solicitors' lien applied to remaining funds — Creditors claimed that they were entitled to remaining funds — Hearing was held regarding disposition of funds — Chambers judge found that lender's priority for advances was lost because they were not in compliance with terms of order — Chambers judge declared that first creditor was entitled to priority subject to claim of third creditor, solicitors — Lender brought successful motion questioning whether funds had in law and in fact been advanced — Chambers judge held that his previous order had not determined entitlement to funds — Chambers judge declined to apply issue estoppel — Earlier proceedings had dealt with priority in DIP financing and not equitable interest in funds — Chambers judge held that lender was not seeking relief against creditors but rather dispute existed over pool of money by three parties — Chambers judge found that debtor did not have control of funds, which were never advanced, and ownership did not pass to debtor — Creditor appealed on, inter alia, ground that chambers judge erred in determining res judicata did not bar lender from claiming entitlement to advance — Appeal allowed — Issue estoppel applied — Issue of priority between lender and creditor was finally determined and chambers judge did not have jurisdiction to rehear it or vary order — Finding that creditor was entitled to priority rested on foundation that funds had indeed been advanced to debtor — No special circumstances existed; this was monetary dispute between sophisticated lenders and it was not open to Court to change its mind in favour of party that had thought of additional arguments that it could and should have mounted at previous hearing — No overriding question of fairness was engaged.

Estates and trusts --- Trusts — Purpose trust — General principles

Debtor attempted to develop property — Development failed and debtor entered protection under Companies' Creditors Arrangement Act — Debtor had obtained debtor-in-possession (DIP) financing from lender — Terms of commitment letter were incorporated by reference into DIP order; letter provided that funds were to be used for development purposes as disclosed by debtor — DIP financing order was set aside on appeal, and Act was found to be improperly invoked — Solicitors claimed that solicitors' lien applied to remaining funds — Creditors claimed that they were entitled to remaining funds — Hearing was held regarding disposition of funds — Chambers judge found that lender's priority for advances was lost because they were not in compliance with terms of order — Chambers judge declared that first creditor was entitled to priority subject to claim of third creditor, solicitors — Lender brought successful motion questioning whether funds had in law and in fact been advanced — Chambers judge found that debtor did not have control of funds, which were never advanced, and ownership did not pass to debtor — Chambers judge found that language of commitment letter disclosed mutual intention between lender and debtor to create quistclose trust — Creditor appealed on, inter alia, ground that chambers judge erred in holding that funds in solicitors' trust account were subject to quistclose trust — Appeal allowed — Quistclose trust was not created — Undertaking was type of trust but did not impose duty on solicitors to supervise how its client, debtor, used money — Solicitors disbursed most of advance and did not fail in quistclose sense — Debtor would have been bound by contract to use funds for purposes it had agreed on in letter, but monies were then its own and would presumably have been paid into its general bank account — There was no obligation on debtor to hold loan proceeds in any separate account, but rather money was intended to be at free disposal of debtor and could be used as part of its cash flow.

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Procter & Gamble Pharmaceuticals Canada Inc. v. Canada (Minister of Health) (2003), 246 F.T.R. 160 (note), 2003 CarswellNat 4445, 2003 CAF 467, 33 C.P.R. (4th) 193, [2004] 2 F.C.R. 85, 2003 CarswellNat 3843, 2003 FCA 467, 313 N.R. 380 (F.C.A.) — considered
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R. v. Duhamel (1984), 1984 CarswellAlta 174, [1984] 2 S.C.R. 555, 1984 CarswellAlta 418, [1985] 2 W.W.R. 251, 14 D.L.R. (4th) 92, 57 N.R. 162, 35 Alta. L.R. (2d) 1, 57 A.R. 204, 15 C.C.C. (3d) 491, 43 C.R. (3d) 1 (S.C.C.) — referred to
R. c. Van Rassel (1990), 1990 CarswellQue 11, 1990 CarswellQue 111, 105 N.R. 103, [1990] 1 S.C.R. 225, 27 Q.A.C. 285, 53 C.C.C. (3d) 353, 75 C.R. (3d) 150, 45 C.R.R. 265 (S.C.C.) — referred to
Revane v. Homersham (2006), 2006 BCCA 8, 2006 CarswellBC 9, 25 C.P.C. (6th) 209, 220 B.C.A.C. 292, 362 W.A.C. 292, 53 B.C.L.R. (4th) 76 (B.C. C.A.) — referred to
Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd. (1988), 1988 CarswellBC 16, 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C. S.C.) — considered
Scherer v. Price Waterhouse Ltd. (August 16, 1985), Sutherland J. (Ont. H.C.) — referred to
Sigal v. Isenberg (1992), [1992] 5 W.W.R. 242, 46 E.T.R. 13, (sub nom. *Zimbel Estate, Re)* 80 Man. R. (2d) 142, 1992 CarswellMan 119 (Man. Q.B.) — considered
Stone v. Ellerman (2009), 2009 BCCA 294, 2009 CarswellBC 1633, 92 B.C.L.R. (4th) 203, [2009] 9 W.W.R. 385, 71 C.P.C. (6th) 25, 461 W.A.C. 126, 273 B.C.A.C. 126 (B.C. C.A.) — referred to
Talbot v. Pan Ocean Oil Corp. (1977), 1977 CarswellAlta 86, 3 Alta. L.R. (2d) 354, 4 C.P.C. 107, 5 A.R. 361 (Alta. C.A.) — considered
Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to
Twinsectra Ltd. v. Yardley (2002), [2002] 2 All E.R. 377, [2002] 2 W.L.R. 802, 2002 UKHL 12, [2002] 2 A.C. 164 (U.K. H.L.) — distinguished
Westar Mining Ltd., Re (2003), 39 C.B.R. (4th) 313, 2003 BCCA 11, 182 B.C.A.C. 161, 300 W.A.C. 161, [2003] 3 W.W.R. 244, 9 B.C.L.R. (4th) 61, 2003 CarswellBC 271 (B.C. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Legal Profession Act, S.B.C. 1998, c. 9
Generally — referred to
Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

APPEAL by creditor from judgment reported at *Cliffs Over Maple Bay Investments Ltd., Re* (2010), 16 P.P.S.A.C. (3d) 237, 2010 BCSC 389, 2010 CarswellBC 726, 65 C.B.R. (5th) 241 (B.C. S.C. [In Chambers]), concluding that lender was entitled to advances made to debtor.

***Newbury J.A.*:**

1 This appeal involves a three-way dispute among creditors of The Cliffs Over Maple Bay Investments Ltd. ("Cliffs" or the "Company"), which was the developer of an ill-fated real estate project near Maple Bay on Vancouver Island. Unfortunately, the Company was unable to secure a reliable water supply for its proposed golf course and residential units, and the project failed. The ensuing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") were, as it turns out, similarly misconceived: this court ultimately ruled that a Supreme Court order made under the *CCAA* staying creditors' proceedings against the Company and authorizing debtor-in-possession ("DIP") financing, should not have been granted, no arrangement or compromise with creditors having been intended.

2 In this last phase of the litigation, the court below had to determine the parties' respective entitlements to what remains of one *tranche* of DIP financing that the DIP lender, "Century", purported to advance in violation of a term in its letter of commitment. The letter had been incorporated by reference in the court order. The chambers judge who was seized of this matter below decided the priority issue as between Century and the existing first-ranking creditor, "Fisgard Liberty", with respect to the funds so advanced. He found that "Century's priority for advances made pursuant to the order is lost because ... those advances were not in compliance with the terms of the order." He granted a declaration that Fisgard Liberty was "entitled to priority" in respect of the funds, subject to the claim of a third creditor, "Lawson", to a solicitor's lien over all or part of the funds - a matter to be decided at a separate hearing following the issuance of his reasons. No appeal was taken from the order.

3 However, Century then brought another motion before the chambers judge, questioning whether the funds had in law and in fact been advanced. On this occasion, the judge stated that his previous order had not determined "entitlement" to the funds. He declined to apply *res judicata*. He found that the advance had never taken place, that the funds remaining in Lawson's trust account had been subject to a *Quistclose* trust in Century's favour, and that Cliffs had never obtained an interest in the funds to which Fisgard Liberty's security interest could attach. Lawson was ordered to [re]pay what remained in its trust account to Century, and its motion for a declaration of solicitor's lien over the funds was dismissed.

4 In this court, Fisgard Liberty (with Lawson joining in) argues among other things that the question of priority was *res judicata* and that issue estoppel or cause of action estoppel should have barred the chambers judge from making the second order. These creditors also assert that the "new" issues concerning advance, trust and attachment raised in the second hearing below were wrongly decided. Fisgard Liberty seeks a declaration that its security interest attached to the funds upon their release to Lawson as Cliffs' agent.

5 Following the issuance of *these* reasons, this court will consider Lawson's claim both to part of the "Administrative Charge" contemplated by the original DIP order and to a solicitor's lien over all the funds it holds in trust. Until that matter has also been disposed of by this court, Lawson holds the funds in trust.

Chronology

6 The following chronology will, I hope, be sufficient to provide an overview of the facts of this case. I will provide additional facts as necessary when analyzing the issues on appeal.

- April 18, 2006 - Cliffs granted to the appellants Fisgard Capital Corp. and Liberty Holdings Excell Corp. (collectively, "Fisgard Liberty") a mortgage of its real property and a General Security Agreement ("GSA"), registered pursuant to the *Personal Property Security Act* ("*PPSA*"), charging all the Company's present and after-acquired property. (The Fisgard Liberty mortgage was a third mortgage, but it appears that the first and second mortgages, which secured fairly small amounts, were assigned at some point to Fisgard Liberty.)

- January 9, 2007 - The Company granted a fourth mortgage to Liberty Holdings Excell Corp. and Canada Trust Company in the amount of $7,650,000.

- June 15, 2008 - By this time, the Company found itself unable to move forward with the project or to draw down funds required for that purpose because of the water supply problem. Approximately $21,160,000 was outstanding under the

third mortgage and $8,800,000 under the fourth, and the sum of approximately $7,340,000 was owed to various trade creditors, lessors and others.

• April-May, 2008 - Fisgard Liberty served the Company with notices of intention to enforce its security and on May 23 appointed a receiver.

• May 26, 2008 - Cliffs proceeded *ex parte* to obtain a stay of proceedings under the *CCAA* and the Court appointed The Bowra Group Inc. as Monitor. The order provided detailed terms for an "Administrative Charge", not to exceed $200,000, in favour of the Monitor and Cliffs' counsel, Lawson Lundell LLP ("Lawson") as security for the payment of their respective fees and disbursements. The Charge was to rank in priority over all other interests and charges.

• June 27, 2008 - The stay was extended in a 'comeback order' under which the Court authorized DIP financing not to exceed $2,350,000 and to be advanced in *tranches* not to exceed $500,000 each. The DIP lender was Century Services Inc. ("Century"), one of the respondents herein. The order, referred to by counsel as the "DIP Order", stated:

> THIS COURT ORDERS that, advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner, subject to further Order of the Court.
>
> [Emphasis added.]

The DIP financing itself was to be on the terms in Century's commitment letter dated June 13, which contained an "appeal provision" as follows:

> The liability and obligation herein and any future obligations of any nature and kind of the Borrower shall be evidenced, governed and secured, as the case may be, by the following documents (collectively, the "Security") completed in a form and manner satisfactory to Century's counsel:
>
> a. Loan Agreement;
>
> b. Promissory note;
>
> c. A court[-]approved first and unencumbered charge on the real and personal property of the Borrower and no appeal therefrom being taken within 21 days after the pronouncement of that Order ...
>
> [Emphasis added.]

• July 7, 2008 - Cliffs and the Monitor signed an "Order to Pay" authorizing Century to advance the first *tranche* of DIP financing to Lawson as solicitors for the Company.

• July 18, 2008 - Fisgard Liberty obtained leave to appeal the June 27 order under the *CCAA*. (This occurred within the specified 21-day appeal period.)

• Early August 2008 - The following events took place as described by the chambers judge:

> [16] In early August, prior to the hearing of the appeal, Century purported to waive the appeal provision, and provided the $500,000 in DIP financing authorized by the order to pay to Lawson Lundell. Century sought, and was provided, further security from the Cliffs' principals for this payment. When commitment fees, interest charges, and other chargebacks were taken into account, Lawson Lundell held the net amount of $350,500 in trust on account of this payment.
>
> [17] Lawson Lundell was placed on an undertaking not to release any portion of this $350,500 until Century's solicitors provided them with written authority to do so. A further condition imposed was the payment of a $25,000 due diligence fee to Century.

> [18] On August 8, 2008, this undertaking and condition were satisfied.
>
> [19] In accordance with paragraph 8 of the DIP Order, the Cliffs and the Monitor requested and proceeded to use some of the DIP funds held in trust by Lawson Lundell. On July 15, 2008, a real estate appraisal was prepared by the Altus Group in respect of the Cliffs' property located at North Cowichan on Vancouver Island at the direction of the Monitor (the "Altus Report"). The parties agree that approximately $98,000 of the DIP monies were used to pay for the Altus Report. Additionally, the parties agree that the amount of $12,958.52 was directed to be paid by the Monitor out of the DIP facility to consultants who provided advice on golf course specific issues. Payments were also made to the principals of the Cliffs on account of wages.
>
> [20] None of the parties dispute the propriety of these expenses, and none advance a claim of entitlement for these amounts. After these expenditures are taken into account, the $162,276.33 which constitutes the subject of this dispute remains in Lawson Lundell's trust account.
>
> [Emphasis added.]

• August 15, 2008 - This court allowed Fisgard Liberty's appeal and set aside the June 27 order for reasons indexed as 2008 BCCA 327 (B.C. C.A.). Tysoe J.A. for the Court stated at para. 41:

> I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

As mentioned earlier, the resulting order had not been settled or entered at the time of the initial hearing of the present appeal, but has now been entered. It states in material part:

> THIS COURT ORDERS that the appeal is allowed, and the order dated June 27, 2008 is set aside;
>
> AND THIS COURT FURTHER DECLARES that the powers and duties of the Monitor contained in the May 26, 2008 and June 27, 2008 orders herein continued until today's date and that the Administration Charge created by the May 26, 2008 order shall continue in effect so as to ensure payment of all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel;
>
> AND THIS COURT FURTHER ORDERS that any issues relating to DIP financing are remitted to the Supreme Court;

• September 24, 2008 - Rice J. confirmed the appointment of a receiver of the Company's assets pursuant to Fisgard Liberty's GSA and granted Century a charge on the Company's property in the amount of $98,000, ranking in priority to all other security interests, to secure the cost of the "Altus report".

• February 17, 2009 - The chambers judge below approved fees and disbursements of the Monitor and counsel. The order did not state the amount so approved, but referred to invoices attached to the Monitor's report. We are told these amounted to $118,577.28.

• March 31, 2009 - Pitfield J. approved the sale of the Company's real property holdings to another company, subject to the prior changes in favour of Fisgard Liberty, various encumbrances in favour of the District of North Cowichan, and the security interest created by the Administrative Charge "as it may have been affected" by the order of June 27, 2008.

• May 4, 2009 - Century filed a motion in Supreme Court seeking *inter alia*:

> 1. A declaration that the monies advanced by Century to The Cliffs Over Maple Bay Investments Ltd. ("Cliffs") on August 7, 2008 was made pursuant to and in accordance with the terms of a valid and enforceable court order dated June 17 [*sic*], 2009 (the "DIP Order");
>
> 2. A declaration that an appeal setting aside the DIP Order does not affect the priority of the security held by Century for funds advanced prior to the appeal under the terms of the DIP Order.
>
> [Emphasis added.]

• May 5, 2009 - Fisgard Liberty filed a motion seeking an order that its mortgage and GSA charged the Company's property in priority to any claims or interests of Century or Lawson, an inquiry as to the amount Century had advanced to Cliffs, and an order for the delivery up to Fisgard Liberty of all amounts of such advance in the possession of Century or Lawson.

• June 30, 2009 - After hearing both motions on May 12, the chambers judge issued reasons, indexed as 2009 BCSC 869, in which he formulated the issues before him as follows:

> 1. Was Century's advance of funds to Cliffs made in accordance with the terms of the DIP Order?
>
> 2. Does the successful appeal of the DIP Order deprive Century of priority for advances already made pursuant to the order?
>
> [Emphasis added.]

He concluded that the "appeal term" in Century's commitment letter had been intended to be a condition of the financing, that Century had not been entitled to waive it unilaterally or indeed without further order, and that:

> ... the August 7, 2008 advance of $500,000 was not authorized under the terms of the DIP order. Thus Century is not entitled to priority on the funds claimed. As Fisgard/Liberty are the first and second mortgagees of Cliffs, they are entitled to priority of the funds in question, with the exception of the amount of $98,000 spent on the Altus appraisal report, which is not in dispute by agreement between the parties.
>
> [At para. 51; emphasis added.]

Having answered the first issue in the affirmative, the judge found it unnecessary to go on to consider the second question. In his words, "Century's priority for *advances made* pursuant to the order is lost because I have concluded that those advances are not in compliance with the terms of the order." [Emphasis mine.] The judge's order of June 30, 2009 stated in material part:

> THIS COURT ORDERS that
>
> 1. The advance of $500,000 by Century, on or about August 7, 2008, to Cliffs Over Maple Bay Investments Ltd. ("Cliffs") (the "Funds"), was not authorized under the terms of the Order of this Court dated June 27, 2008.
>
> 2. Century is not entitled to priority over the Funds except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.
>
> 3. Fisgard and Liberty are entitled to priority over the Funds, except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.
>
> 4. Nothing in this Order affects the entitlement, if any, of Lawson Lundell LLP, to a solicitor's lien over all or part of the Funds in its trust account, which shall be determined on a separate motion.
>
> 5. Fisgard/Liberty are entitled to their costs of this application.

[Emphasis added.]

• In November 2009, Lawson and Fisgard Liberty filed motions which the chambers judge heard on November 24 and 26. Lawson sought a declaration that it was entitled to "payment of its outstanding accounts from the funds secured by the Administrative Charge granted herein by order of the Court on May 26, 2008", and to a solicitor's lien "over funds held in its trust account to the credit of the Petitioner [Cliffs] in an amount to be determined", and costs. For its part, Fisgard Liberty sought an order that:

1. Century Services Inc. ("Century") pay to Fisgard and Liberty the sum of $239,860.31, together with interest on that sum from the date of making of the Advance by Century to The Cliffs Over Maple Bay Investments Ltd. ("COMB") in or about August 2008.

2. Alternatively, an accounting to determine that portion of the $500,000 Advance which was actually paid into the hands of COMB in or about August 2008, and an order that Century pay to Fisgard and Liberty an amount calculated by deducting from the $500,000 Advance;

a) the sum of $162,139.69 held in trust by [Lawson];

b) the sum of $98,000 incurred in connection with the Altus appraisal report; and

c) that amount determined on an accounting to have been actually paid into the hands of COMB from the Advance.

3. Lawson pay to Fisgard and Liberty the sum of $162,139.69, together with interest on that sum from the date of payment of those funds into Lawson's trust account in or about August 2008.

4. An accounting as to funds received into and/or paid out of Lawson's trust account in connection with the Advance and the *CCAA* proceeding.

5. An order that Lawson pay to Fisgard and Liberty any sum held by Lawson for the benefit of or in connection with COMB other than the sum referred to in paragraph 3. ...

The Chambers Judge's Reasons

7 The chambers judge issued reasons dated March 25, 2010 that are indexed as 2010 BCSC 389 (B.C. S.C. [In Chambers]). After describing the events I have summarized, he reviewed the amounts relevant to Lawson's claim:

In addition to its claim of solicitor's lien, Lawson Lundell seeks a declaration that it is entitled to payment of its outstanding accounts from the administrative charge created in the Initial Order.

To date, Lawson Lundell has been paid $15,700.70 by the Cliffs for legal fees and disbursements incurred in this matter. On June 26, 2008, Lawson Lundell rendered a bill in the amount of $7,291.34 for which it was paid in full. On August 18, 2008, Lawsons rendered a bill in the amount of $144,822.94 to the Cliffs for legal services and disbursements incurred up to that date in this matter, of which $8,409.36 has been paid. Thus, Lawson Lundell is owed $136,413.58 on account of that bill. Interest continues to accrue on this sum at 12% per annum.

Since August 18, 2008, Lawsons has continued to perform work for the Cliffs, and as of January 5, 2009, had recorded unbilled work in progress in the amount of $50,516.29 inclusive of disbursements, but not any applicable taxes. [At paras. 30-2.]

8 He described the issues before him as follows:

1. Does *res judicata* bar Century from claiming entitlement to the Funds?

2. Were the Funds "advanced" by Century to the Cliffs? Did the Cliffs ever own or possess the Funds?

3. Alternatively, are the Funds impressed in equity with a trust in Century's favour? If the Funds are subject to a trust, does this defeat Fisgard's claim?

4. Is Lawson Lundell entitled to a solicitor's lien over the Funds?

5. Is Lawson Lundell entitled to access the residue of the administrative charge on account of its fees and disbursements? [At para. 33.]

Items 4 and 5 will be the subject of our second hearing in this proceeding.

Res Judicata

9 The chambers judge's analysis of *res judicata* began at para. 34 of his reasons. Fisgard Liberty contended that any claim by Century to the funds in trust was barred by both issue estoppel and cause of action estoppel in light of the chambers judge's earlier finding that Century's "advance of funds to Cliffs" on August 7, 2008, had violated the DIP Order. That the advance had indeed occurred was also reflected on the face of the order, which stated that "The advance of $500,000 by Century ... to [Cliffs] was not authorized" under the June 30 (DIP) Order, and that "Fisgard and Liberty are entitled to priority over the Funds." No appeal had been taken from that order. As a result, the lenders submitted, it was not open to Century to assert arguments that could and should have been raised at the hearing on May 12, 2009, nor to attack collaterally what was said to be a final order, i.e., the order of June 30, 2009 declaring Fisgard Liberty's priority over the funds.

10 The chambers judge reviewed the law relating to issue estoppel, which he noted (citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.)) applies only where the question said to be previously decided was "distinctly put in issue and directly determined by the court" at the previous hearing. (See also *R. c. Van Rassel*, [1990] 1 S.C.R. 225 (S.C.C.), at 238.) After reviewing the motion material filed prior to the hearing on May 12, 2009, his earlier reasons for judgment and the resulting order of June 30, 2009, the judge concluded that what he had considered and decided on the previous occasion was limited to the "construction of a clause in the commitment letter, whether the loan was made in compliance with the required terms and conditions, and the relative priorities Century and Fisgard held in relation to those funds *as a result of the advance having been made in a manner contrary to these terms and conditions*." He continued:

> It is clear that issue estoppel does not bar what Fisgard itself characterized as Century's "new arguments", based on unjust enrichment and the law of trusts. The beneficial ownership of the funds was not a question decided at the May 12, 2009 hearing, nor was it raised in the parties' arguments or the reasons of this Court. Thus, it cannot be said that this question was "distinctly put in issue and directly determined" at that time. Neither party raised, nor did the Court address, any party's equitable interest in or entitlement to the funds at the previous hearing.
>
> Further, I find that Century is not barred by issue estoppel from arguing that the Funds were never advanced to the Cliffs. The previous hearing only addressed priorities within the context of the DIP charge, not at large.
>
> Finding that Fisgard was entitled to "priority" over the Funds insofar as the terms of the DIP Order were concerned was not a finding on the issue of ownership. A "priority" is distinct from an *in rem* interest in property: *Dinning v. Workmen's Compensation Board*, [1932] 1 D.L.R. 373 at 378 (B.C.C.A.). A priority is not a property right; rather, it is a relative or comparative term, a concept which is legally distinct from that of ownership or title: *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Ltd.* (1983), 49 Nfld. & P.E.I.R. 181 at 226, *aff'd*. on other grounds (1985), 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.), *aff'd*. [1988] 1 S.C.R. 1085.
>
> [At paras. 45-7; emphasis added.]

11 The chambers judge also rejected Fisgard Liberty's submission that his order of June 30 had conclusively established that Century had not retained "title" to the funds. In his analysis, issues of "ownership" and the "impact of legal and equitable

principles beyond the narrow scope of the priority granted in the DIP order itself" had not been argued and were simply "not in the contemplation of the Court" at the time of the previous hearing.

12 Alternatively, if he was wrong and issue estoppel was applicable in the circumstances, the chambers judge said he would exercise his discretion to refuse to apply the doctrine where it would work an injustice. Again in his words:

> These proceedings are not the "one shot" trial of an action, and of necessity have required multiple hearings. Great care must be taken in applying *res judicata* to proceedings in the same action, as distinct from separate actions between the same parties: *Talbot v. Pan Ocean Oil Corp*. (1977), 3 Alta. L.R. (2d) 354 at 360 (C.A.).
>
> Further, the key finality rationale which was held in *Danyluk* to underpin *res judicata* is of limited weight in the present circumstances, given that Fisgard knew that issues surrounding Lawson Lundell's entitlement to a solicitor's lien would require a subsequent application relating to the Funds, and that no conclusive finding as to their ultimate disposition had been made in my June 30 reasons.
>
> I do not accept that Century is precluded from advancing its claim. The public interest in ensuring that justice is done on the facts of this case requires entertaining the parties' submissions on the merits.
>
> [At paras. 52-4; emphasis added.]

13 The chambers judge then turned to cause of action estoppel. Unlike issue estoppel, he noted, this principle does not require that the issue have been directly raised and decided by the court previously. The classic statement to this effect is found in *Henderson v. Henderson* (1843), 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.-C.), where Wigram, V.C. stated:

> In trying this question, I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.
>
> [At 381-82; emphasis added.]

14 The chambers judge noted that "some flexibility" had been introduced to cause of action estoppel recently in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (N.S. C.A.), where it was suggested that the language in *Henderson* was "somewhat too wide" and that the better principle was that "those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred." (At para. 37.) He also referred to *Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718 (B.C. S.C.) (*rev'd on other grounds*, 2004 BCCA 142 (B.C. C.A.)), where the Court observed that the rule in *Henderson* is of limited application to interlocutory applications and that judicial efficiency will often "be well served by allowing interlocutory applications to deal with only small parts of a larger picture." (Para. 36.)

15 The chambers judge was not satisfied that cause of action estoppel had any application in the circumstances before him. This was not an instance, he said, in which Century was seeking any relief *against Fisgard Liberty* - indeed there was "no cause of action or claim asserted by Century against Fisgard". Instead, the dispute involved three competing creditors in a dispute over a pool of money. Further, the question litigated at the prior hearing had not decided the ultimate disposition of the funds. (Para. 65.) In the circumstances, the chambers judge found that cause of action estoppel had not been established and that in any event, he would again have exercised his residual discretion to refuse to apply the doctrine:

> I reiterate my earlier conclusion that it would be against the interests of justice if Century were precluded from arguing its legal and equitable entitlement to the funds, given that the issue was not considered, and that the fundamental "finality" consideration which underpins *res judicata* is of limited force in the circumstances. [At para. 68.]

Were the Funds Advanced to Cliffs?

16 Being satisfied that neither issue estoppel nor cause of action estoppel applied to bar Century's motion, the chambers judge turned next to consider whether Century had in fact "advanced" the $500,000 *tranche* of DIP financing to the Company or its agents, thus (in Fisgard Liberty's submission) losing any rights to those funds. Even though Century had purported to advance the funds in breach of the appeal provision in the commitment letter, the chambers judge found that they had remained subject to the conditions specified in the DIP Order — that the Monitor authorize or request the release of funds and that the Monitor in consultation with the Company request Lawson to pay the funds out. The chambers judge said there was "no evidence" the Monitor had authorized or requested the funds and that accordingly, they had remained subject to a trust condition that would now never be satisfied. In his analysis:

> Where funds have been released by a lender to a borrower's solicitor with trust conditions governing their use, they do not become the property of the borrower until the trust conditions are satisfied. If the trust conditions are not satisfied, unspent funds must be returned to the lender. [At para. 78.]

This conclusion, the Court said, defeated the claims of both Fisgard Liberty and of Lawson. (Para. 89.)

Alternative Conclusions: Trust and Attachment

17 Century argued in the alternative that Fisgard Liberty and Lawson would be unjustly enriched if they obtained the funds, but the chambers judge found a "clear juristic reason" — the existence of the financing agreement between Cliffs and Century, the foreclosure proceedings taken against Cliffs, and Lawson's "purported statutory entitlement" to a solicitor's lien pursuant to the *Legal Profession Act* — for any deprivation Century might have suffered if the funds *had* been advanced and Fisgard Liberty or Lawson were to receive them. (Para. 93.)

18 In the further alternative, Century submitted that regardless of whether the funds had been advanced to Cliffs, they had been subject to a *Quistclose* trust in Century's favour: see *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.). It was clear that such trusts are subject to the requirement of the three certainties (see *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (U.K. H.L.) at paras. 70-1, 101; *Westar Mining Ltd., Re*, 2003 BCCA 11 (B.C. C.A.) at para. 12; *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411 (B.C. C.A.) at para. 31.) With respect to certainty of intention, the Court reviewed Century's commitment letter, which stated that the purpose of the DIP loan was to further the "construction of a golf course and development of the home lots and source an irrigation source for the golf course." This purpose had the effect of restricting the Company's freedom to use the funds. (Para. 105.) The surrounding circumstances and the terms of the DIP order shed additional light on the parties' intention that the funds were not to be used to extinguish the Company's general liabilities or wind up the project. The chambers judge found as a fact that the terms of the commitment letter disclosed a mutual intention on the part of Century and Cliffs to create a *Quistclose* trust. (Para. 110.)

19 Being satisfied that the second certainty — certainty of subject matter — was shown, the chambers judge found that the commitment letter provided adequate clarity for the Court to determine that if the funds had been provided either to Fisgard Liberty or Lawson following the demise of Cliffs' development project, the funds would have been misapplied, i.e., the trust would have been breached. Thus, he said, certainty of objects was also made out.

20 The next question was whether, again assuming the funds had been advanced to Cliffs, a *Quistclose* trust alone could defeat Fisgard Liberty's registered security interest. The chambers judge accepted that a *Quistclose* trust is a form of resulting trust, which comes into existence when money is advanced rather than at the time the trust is judicially declared to exist: see *Twinsectra*, *supra*, at paras. 100-102. Existing case law suggested that a *constructive* trust is not defeated by a prior security

interest registered under the *PPSA* (see *Ellingsen, Re*, 2000 BCCA 458 (B.C. C.A.) and *Kimwood Enterprises Ltd. v. Roynat Inc.* (1985), 15 D.L.R. (4th) 751 (Man. C.A.)), but it was unclear whether the same was true of resulting trusts.

21 The chambers judge found it unnecessary to decide this point, since in his analysis, the *PPSA* security interest of Fisgard Liberty had never "attached" to the funds and could therefore not defeat or rank ahead of Century's "equitable ownership". (Para. 121.) He cited various authorities for the proposition that before an interest may attach, the debtor must have something more than mere possession of the collateral or an interest that is "trifling" or "completely contingent" in nature. (See paras. 122-29.) Since the advances to be made under the DIP loan facility had been conditional upon the Monitor's making a written request, he concluded that the Company had not had sufficient rights in the collateral for Fisgard Liberty's security interest to have attached, regardless of whether the funds had been "advanced" or not. In his analysis:

> ... The will of a third party (the Monitor) is an external condition upon which the Cliffs' entitlement to the money is entirely dependent, and is therefore a barrier to the Cliffs obtaining "rights in the collateral" beyond a mere expectation or contingent right to future enjoyment.
>
> The Cliffs certainly had a right to receive the collateral; but this right was contingent upon the Monitor making a request in writing which has not and never will be made. Century held the entirety of the beneficial interest in the Funds through the *Quistclose* trust; the Cliffs never had actual possession of the Funds, had no control over their disposition, and could not compel Lawson Lundell to disburse them. The agency of the Monitor was required. In these circumstances, I find that the Cliffs did not have sufficient "rights in the collateral" for Fisgard's security interest to attach.
>
> [At paras. 131-32; emphasis added.]

22 In the result, the chambers judge's order, dated March 25, 2010, stated in material part:

> 1. The Fisgard and Liberty Motion is dismissed;
>
> 2. Lawson pay the sum of $162,276.33 held in Lawson's trust account to the credit of The Cliffs Over Maple Bay Investments Ltd. (the "Funds") to Century;
>
> 3. Lawson is entitled to payment of $81,422.72 on account of its fees and disbursements from the funds secured by the Administrative Charge granted herein by Order of the Court on May 26, 2008, unless an application for further relief in this regard is brought within 30 days of March 25, 2010;
>
> 4. Lawson's application for a declaration that it is entitled to a solicitor's lien over the Funds is dismissed; and
>
> 5. the parties each bear their own costs of the Lawson Motion and the Fisgard and Liberty Motion.

On Appeal

23 Fisgard Liberty advanced the following grounds of appeal in its factum:

> 1. The learned Chambers Judge erred in law in determining *res judicata* did not bar Century from claiming entitlement to the Advance at the November 2009 hearing.
>
> 2. The learned Chambers Judge committed an error of law in determining the Fisgard/Liberty's security interest did not attach to funds in Lawson's trust account and with Century.
>
> 3. The learned Chambers Judge erred in law in holding that the funds in Lawson's trust account were subject to a *Quistclose* trust.
>
> 4. The learned Chambers Judge erred in law in finding that the funds in Lawson's trust account were not advanced to Cliffs.

5. The learned Chambers Judge erred in law in determining Lawson was entitled to the administration charge and that the charge had not been used up.

I propose to deal with item 1, and then with items 2, 3 and 4 together. Item 5, together with Lawson's grounds of appeal, will be addressed following the later hearing.

Res Judicata

24 The appellant Fisgard Liberty acknowledged that whether *res judicata* should have applied to bar Century's motion is a question of law, reviewable on a standard of correctness. The only exception relates to the chambers judge's exercise of discretion not to apply the principle even if the circumstances of this case fell within its ambit. The appellant notes the well-known formulation of the circumstances in which an appellate court may interfere with such a decision - i.e., if the court below proceeded on a wrong principle or failed to give weight, or sufficient weight, to relevant considerations: see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 76-7; *Stone v. Ellerman*, 2009 BCCA 294, 92 B.C.L.R. (4th) 203 (B.C. C.A.) at para. 94. We were also referred to a more recent formulation, which mandates intervention if the court below has misdirected itself as to the applicable law or made a palpable error in its assessment of the facts: see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.) at para. 43.

25 The policy objectives underlying *res judicata* generally are well-known and have been discussed at length in the jurisprudence and in the academic context: see for example, Donald J. Lange, *Res Judicata in Canada* (3rd ed., 2010), chapter 1; *Henderson v. Henderson*, *supra*; *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.); *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.); and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.). The authors of Spencer Bower and Turner, *The Doctrine of Res Judicata* (4th ed., 2009), state:

> Two policies support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
>
> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

26 Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' (*bis vixari*) for the same cause, must be balanced against the other "fundamental principle" (see *Hoque* at para. 21) that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 55; *Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76 (B.C. C.A.) at paras. 16-7; Lange at 7-8.

27 *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. Lange summarizes them as follows:

> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]

The distinction was described in more elaborate terms by Lord Denning, M.R. in *Fidelitas Shipping Co. v. V/O Exportchieb*, [1965] 2 All E.R. 4 (Eng. C.A.):

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in *rem judicatam* ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then,

> as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. ... But this again is not an inflexible rule. It can be departed from in special circumstances. ... [At 8-9; quoted with apparent approval in *Grandview v. Doering*, *infra*.]

28 Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle*, *supra*, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), at 34, *aff'd.* (1987), 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.):

> 1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
>
> 3. The cause of action and the prior action must not be separate and distinct; and
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.
>
> [At para. 6; emphasis added.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" — the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 (B.C. C.A.) at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also Lange at 147; *Comeau v. Breau* (1994), 145 N.B.R. (2d) 329 (N.B. C.A.) at para. 18; and *Letang v. Cooper* (1964), [1965] 1 Q.B. 232 (Eng. C.A.), at 242-43.

29 Presumably, it is the breadth of the fourth requirement listed above ("could have been argued") that leads Fisgard Liberty to argue that cause of action estoppel can have application in the case at bar. The appellant cites four cases for the proposition that "both issue and cause of action estoppel apply to subsequent motions in the same proceeding on the same questions finally decided in an earlier motion". Three of these authorities — *Air Canada v. British Columbia* (1985), 21 D.L.R. (4th) 685 (B.C. C.A.), *Heather's House of Fashion Inc. (No. 2), Re* (1977), 24 C.B.R. (N.S.) 193 (Ont. H.C.), and *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.) — do not in my view support this proposition. *Air Canada* was decided on the basis of issue estoppel (see 697), and *Heather's House of Fashion Inc. (No. 2)* and *Las Vegas* involved proceedings that resembled separate causes of action (in the substantive, rather than the formal, sense), as opposed to steps taken in the same proceeding. The fourth case, *Re Agil Holdings Ltd.;* (also indexed as *Scherer v. Price Waterhouse Ltd.* (1985), 32 A.C.W.S. (2d) 259 (Ont. H.C.) [(August 16, 1985), Sutherland J. (Ont. H.C.)], does take a broader view than the prevailing one, and illustrates the difficulty in some cases of distinguishing between cause of action and issue estoppel.

30 While it is arguable that the other conditions associated with cause of action estoppel exist in this case, I am not persuaded the chambers judge erred in concluding that because of the procedural context of the two orders — in particular, the fact this is a "dispute over a pool of money between three competing creditors" in one proceeding — the doctrine does not apply. At the very least, one would have to bend it considerably out of shape to fit the facts with which we are concerned. Given my view that issue estoppel applies, it is not necessary to go to these lengths.

31 Turning then to issue estoppel, I note the three traditional "tests" adopted by the Supreme Court of Canada in *Angle*, namely:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ...

[At 254; emphasis added.]

There is also the well-known formulation of issue estoppel given by Middleton J.A. in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.):

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[At 422; emphasis added.]

32 The narrow wording ("directly determined") adopted in these and other authorities, however, has not been construed as strictly as one might expect. In *Danyluk*, Binnie J. for the Court stated at para. 54 that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are *necessarily bound up* [my emphasis] with the determination of that 'issue' in the prior proceeding". This would seem to echo the formulation provided by Lord Shaw in *Hoystead*:

... Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

[At 165-66; emphasis added.]

The wording used in *Hoystead* (where it was held that issue estoppel applied not only to the admission of a fact fundamental to the first decision, but also to "an erroneous assumption as to the legal quality of that fact") which I have underlined above was approved in *Angle*, *supra*, at 255, and by this court in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C. C.A.), at 252. (See also *Hill v. Hill* (1966), 57 D.L.R. (2d) 760 (B.C. C.A.), at 764; *Global Aerospace Inc. v. Insurance Co. of State of Pennsylvania*, 2010 SKCA 96 (Sask. C.A.) at para. 78; *Foster v. Reaume*, [1927] 1 D.L.R. 1024 (Ont. Div. Ct.), at 1033; *Prince v. T. Eaton Co.* (1992), 91 D.L.R. (4th) 509 (B.C. C.A.), at 522.)

33 Lange (see 58-65 and the cases cited therein) suggests that an "extended form" of issue estoppel has been adopted in some provinces such that any question that could have been decided or could have been raised at the first proceeding, will be barred in the second. However, this approach has not received appellate approval in this province, and when it has been used, seems not to have led to a different result than the traditional approach. (See the discussion in *Re Agil Holdings*, *supra*, and in Lange at 62-3.) Neither party relied on the extended form of issue estoppel in the case at bar.

34 Century submits that both the requirement of finality and that of the "same question" are not met in the case at bar. Regarding finality, it contends at para. 59 of its factum:

> ... to the extent [the chambers judge's] Order addressed entitlement to the Trust Funds, Century submits that it was not final. Cause of action (and issue estoppel) only apply when the court has no further jurisdiction to hear the issues or to vary or rescind its decision. In this case [the chambers judge] retained jurisdiction to consider entitlement to the Trust Funds. To the extent [his] later decision contradicted his earlier one, the later decision is to be taken as the final one on the basis that it is the most informed expression of the Court's opinion.
>
> [Emphasis added.]

With respect, if by this Century is suggesting that having made a final order, a court may subsequently adopt a "more informed opinion" of the matter and proceed to contradict its earlier order, I must disagree. Obviously, this proposition flies in the face of the principle of finality which is the essence of *res judicata.* Nor did the court below "retain jurisdiction" to vary or rescind its decision: only Lawson's claim, which had the potential of trumping that of Fisgard Liberty, was left for another day. The issue of priority as between Century and Fisgard Liberty was finally determined and the Court did not have jurisdiction to rehear it or to vary or rescind its order.

35 In connection with the "same question" criterion, Century naturally relies on the chambers judge's observation that the issue of the "ultimate disposition of the funds" was not decided in the first proceeding. It says that since "issues of ownership" were not in the Court's contemplation, Century's position in the second hearing did not amount to a collateral attack on the first order; that the two applications concerned "different facts altogether"; that evidence advanced at the second hearing was not known to Century (although Mr. Roberts on behalf of Lawson suggested it was available) until Lawson's affidavit evidence was filed; and that:

> The two hearings related to separate and distinct causes of action, as the First Hearing sought a declaration in respect of the parties' priorities in respect of Cliffs' estate generally, whereas the Second Hearing concerned the parties' potential entitlement to the Trust Funds in particular.

36 It is certainly true that the two hearings dealt with different issues. The question is whether the issues of advance, attachment and trust were "necessarily bound up" with or "fundamental to" the determination of priority as between Fisgard Liberty and Century. In my opinion, it is clear that to the extent the earlier order addressed priority, it assumed "entitlement". As a matter of logic, the question of whether the advance had been validly made to Cliffs (through its agent Lawson) should have been raised and determined before or as part of the determination of priority *over the advance* as between Century and Fisgard Liberty. A finding that Fisgard Liberty was entitled to priority in respect of the funds would seem to be "bound up with" or indeed to rest on the 'foundation' that the funds had indeed been advanced to Cliffs. (Indeed, it was precisely *because* Century had made an advance in violation of the 21-day period that it had lost its priority in the first hearing.) In the wording used by Lange, entitlement or ownership was part of the "latent structure supporting the express question [of priority] by virtue of an ... assumed recognition of that structure." (*Supra*, at 47.) If the funds had not been advanced, the question of priority would have been moot. Priority was not a "threshold issue", as counsel for Century suggests; it was the ultimate issue.

37 In this respect, the case at bar resembles *Sigal v. Isenberg* (1992), 80 Man. R. (2d) 142 (Man. Q.B.), where a party who had participated in a proceeding to interpret a will was barred from challenging the validity of the same will in a subsequent proceeding. The Court noted that "there is an underlying assumption that parties participating in an action for interpretation of the will have inferentially conceded its validity. Courts do not construct invalid wills. If there is some issue as to validity, that issue must first be determined." The Court also quoted the following passage from the 1969 edition of Spencer Bower and Turner, *Res Judicata*:

> Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question, or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and

> which, therefore, it was his duty (in a sense) to have then raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue, or point so omitted to be raised, just [as] much as if it had been expressly raised by the party, and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertence, or is made the subject of express or implied assumption or admission. [At 160.]

38 Similarly, in *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337 (Alta. C.A.), the Alberta Court of Appeal held that the defendant's apparent acceptance of the validity of certain trusts in a receivership proceeding barred it from challenging the validity of the trusts in a subsequent action. (See also *Hill v. Hill* (1966), 57 D.L.R. (2d) 760 (B.C. C.A.), at 769; *R. v. Duhamel* (1981), 33 A.R. 271 (Alta. C.A.), at 277-8 (*aff'd* [1984] 2 S.C.R. 555 (S.C.C.).); Spencer Bower and Turner (2009), *supra*, at § 8.09, 8.10 and 8.12, and cases cited therein.)

39 Ms. Buttery contends on behalf of Century that at the time of the first hearing in May 2009, her client was not aware of the amount of funds Lawson was holding in trust — a fact she says was important because Century needed to know whether the question of "entitlement" was "worth fighting about". Since it was clear, and the first order contemplated, that Lawson would be asserting entitlement to a solicitor's lien at a later date, she says it would be "incongruous" if other parties (i.e., Century) would not have been able to assert claims at a later date as well. In her submission, there was nothing in the record to suggest that the "super-priority" question (i.e., priority as between Fisgard Liberty and Century as the DIP lender) decided at the first proceeding was intended to be the only issue, or that its determination was to bar any of the parties from raising questions as to whether an advance had taken place and whether Cliffs' interest had attached. Although the parties' notices of motion and the first order itself had all referred to "advances" as though they were an accepted fact, Ms. Buttery emphasized that counsel were dealing with an unusual situation (i.e., the reversal of a stay granted under the *CCAA* and the finding that the Supreme Court's authorization of DIP financing was invalid). This situation gave rise to many uncertainties in the course of the 'unwinding' of the restructuring, and counsel found themselves having to adapt to facts as they unfolded. Thus, it is implied, the requirements of due diligence should not be applied too stringently in this instance.

40 These arguments may bear on the issue of the chambers judge's discretion, but I do not find them persuasive on the prior question of whether issue estoppel is technically applicable to this case. If counsel at the first hearing intended the Court to deal with only one of many issues, they should have made that clear to the other parties and to the Court, which may have had an opinion on the subject. They should have begun with what logically was the *first* issue — were the funds advanced? — and left the ultimate issue — which creditor has priority? — for later if that course was acceptable to the Court, and if it became necessary. They should have reserved not only the question of Lawson's entitlement in the order but Century's — a course that would have placed the problem of "conflict" front and centre. They should have been much more restrictive in the wording of the first order, ensuring that the Court would not be embarrassed by what appears to be a contradiction of its first order by the second order. If nothing else, this case is a cautionary tale for practitioners in the insolvency area about the importance of clearly informing the Court as to the issues being raised, and properly stating in the Court's order exactly what was determined and what was not.

41 In my respectful view, the question of Cliffs' "entitlement" to the funds advanced by Century was, to paraphrase the reasoning in *Hoystead*, a "point fundamental to the [first] decision ... assumed by [Fisgard Liberty] and traversable by [Century] which was not traversed." I conclude that the chambers judge erred in permitting Century to re-open the question, and in ruling that its arguments were not barred by issue estoppel.

42 This brings us to the exercise of the chambers judge's discretion not to apply issue estoppel, a question that is also dependant on case law that is not completely consistent and in which subtleties abound. In *Danyluk*, the Court ruled that it was an error of principle not to address the factors for and against the exercise of the discretion not to apply issue estoppel and that "The list of factors is open ... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (Para. 67.) The most important of these, the Court said, was the potential for injustice since, as noted by Jackson J.A. in dissent in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.):

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard. [At 21.]

43 Binnie J. was referring, however, to the tribunal-to-court context rather than the court-to-court context. He noted the Court's earlier decision in *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), where it was said that the discretion not to apply issue estoppel is "very limited in its application". A broader discretion, Binnie J. stated, was warranted *in relation to the decisions of administrative tribunals*. This distinction was made in *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46 (N.L. C.A.), where the Court emphasized that *Danyluk* had not modified *Naken*, *supra*, and that potential injustice becomes relevant only where, *having exercised due diligence*, a party has not received a "full and fair hearing". (At paras. 41-2; my emphasis.)

44 In *Procter & Gamble Pharmaceuticals Canada Inc. v. Canada (Minister of Health)* (2003), [2004] 2 F.C.R. 85 (F.C.A.), Rothstein J., then of the Federal Court of Appeal, suggested for the majority that the discretion is limited to "special circumstances" (citing *Henderson v. Henderson*, *supra*, at 115), which would include fraud, misconduct or the discovery of decisive fresh evidence that could not have been adduced at the earlier proceeding by the exercise of reasonable diligence, although "fairness considerations could cancel the exercise of discretion." (Para. 29.) In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), Chief Justice McEachern described the exception as requiring "some overriding question of fairness" necessitating a rehearing. (At 438.)

45 Fisgard Liberty contends that Century made no argument and led no evidence at the second hearing as to any "special circumstances" that would justify the chambers judge's decision declining to apply *res judicata* in this case. Whilst acknowledging that considerations of fairness are relevant, the appellant emphasizes that the first hearing occupied an entire day, that the parties filed extensive written submissions, and that both are "sophisticated commercial entities". Not surprisingly, Century responds that *if* the chambers judge "did not decide the ultimate disposition of the funds" and *if* the issues raised in the second hearing were "simply not in the contemplation of the court" in the first hearing (as the chambers judge himself suggested), it would be unfair if Century were held to be bound by the earlier order.

46 It will be recalled that the chambers judge enunciated two reasons for finding that it would be contrary to justice to apply issue estoppel in this case. The first was that these proceedings are not the "one-shot" trial of an action and that "great care" should be taken in applying *res judicata* to proceedings in the same action. On this point, he cited *Talbot v. Pan Ocean Oil Corp.* (1977), 3 Alta. L.R. (2d) 354 (Alta. C.A.), at 360, where the Court was discussing the fact that in many interlocutory applications — e.g., an application for an interim injunction — the court proceeds on assumed or incomplete facts. Obviously, such applications do not give rise to final decisions, and *res judicata* has no place. (For this reason, it seems to me that the comment quoted by the chambers judge from *Buschau v. Rogers Communications Inc.* (see para. 14 above) cannot be correct.) The Court in *Talbot* did not suggest that estoppel is to be applied with "great care" in subsequent motions once a final determination *has* been made on an issue; nor did it make any mention of the residual discretion not to apply issue estoppel.

47 The second reason given by the chambers judge was that the principle of "finality" underlying *res judicata* was of "limited weight" in this instance, given that Fisgard Liberty knew a subsequent application would be necessary to decide Lawson's claim to the funds, and that no "conclusive finding as to their ultimate disposition" had been made in the order of June 30, 2009. As has been seen, however, Fisgard Liberty's status was squarely raised at the first hearing and Fisgard Liberty had no reason to think that the Court's declaration of priority over Century was anything less than a "conclusive finding" on that question.

48 We are of course not exercising our discretion as a matter of first instance. The question for us is whether the chambers judge proceeded on a wrong principle or failed to give weight or sufficient weight to valid considerations in exercising his discretion as he did. In my view, he did err in failing to recognize the finality of his earlier order as between Century and Fisgard Liberty and in failing to give consideration to the narrowness of the circumstances in which his discretion could properly be exercised. It cannot be said "special circumstances" existed here: this was a monetary dispute between sophisticated lenders that had been decided in favour of one of them, and it was not open to the Court to change its mind in favour of a party that had thought of additional arguments that it could and should have mounted at the previous hearing. No overriding question

of fairness was engaged. Indeed, in my view, it would be unfair to permit Century's arguments to prevail. I would allow the appeal on this ground.

"Advance" and "Attachment" Issues

49 In the event I am wrong on the applicability of issue estoppel to this case, however, I turn to the alternative grounds of appeal advanced by Fisgard Liberty, namely that the chambers judge erred in determining that the funds in Lawson's trust account had not been advanced to Cliffs and in finding that the appellant's security interest did not attach to the funds. In my view, these two issues are essentially the same: if the funds were indeed "advanced" to the Company (through its agent Lawson), then, subject to the remaining issue concerning the existence of a *Quistclose* trust, Cliffs would have been entitled to the funds and thus would have had a sufficient interest to which Fisgard Liberty's security could attach.

50 It will be recalled that the chambers judge's order of June 27, 2008 authorized the Company to borrow an amount not exceeding $2,350,000 from Century, "provided that such advances under the DIP Facility will be made in *tranches* not to exceed $500,000, unless permitted by further Order of this Court". The conditions under which such advances would be made were specified:

> ... advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner [the Company], subject to further Order of the Court.

51 The order also stated that the "DIP Facility" would be on the terms and conditions in the commitment letter, which in turn said the purpose of the loan was to "facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course." A commitment fee of 3% was to be deducted from each advance, "representing the Commitment Fee for the entire Facility and six months' interest for each draw."

52 On or before July 17, 2008, Cliffs and the Monitor signed an "Order to Pay" addressed to Century and its solicitors, Boughton Law Corporation ("Boughton"). The material part of this document stated:

> Please accept this as your irrevocable authority and direction to payout [*sic*] of the first advance under the above referenced mortgage loan all taxes, assessments and utilities charged against the Property given as security; property valuation fee, solicitor's charges, accrued interest to interest adjustment date, and other expenses payable, and to pay all prior encumbrances on the Property as follows:
>
> | | |
> |---|---|
> | Mortgage Advance Amount | $500,000 |
> | Less: | |
> | The Lender's Commitment Fee | 70,500 |
> | The Lender's Six Month Interest Reserve | 54,000 |
> | Boughton Law Corporation | |
> | Holdback for estimated legal fees, disbursements and taxes to complete the transaction** | 25,000 |
> | Net mortgage proceeds under the 1{st} advance payable to Lawson Lundell LLP "In Trust" | $350,500 |
>
> Dated this 17th day of July, 2008.
>
> [Emphasis added.]

53 On August 7, Boughton remitted its trust cheque to Lawson. Referring to Cliffs as "Borrower" and Century as "Lender", Boughton advised:

> Further to your recent correspondence with ... our office, we enclose our trust cheque payable to Lawson Lundell LLP In Trust in the sum of $350,000.00 representing the advance under the above loan, in accordance with the approved Order to Pay.

> The enclosed funds are sent to you on your undertaking not to release any portion of the funds to your client until we have provided you with our written authority that it is in order for you to do so.

The written authority referred to in the second paragraph was given later the same day by an email from Boughton to Lawson, confirming that:

> It is now appropriate pursuant to my instructions to release the monies you have in trust to your client. The only undertaking I impose upon your firm is to pay the due diligence fee of $25000 to Century Services Inc., care of Boughton Law Corporation.
>
> I also confirm that my client has waived the condition requiring no appeals to be filed.
>
> [Emphasis added.]

54 The following day, Lawson forwarded its trust cheque in the amount of $25,000 payable to Century. According to the affidavit of Ms. Ferris of Lawson, her firm also disbursed $100,000 to the Monitor, $4,400 to 648962 B.C. Ltd., and $36,000 to Mr. and Ms. Paulin, the principals of Cliffs. (The $100,000 payable to The Bowra Group Inc. represented the costs of preparing the Altus Report, which had been the subject of a specific priority order mentioned earlier.) On August 15, further funds were disbursed by Lawson, leaving the sum of $162,276.33 in its trust account as at November 1, 2009.

55 The chambers judge stated at para. 21 of his reasons that there was "no evidence that the Monitor requested the release of the Funds, as required by the DIP Order and they were never used by the Monitor or the Cliffs." With respect, the Company and the Monitor did sign the Order to Pay and surely an "order" goes even farther than a "request". In my view, it simply cannot be said that the conditions for the advance set forth in the order of June 27, 2008 were not met. I conclude, with respect, that the chambers judge fell into clear error at para. 89 of his reasons in finding that the funds remained held by Lawson on a trust condition "that has not and now never will be satisfied" and that therefore Century was entitled to their return.

Quistclose Trust

56 This leads us to the final alternative argument, acceded to by the chambers judge, that the funds were impressed with a *Quistclose* trust in Century's favour, based on the terms of the commitment letter which were incorporated by reference into the DIP Order of June 27, 2008. The letter described the purpose of the DIP Facility thus:

> 3. PURPOSE: To facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course.
>
> 8. CONDITIONS: The obligation of Century to make the facility available is subject to and conditional upon each of the following:
>
> > a. Court [-] authorized DIP borrowing, with the funds to be used for development purposes as disclosed by the borrower.
>
> [Emphasis added.]

57 A *Quistclose* trust is a purpose trust of a very special kind. Waters, Gillen and Smith in *Waters' Law of Trusts in Canada* (3rd ed., 2005) write that such trusts arise "when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan." (At 565.) The authors continue:

> These trusts occur when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan. The lender advances the moneys on the condition that they are to be held "on trust" by the borrower until the time for expenditure upon the purpose takes place. At that point in time, having the authority of the loan agreement, the borrower applies the moneys to the purpose and becomes a debtor *vis-à-vis* the lender. If the contemplated expenditure

> upon the purpose does not occur, the moneys are held in trust by the borrower for the lender - that is, ahead of all the unsecured creditors of the borrower. [At 565.]

58 A somewhat narrower description was given in a Canadian case, *Niedner Ltd. v. Lloyds Bank Canada* (1990), 72 D.L.R. (4th) 147 (Ont. H.C.):

> A Quistclose trust is created when A lends money to B for the specific purpose of enabling B to pay its creditors or a specific class of them ["C"]. The money is then impressed with a trust and may not be reached by third parties other than the beneficiaries of the trust. Assuming the purpose of the trust should fail, the money reverts back to the settlor of the trust. ...
>
> [At 151; emphasis added.]

59 In fact, *Quistclose* trusts have had a broader application, at least in the U.K. In *The Quistclose Trust in a World of Secured Transactions* (1992) 12 Oxf. U. Leg. Stud. 333, Professor M. Bridge observes that they have arisen in three main situations:

> These cases are, for the most part, centred on three fact patterns, though the authorities relied upon in the *Quistclose* decision itself are confined to the first of these categories. First, A puts in funds B, a debtor, for the purpose of paying C, one of B's creditors. The practical issue here is whether the funds may be retained or recovered by B's trustee-in-bankruptcy. Secondly, A consigns goods to C in response to an order placed by B and A draws on B for payment of the price. The question here is whether the cargo has been appropriated to secure the due payment of the bill of exchange. This transaction can also occur in a two-party form, where A consigns goods to B and then, after so advising B, discounts a bill drawn upon B. Thirdly, A transfers to B, a bank, bills of exchange payable to A in payment for other bills drawn earlier by A upon B. B becomes insolvent before paying the bills drawn upon it. Is B merely indebted to A in respect of the bills transferred to it? Another bank insolvency problem occasionally presents itself where one bank is put in funds to be remitted to another bank and becomes insolvent before the remittance is made. [At 347.]

The author also notes certain characteristics common to the decided cases:

> A characteristic of these cases is the immediacy of the debtor's need for outside sources of funding. The debtor may already be faced with a bankruptcy petition by one of his creditors, who may be a judgment creditor, or he may be poised to abscond to evade his creditors, or already by lying in a debtors' prison. In one case, the money is paid over to the debtor to obtain the release of the payer's property from a sheriff executing on behalf of a judgment creditor of the debtor. It does no harm to the payer's case if the money advanced is still capable of being returned *in specie*. This was so in one case where it was a surety who was seeking the return of the money to the payer, who unlike the surety was unaware that the money was being advanced conditionally to save a bank from bankruptcy. In all of these cases, the party paying the money does so on an emergency, rescue basis and the debtor is merely a conduit through whom money is channelled to the outside creditor. In the circumstances, the debtor's possession of the money is far removed from misleading anyone entering into further dealings with him and any benefit accruing to the unsecured general creditors would be of a windfall nature. Nor is the payer, it seems, receiving anything in the nature of a premium or reward for the very high degree of risk attendant upon the transaction being a mere loan. It is therefore difficult to see that the payer receives an unfair advantage over the payee's other creditors, in the period leading up to the bankruptcy, making it unfair to allow him to retain or recover the money as the case may be. [At 348.]

60 Such trusts are the subject of much controversy and academic comment in the United Kingdom, and it appears that they are used mainly there to overcome the vagaries of what Bridge describes as its "antiquated" property security laws (see 345.) Many questions about them remain unanswered, despite the important role played by Lord Millett in explaining them in the academic and judicial contexts: see *The Quistclose Trust: Who can Enforce it?* (1985) 101 LQR 269; *The Quistclose Trust - a Reply* (2011) 17:1 Trusts & Trustees 7. (See also Dennis R. Klinck, *Re-Characterizing the Quistclose Trust: Lord Millett's Obiter Dicta in Twinsectra* (2005) 42 Can. Bus. L.J. 427 at 428-31, and Michael Smolyansky, *Reining In the Quistclose Trust: A Response to Twinsectra v. Yardley* (2010) 16 Trusts & Trustees 558.)

61 The first situation described by Professor Bridge existed in the *Quistclose* case itself, *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, *supra.* It involved a company, Rolls Razor Ltd., that had declared a dividend but was unable to pay it. The company negotiated a loan from Quistclose Investments Ltd. for the purpose of paying it, and the lender paid the money into a specific account at Barclay's Bank for this purpose. Before the dividend could be paid, however, Rolls Razor went into bankruptcy and the bank purported to apply the funds against the bankrupt's outstanding indebtedness to the bank. The House of Lords held that a (resulting) trust had been created for the purpose of paying the dividend, which trust had "failed", entitling the original settler, the lender, to the return of the funds, and ensuring the bank did not enjoy what would have been a windfall.

62 The chambers judge in the instant case began his discussion by noting the most recent leading case in this context, the decision of the House of Lords in *Twinsectra*, *supra.* Its facts were somewhat closer to those in the case at bar: a lender agreed to advance funds to "Y" for the specific purpose of enabling him to purchase certain property. The lender forwarded the loan proceeds in trust to a firm of solicitors on their undertaking to hold the funds until they were applied to the acquisition of the property by Y. The firm instead paid the funds to another solicitor, who simply paid them out on Y's instructions, utilizing some £358,000 for purposes unrelated to the acquisition. The second solicitor then went bankrupt, and the loan was not repaid.

63 The House of Lords applied *Quistclose*, ruling that the money had been subject to a trust in the firm's hands, that the trust met the three certainties, that the firm was liable for breach of the trust, and that the second solicitor held the remaining funds in trust for the lender, subject to a power to apply it by way of loan to Y in accordance with the undertaking.

64 The chambers judge quoted by way of overview a passage from the reasons of Lord Millett in *Twinsectra*, part of which I will also reproduce:

> Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases. [At para. 68.]

At the same time, his Lordship observed:

> A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case.
>
> The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 100 *per* Lord Mustill. ... [Paras. 73-4.]

65 As we have seen, in considering whether the three certainties were met in the case at bar, the chambers judge noted the statement of purposes for which the loan was to be used, finding that these were "intended to, and had the effect of, restricting the Cliffs' freedom to utilize the funds for purposes other than those set out in the commitment letter." (Para. 105.) Further, since the commitment letter had been executed after the Company had sought *CCAA* protection, Century was obviously aware that Cliffs' continued existence was "in doubt". He continued:

> ... In light of the danger that Century's funds would simply be used to satisfy other creditors and wind up the project instead of constructing and completing the development, it makes sense that Century set out the permitted purposes for which the Funds could be used in clauses 3 and 8(a) of the commitment letter. The purpose of Century's credit facility was not to pay

> secured creditors and wind up the project; rather, it was to provide funds which were required for the project's continued existence and completion. [At para. 107.]

66 It will be recalled that the Order to Pay which was signed by Cliffs and the Monitor and then forwarded to Century and its solicitors, was somewhat more specific than the commitment letter about the purposes for which the first advance was to be used. (See above at para. 52.) It referred to the payment of prior encumbrances, taxes, assessments, utility charges, a property valuation fee, and solicitor's charges. The chambers judge seemed to assume that this "direction" from the Monitor to Century was in conflict with the commitment letter: he said it could not "negate or vary the terms of the purpose trust in the commitment letter." Having said this, he concluded without more that the language of the commitment letter disclosed a mutual intention between Century and the Company to create a *Quistclose* trust.

67 With respect, I find myself in disagreement with much of the chambers judge's analysis. First, I doubt that a *Quistclose* trust was created. This is not a case in which A put B in funds in order to pay C, a creditor of B. (See *Niedner*, *supra*.) Rather, A (Century) put B (Lawson, not a debtor) in funds to disburse to B's client, C (Cliffs), on B's undertaking to hold the money until it received A's written authority to release to C. The undertaking was a type of trust, certainly, but did not, as in *Twinsectra*, impose a duty on B to supervise how its client C used the money. The trust was almost completely executed — Lawson disbursed most of the advance, including the $25,000 paid to A — and did not "fail" in the *Quistclose* sense.

68 Nor is this a case like *Twinsectra*, in which the bankruptcy or insolvency of C made the purposes of the loan impossible, such that a resulting trust was necessary to ensure the monies reverted to A and did not fall into the hands of C's creditors. Indeed, A was fully aware of C's financial condition and believed at the time of the advance that it was entitled to the super-priority given by the DIP Order. Once it had obtained additional covenants from the borrower's principals, Century directed that the funds be disbursed. Upon all the conditions being met, the funds were *ipso facto* "advanced" to C. The Company would have been bound by *contract* to use the funds for the general purposes it had agreed on in the letter, but the monies were then its own, and but for this litigation, would presumably have been paid into its general bank account. As Lord Wilberforce observed in *Quistclose*, "in the absence of some *special arrangement* creating a trust ..., payments of this kind are made upon the basis that they are to be included in a company's assets." There was no obligation on Cliffs to hold what it received from the loan proceeds in any separate account; rather, as stated by Lord Millett in *Twinsectra*, "the money [was] intended to be at the free disposal of the [borrower]" and could be used as part of its cash flow.

69 In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties (Century and Cliffs) to create the specialized vehicle that is a *Quistclose* trust. The only trust in existence here was the usual type created by the undertaking given to the lender by Lawson as Cliffs' solicitors. The terms of that trust were met, as were the terms of the DIP Order.

70 Nor do I agree that the terms of the Order to Pay, under which the Monitor directed Century to pay the first *tranche* into Lawson's trust account and gave its "irrevocable authority" to pay out taxes, assessments, utilities, solicitor's charges and prior encumbrances, would have constituted a breach or "negation" of any trust or of the June 27 order incorporating the commitment letter. Century chose to make the advance it did in July 2008, fully aware of the circumstances that had led to the receivership and to the *CCAA* order, pronounced on May 26, 2008. We may assume Century had fully discussed the risk of lending to Cliffs and had decided that advancing funds for the specified purposes in the conditions prevailing in August was necessary or conducive to the Company's efforts to revive the project (which efforts were referred to by Tysoe J.A. in his reasons, *supra*, at paras. 14-5). And, by signing the Order to Pay, the Monitor must be taken to have indicated its satisfaction that the expenditures were appropriate. Both decisions were judgements that in my opinion were not unreasonable, and ones that a court should not second-guess.

71 In summary, I conclude that:

- the chambers judge did not err in finding that cause of action estoppel did not apply;

• the chambers judge did err in finding that the criteria for issue estoppel were not met. Although different questions were addressed and different evidence was adduced in the two hearings, the issues addressed in the second proceeding were a foundational element of the first order;

• the chambers judge erred in the exercise of his discretion not to apply issue estoppel in that he failed to recognize the finality of his first order, and the requirement for "special circumstances" such as fraud or the discovery of fresh evidence that due diligence could not have brought forward. No such circumstances were present in this case;

• the chambers judge erred in finding that the conditions in the DIP Order for the advances by Century were not met;

• contrary to the finding below, the *tranche* which Century purported to advance on August 7, 2008 was advanced in fact and in law, and Fisgard Liberty's interest thereupon attached to the funds and remains attached to the residue still held by Lawson, subject to the outstanding issue of Lawson's claim;

• the chambers judge erred in finding that a *Quistclose* trust was intended or created; and

• the chambers judge erred in ruling that the use by Cliffs of the funds for the purposes stated in the Order to Pay would have been a violation of the commitment letter or the order that incorporated it.

72 I would therefore allow Fisgard Liberty's appeal and declare that as between it and Century, its interest in the funds ranks in priority to any interest of Century, but that pending this court's determination of Lawson's claim to the funds (or settlement of that issue by the relevant parties) the funds shall continue to be held by Lawson in trust.

***Prowse J.A.*:**

I Agree:

***Chiasson J.A.*:**

I Agree:

Appeal allowed.

Tab 18

2013 ABCA 386
Alberta Court of Appeal

Milner v. Sostar

2013 CarswellAlta 2304, 2013 ABCA 386, [2014] A.W.L.D. 10, [2014] A.W.L.D. 11, [2014] A.W.L.D. 156, 235 A.C.W.S. (3d) 258, 566 A.R. 29, 597 W.A.C. 29

Dean Milner and Susan Milner, Respondents (Plaintiffs) and John Sostar, Appellant (Defendant)

Constance Hunt J.A., Ronald Berger J.A., Rosemary Nation J. (ad hoc)

Heard: October 8, 2013
Judgment: November 21, 2013
Docket: Calgary Appeal 1201-0210-AC

Proceedings: reversing *Milner v. Sostar* (2012), 2012 ABQB 473, 2012 CarswellAlta 1506 (Alta. Prov. Ct.)

Counsel: M.X. James, for Respondents
C.M.A. Souster, for Appellant

Subject: Contracts; Property; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.vii Whether cause of action identical
Real property
III Sale of land
III.5 Option contracts
III.5.b Exercise of option
III.5.b.iii Contractual requirements
III.5.b.iii.C Notice
Headnote
Real property --- Sale of land — Option contracts — Exercise of option — Contractual requirements — Notice
Respondents granted appellant option to purchase parcel of land conditional on appellant obtaining subdivision approval before January 1, 2011, extendable for five years if plaintiffs caused approval delay — Respondents refused to sign authorization that would have allowed appellant to obtain subdivision approval, and appellant registered caveats on respondents' land title — After respondents successfully applied to discharge caveats, judge considered himself functus and did not accept evidence of letter produced by defendant showing that he gave respondents notice that he was exercising his right to extend time to obtain subdivision approval — After appeal court overturned judge's decision and remitted decision for reconsideration, judge refused to admit letter as new evidence and caveats were discharged from title — Defendant appealed judge's order — Appeal allowed — To resist discharge of caveat, Land Titles Act requires that caveator need only show prima facie claim to interest in land — Appellant established prima facie case that respondents would have been made aware through his letter that he was exercising his right to extend — Agreement between appellant and respondents did not specify how defendant was to exercise his right to extend option — Defendant's letter was sufficient notice to establish prima facie case of interest in land, and judge's conclusion to contrary constituted palpable and overriding error in his assessment of evidence.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Whether cause of action identical

Respondents granted appellant option to purchase parcel of land conditional on appellant obtaining subdivision approval before January 1, 2011, extendable for five years if plaintiffs caused approval delay — Respondents refused to sign authorization that would have allowed appellant to obtain subdivision approval, and appellant registered caveats on respondents' land title — After respondents successfully applied to discharge caveats, judge considered himself functus and did not accept evidence of letter produced by defendant showing that he gave respondents notice that he was exercising his right to extend time to obtain subdivision approval — After appeal court overturned judge's decision and remitted decision for reconsideration, judge refused to admit letter as new evidence and caveats were discharged from title — Defendant appealed judge's order — Appeal allowed — Respondents argued that these issues were argued previously, and could not be argued again (res judicata) — Two-step analysis to determine if issue is res judicata is to first determine if certain pre-conditions for issue estoppel are met, and then to determine whether in all circumstances to apply issue estoppel as matter of discretion — First pre-condition is to determine if issue was actually decided in prior judicial proceeding, not merely that it could have been previously decided — Previous appeal decision did not deal with whether appellant was required to give notice of his intention to exercise option, or whether he complied with that obligation — First pre-condition of issue estoppel was not met, and appeal ground was not res judicata.

Table of Authorities

Cases considered:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

Ernst & Young Inc. v. Central Guaranty Trust Co. (2006), 384 W.A.C. 225, 397 A.R. 225, 24 B.L.R. (4th) 218, 66 Alta. L.R. (4th) 231, 2006 CarswellAlta 1479, 2006 ABCA 337, [2007] 2 W.W.R. 474, 28 E.T.R. (3d) 174 (Alta. C.A.) — referred to

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Milner v. Sostar (2012), 2012 ABCA 128, 2012 CarswellAlta 759 (Alta. C.A.) — referred to

Scott v. Cook (1970), 12 D.L.R. (3d) 113, [1970] 2 O.R. 769, 1970 CarswellOnt 253 (Ont. H.C.) — followed

574095 Alberta Ltd. v. Hamilton Brothers Exploration Co. (2003), [2003] 4 W.W.R. 417, 2003 ABCA 34, 10 Alta. L.R. (4th) 23, 30 C.P.C. (5th) 39, 320 A.R. 351, 288 W.A.C. 351, 2003 CarswellAlta 120 (Alta. C.A.) — referred to

Statutes considered:

Land Titles Act, R.S.A. 2000, c. L-4

s. 141(1) — referred to

APPEAL from judgment at *Milner v. Sostar* (2012), 2012 ABQB 473, 2012 CarswellAlta 1506 (Alta. Prov. Ct.)regarding removal of caveats registered against respondent's land and admission of fresh evidence.

Per curiam:

1 This appeal relates to two orders granted by the chambers judge. In the order of June 15, 2011 (pursuant to unreported oral reasons) he discharged the appellant's caveats registered against the respondents' land. In the order of July 20, 2012 (for reasons given at 2012 ABQB 473 (Alta. Prov. Ct.)) he refused to admit fresh evidence, after the Court of Appeal (for reasons given at 2012 ABCA 128 (Alta. C.A.)) had directed him to consider whether it should be admitted.

2 The appeal from the decision of July 20, 2012 is allowed because the fresh evidence should be admitted. The appeal from the June 15, 2011 decision is also allowed. The caveats should be reinstated.

Background Facts

3 The appellant sold a four-acre parcel of land to the respondents in 2007. At the time of the sale, the respondents gave him an option to purchase two acres of land; on December 21, 2007 the appellant registered a caveat on title disclosing a "purchasers interest" in the respondents' land. It was a pre-condition to the option that the appellant had to obtain subdivision for the two acres, and register the subdivision approval on or before January 1, 2011.

4 The respondents were under a contractual obligation to sign any application or documents necessary to allow the appellant to make the subdivision application. The written agreement provided that if the appellant was delayed in obtaining subdivision approval and registration of that approval due to a breach or non-performance by the respondents, the appellant was entitled, in his "sole and absolute discretion", to extend the January 1, 2011 deadline by up to a further five years.

5 The appellant made an initial application for subdivision, with the consent of the respondents, which was denied in the spring of 2009. In June 2010, the appellant's counsel sought the respondents' signature on a second subdivision application. The respondents refused to cooperate unless the appellant paid a portion of the property taxes on the property. The appellant did not pay the taxes, so the respondents did not consent to the application, and it could not proceed.

6 In December 2010, the appellant's new counsel wrote a letter to the respondents' counsel (the December 31 letter) which is the new evidence referred to in the first appeal. The wording of that letter germane to these appeals is as follows:

> I note that the option is set to expire on January 1, 2011, absent a breach of the contract. My client is of the opinion that yours has failed to reasonably comply with the promises, representations, and obligations contained in provisions D&E of the preamble to the agreement and asserts that he is accordingly entitled to the extension under condition 3(b).

7 The appellant's counsel then prepared a second caveat disclosing a "purchasers interest" that was registered at the Land Titles Office on January 21, 2011.

8 The respondents brought an application to discharge the January 21, 2011 caveat. At the hearing of that application in June 2011, there was argument about whether the appellant was obliged to pay the taxes, and his right to extend the option and file a caveat. Both counsel conceded that near the end of that argument, for the first time, as a result of an inquiry by the chambers judge, a question arose as to whether the appellant was obligated to and had, in fact, given notice of his intention to extend the option for a further five years.

9 The chambers judge held there was a breach by the respondents in that their obligation to consent to the subdivision was not conditional on the appellant paying property taxes. He concluded that the appellant had to communicate any decision to exercise the extension before January 1, 2011. He added that as the appellant had failed to give notice of an election to extend the option, the option expired and the two caveats should be discharged.

10 The issue that led to this matter being considered by the Court of Appeal the first time was that immediately after the application the appellant's counsel reviewed his file and located the December 31 letter. Steps were taken immediately to make the chambers judge aware of this letter, with a request that he review his ruling. He declined to consider the letter or reconsider his decision, believing he was *functus*. The Court of Appeal concluded he was not *functus*, and remitted the matter to him to consider the letter and any additional argument. On July 3, 2012 he heard argument about the new evidence, being the December 31 letter and a responding letter from respondents' counsel of February 9, 2011.

11 He held that the wording of the December 31 letter was not a clear exercise of the right of extension, but rather a reiteration of entitlement or an opinion. It did not state without equivocation that the appellant was exercising his right to an extension. As a result, he held that the evidence would not have changed his earlier decision, and thus failed to meet the first of two requirements for the admission of new evidence, as set out in *Scott v. Cook*, [1970] 2 O.R. 769 (Ont. H.C.) at para 59, (1970), 12 D.L.R. (3d) 113 (Ont. H.C.) ["*Scott*"]. He affirmed his earlier order that the two caveats be discharged.

Standard of Review

12 The standard of review on a question of pure law is correctness. On a question of mixed fact and law, or the application of a legal standard to a set of facts, the standard of review is palpable and overriding error in the assessment of the evidence as a whole: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 8 and 36, [2002] 2 S.C.R. 235 (S.C.C.).

Grounds of Appeal

13 The appellant asserts that the chambers judge erred by finding an implied requirement that the appellant notify the respondents that he wished to extend the option. Alternatively, he contends that the chambers judge erred in ruling that the December 31 letter was insufficient notice.

14 The respondents claim that the first ground of appeal is *res judicata* as that issue was before the Court of Appeal at the first appeal. They add that the chambers judge correctly considered the December 31 letter to be insufficient notice, and correctly concluded it did not meet the first step of the *Scott* test.

Analysis

Res Judicata

15 This court must first deal with the *res judicata* argument. At the first appeal, the appellant requested relief to allow the admission of the new evidence. When admitted, he argued that a finding should be made that he did provide notice prior to January 1, 2011. The appellant also argued that the filing of a caveat after January 1 was sufficient and proper notice of the extension of the option. The respondents argue that the appellant cannot pursue these arguments again before this Court.

16 The law pertaining to *res judicata* requires a two-step analysis for determining whether issue estoppel bars the advancement of a question in subsequent judicial proceedings. There must be a determination whether, first, the three preconditions for issue estoppel are established, and second, whether in all the circumstances issue estoppel ought to be applied as a matter of discretion. See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) at para 33, [2001] 2 S.C.R. 460 (S.C.C.) ["*Danyluk v. Ainsworth Technologies Inc.*"]; *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337 (Alta. C.A.) at para 29, (2006), 397 A.R. 225 (Alta. C.A.) ["*Ernst & Young Inc.*"].

17 The three pre-conditions for issue estoppel are:

(i) the same question/issue has been decided,

(ii) the judicial decision which is said to create the estoppel is final, and

(iii) the parties to the judicial decision or their privies must be the same as the parties to the proceedings in which the estoppel is raised, or their privies.

18 The first pre-condition requires that the question in issue was actually decided in the prior judicial proceeding, not merely that it *could* have been previously decided: *Ernst & Young Inc.* at para 31. The questions decided in previous proceedings included one distinctly put into issue and decided, and questions of fact, law or mixed fact and law that were necessarily (if not explicitly) determined in the previous proceedings: *Danyluk* at para 54; *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2003 ABCA 34 (Alta. C.A.) at para 47, (2003), 320 A.R. 351 (Alta. C.A.) ["*Hamilton Bros*."]. A question will only have been necessarily decided in previous proceedings when it was so fundamental to the prior decision that it could not stand without the question having been decided in a particular way: *Danyluk* at para 54; *Hamilton Brothers* at para 52.

19 The first Court of Appeal decision only dealt with whether the chambers judge erred in law in concluding he was *functus*. This Court expressed no opinion and did not decide the propriety or correctness of his decision to imply a notice obligation into the agreement. Nor was any opinion rendered on whether, if there was an implied notice requirement, the appellant had complied with that obligation. Therefore, there is no issue identity between what was decided in the first appeal and the questions to be decided now.

20 Since the first pre-condition to establish issue estoppel is not met, the first ground of appeal is not *res judicata*.

Substantive Grounds of Appeal

21 It is doubtful that the chambers judge erred in concluding that the appellant was required to give the respondents notice that he wished to extend the option. It would be unreasonable to think that he could wait up to five years to tell them he wanted to extend his rights. Moreover, if he did not inform them, the option agreement would have already expired and his rights to extend could not be revived thereafter.

22 In any event, in our view the chambers judge erred in his conclusion that the December 31 letter was not worded specifically enough to constitute notice. He failed to consider the fact that the option agreement gave the appellant the "sole and absolute discretion" to extend, if there was a breach or non-performance by the respondents of their obligations that delayed subdivision approval. In contrast to the notice provision concerning the exercise of the option to purchase itself (clause 4), the provision about extending the option in the circumstances of clause 3(b) did not specify how to exercise that right. The central question, therefore, was whether the appellant had established a *prima facie* case that the respondents would reasonably have been made aware that the appellant was exercising his right to extend. In order to resist a show cause hearing for the discharge of a caveat under s 141(1) of the *Land Titles Act*, RSA 2000, c L-4, the caveator need only show a *prima facie* claim to an interest in land: *Main v. Jeerh*, 2006 ABCA 138 (Alta. C.A.) at para 17, (2006), 384 A.R. 276 (Alta. C.A.).

23 We are satisfied that the December 31 letter was arguably sufficient notice to the respondents that the appellant was exercising a right to extend his option. Although the respondents did not agree that he could do so (contesting the breach that was the basis of his right), when one views the background circumstances, the terms of the agreement, the wording of the December 31 letter and the subsequent caveat, the conclusion is that the respondents were put on notice sufficient to establish a *prima facie* case and the chamber judge's conclusion to the contrary constitutes palpable and overriding error in his assessment of the evidence. He should have held that the December 31 letter would likely change the result of his earlier decision, and therefore met the first pre-condition in the *Scott* test.

24 It is clear that the issue of whether the appellant had communicated his position about extending the option was raised very late in oral argument before the chambers judge, and came after affidavits and written briefs had been filed. The second part of the *Scott* test is therefore met. Though the letter existed before the June application, the fact of its relevance or critical importance could not reasonably have been anticipated until the chambers judge raised the issue in the hearing. Thereafter, the appellant's counsel diligently brought the letter to everyone's attention.

25 As a result, the December 31 letter should have been admitted. Since it arguably gave notice of the appellant's intention to extend the option, the respondents' application to remove the caveats should have been dismissed.

Conclusion

26 The appeal is allowed. The caveats shall be restored to the title.

Appeal allowed.

Tab 19

Most Negative Treatment: Check subsequent history and related treatments.

2001 SCC 44, 2001 CSC 44
Supreme Court of Canada

Danyluk v. Ainsworth Technologies Inc.

2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, 2001 CSC 44, [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 106 A.C.W.S. (3d) 460, 10 C.C.E.L. (3d) 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 201 D.L.R. (4th) 193, 272 N.R. 1, 34 Admin. L.R. (3d) 163, 54 O.R. (3d) 214 (headnote only), 7 C.P.C. (5th) 199, J.E. 2001-1439, REJB 2001-25003

Mary Danyluk, Appellant v. Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, Respondents

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 31, 2000
Judgment: July 12, 2001
Docket: 27118

Proceedings: reversing (1998), 41 C.C.E.L. (2d) 19 (Ont. C.A.)

Counsel: *Howard A. Levitt* and *J. Michael Mulroy*, for appellant
John E. Brooks and *Rita M. Samson*, for respondents

Subject: Employment; Public; Insolvency; Family; Civil Practice and Procedure
Related Abridgment Classifications
Administrative law
II Natural justice
II.1 Duty of fairness
II.1.a Procedural fairness
II.1.a.i Opportunity to respond and make submissions
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles
Labour and employment law
III Employment standards legislation
III.15 Administration and enforcement
III.15.g Review or referral of decision
Labour and employment law
III Employment standards legislation
III.15 Administration and enforcement
III.15.i Relation to other remedies
Labour and employment law
III Employment standards legislation

III.16 Civil actions

Headnote

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing to ensure that employee had received adequate notice and responded to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Appeal and judicial review

Denial of natural justice by employment standards officer did not deprive her decision of its judicial character — Errors made by standards officer rendered decision voidable, but not void — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — Employee was entitled to appropriate consideration of factors relevant to whether court should exercise its discretion — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14.

Employment law --- Wages and benefits — Statutory enforcement of payment of wages — Procedure for recovery under statute — Relation to other remedies

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Remedy available pursuant to s. 67 of Employment Standards Act did not give employee right of appeal — Director had discretion to deny application for review or to appoint adjudicator to conduct hearing — Decision of employee not to apply for review by director was not fatal to her action for $300,000 of unpaid wages and commissions — By failing to ensure that employee had received adequate notice and failing to give her opportunity to respond to case laid out against her, employment standards officer prevented claim from being properly considered or adjudicated — Invoking issue estoppel could result in significant injustice — Employment Standards Act, R.S.O. 1990, c. E.14, s. 67.

Procédure --- Jugements et ordonnances — Chose jugée et préclusion — Préclusion découlant d'une question déjà tranchée — Principes généraux

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à tigre de salaire et de commissions impayés — Employée avait droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail individuels --- Salaires et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Appel et révision judiciaire

Manquement à la justice naturelle de l'agente des normes d'emploi n'a pas fait perdre à sa décision son caractère judiciaire — Erreurs faites par l'agente des normes d'emploi avaient pour effet de rendre sa décision annulable, mais non nulle — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre

de salaire et de commissions impayés — Employée avait le droit à ce qu'il soit donné une considération appropriée aux facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire ou non — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14.

Droit du travail (rapports individuels) --- Salaire et avantages sociaux — Coercition légale au paiement du salaire — Procédure pour recouvrer en vertu de la loi — Relation avec les autres recours

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision ou de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant 300,000 $ à titre de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employée d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importante injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

Droit administratif --- Exigences de la justice naturelle — Droit d'être entendu — Droits procéduraux lors de l'audience — Opportunité de répondre et de faire des représentations

Recours disponible en vertu de l'art. 67 de la Loi sur les normes d'emploi ne fournissait aucun droit d'appel à l'employée — Directeur avait le pouvoir discrétionnaire de décider de rejeter ou non la demande de révision, de nommer un décideur et de présider l'audience — Décision de l'employée de ne pas demander de révision au directeur n'a pas porté un coup fatal à son action réclamant le paiement de salaire et de commissions impayés — En ne s'assurant pas que l'employée reçoive un préavis adéquat et que celle-ci réponde à la preuve devant elle, l'agente des normes d'emploi a empêché la réclamation de l'employé de 300 000 $ d'être examinée ou jugée de façon appropriée — Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme effet une importance injustice — Loi sur les normes d'emploi, L.R.O. 1990, c. E.14, art. 67.

The employee claimed that she was owed $300,000 in unpaid wages and commissions by the employer. She filed a complaint under the *Employment Standards Act* (Ont.) for unpaid wages and commissions. The employer denied the claim, alleging that the employee had resigned from her position. The employment standards officer investigated the complaint. The employer responded to the complaint through the standards officer. The standards officer did not inform the employee of the employer's response and did not give her an opportunity to respond. The employee commenced an action against the employer, seeking unpaid wages, commissions, and damages for wrongful dismissal. The standards officer denied the employee's claim for commissions. The standards officer found that the employee was entitled to two weeks' pay in lieu of notice for termination. Rather than applying to the director for a review of the standards officer's decision, the employee chose to pursue a civil action. The employer's motion to strike out the action was granted, barring the action on the ground of issue estoppel. The motions judge found that the standards officer's decision was final and that the criteria for issue estoppel had been met. The employee appealed unsuccessfully. The Ontario Court of Appeal concluded that the standards officer's decision was final on the ground that neither party had exercised its right of internal appeal. The Court of Appeal confirmed that the standards officer's decision was judicial for the purpose of issue estoppel. The standards officer's failure to observe procedural fairness did not prevent the operation of issue estoppel. Although the standards officer denied the employee natural justice, the employee forfeited her right to judicial review by not applying to the director for a review of the decision. The employee appealed.

Held: The appeal was allowed.

Although it is compelling not to duplicate litigation, the general principles of the estoppel doctrine need re-examination when a claim for $300,000 is barred by a manifestly improper and unfair administrative decision. Issue estoppel is a doctrine of public policy, and the court maintains discretion to relieve against the harsh consequences of estoppel even if the preconditions of issue estoppel are present.

The redress procedures under the *Employment Standards Act* are incapable of dealing with complex questions of law and fact. An oral hearing, at which both parties are in attendance, is not required. Standards officers are not required to have legal training. No monetary limit is placed on the cases that fall within the standards officer's jurisdiction. Procedural defects can be rectified on review to the director. The request for review can, however, be denied. The director has discretion whether to appoint an adjudicator and, consequently, whether to conduct a hearing. Essentially, a right of appeal does not exist.

Because the employee was allowed to bring an action, the employer was not entitled as of right to an imposition of estoppel. Standards officers are required to exercise adjudicative functions in a judicial manner. The adjudication of the employee's claim was of a judicial nature. Denial of natural justice by the standards officer did not deprive her decision of its judicial character. The decision remained judicial, as distinct from administrative or legislative decisions. Errors made by the standards officer rendered the decision voidable, but not void. The employee's decision to pursue the civil action rather than applying for review was not fatal to the action. The denial of natural justice by the standards officer was important to the exercise of the court's discretion.
The three preconditions to issue estoppel were established. The employee was entitled to the appropriate consideration of factors relevant to whether the court should exercise its discretion. The legislature did not intend for the statutory proceedings to be the exclusive forum for employment complaints. Because the employee's action was commenced before the standards officer released her decision, the employer knew that it was expected to respond to parallel proceedings. The purpose of the Act is to provide inexpensive and expedited resolutions of employment disputes. By placing excess weight on the statutory decision in terms of issue estoppel, the purpose of the legislation could be undermined. Although the employee had no right of appeal from the standards officer's decision, the employee failed to exercise the opportunity provided to apply for a review of the decision. Few safeguards existed for the parties in the statutory process. The standards officer was ill-equipped to decide complex issues of law. When the employee invoked the statutory process, she was personally vulnerable and facing dismissal. It is likely that the legislature did not intend for the process to become a barrier for claims involving large sums. The standards officer's decision prevented the employee from receiving adequate notice and from responding to the case laid out against her. As such, the employee's claim had not been properly considered or adjudicated. Invoking issue estoppel could result in a significant injustice. Given the cumulative effect of the relevant factors, the court should exercise its discretion and refuse to apply issue estoppel.
L'employée prétendait que son employeur lui devait 300 000 $ à titre de salaire et de commissions impayés. Elle a déposé une plainte, en vertu de la *Loi sur les normes d'emploi*, dans laquelle elle réclamait le salaire et les commissions impayés. L'employeur a nié lui devoir de l'argent et a prétendu que l'employée avait démissionné de ses fonctions. Une agente des normes d'emploi a enquêté sur la plainte. L'employeur a donné une réponse à la plainte de l'employée à l'agente des normes d'emploi. Cette dernière n'en a pas informé l'employée et ne lui a pas donné l'opportunité d'y répondre. L'employée a intenté une action contre l'employeur dans laquelle elle réclamait le salaire et les commissions impayés ainsi que des dommages-intérêts pour congédiement injustifié. L'agente a rejeté la réclamation de l'employée pour les commissions. Elle a conclu que l'employée avait droit à deux semaines de salaire à titre d'indemnité de préavis. Plutôt que de demander au directeur une révision de la décision rendue par l'agente, l'employée a choisi de continuer son action.
La requête en irrecevabilité de l'employeur a été accordée, ce qui a mis un terme à l'action au motif de préclusion découlant d'une question déjà tranchée. Le juge saisi de la requête a conclu que la décision de l'agente des normes d'emploi était définitive et qu'on avait satisfait aux critères de la préclusion. Le pourvoi de l'employée a été rejeté. La Cour d'appel a conclu que la décision de l'agente des normes d'emploi était définitive au motif qu'aucune des deux parties n'avait utilisé le droit d'appel interne. La Cour d'appel a confirmé que la décision de l'agente était judiciaire en ce qui avait trait à la préclusion. Le défaut de l'agente d'avoir respecté l'équité procédurale n'avait pas empêché que la préclusion ait lieu. Même si l'agente des normes d'emploi avait nié à l'employée l'application de la justice naturelle, cette dernière avait renoncé à son droit à la révision judiciaire lorsqu'elle n'avait pas demandé au directeur de réviser la décision. L'employée a interjeté appel.
Arrêt: Le pourvoi a été accueilli.
Même s'il est important qu'il n'y ait pas de poursuites en double, les principes généraux de la doctrine de la préclusion doivent être réexaminés lorsqu'ils ont pour effet de permettre à une décision administrative manifestement inappropriée et inéquitable d'empêcher une réclamation de 300 000 $. La préclusion est une doctrine d'ordre public et le tribunal conserve le pouvoir discrétionnaire de remédier aux dures conséquences de celle-ci, mêmes si ses conditions préalables sont présentes.
Les mesures de redressement prévues à la loi ne pouvaient se préoccuper de questions de droit et de fait complexes. On n'exigeait pas la tenue d'une audience verbale à laquelle seraient présentes les deux parties. Les agents des normes d'emploi n'étaient pas tenus d'avoir une formation juridique. La loi ne prévoyait aucune limite pécuniaire aux affaires qui pouvaient relever de la compétence de l'agent. Les défaux procéduraux pouvaient être rectifiés en demandant une révision au directeur. La demande de révision pouvait cependant être refusée. Le directeur avait le pouvoir discrétionnaire lui permettant de nommer un décideur, et donc de présider une audience. Il n'existait, essentiellement, aucun droit d'appel.
Puisqu'on a permis à l'employée d'intenter une action, l'employeur n'avait pas le droit d'obtenir de plein droit la préclusion. Les agents de normes d'emploi devaient exercer des fonctions de décideurs de manière judiciaire. La décision relative à la

réclamation de l'employée avait une nature judiciaire. Le manquement à la justice naturelle de l'agente des normes d'emploi n'a pas enlevé à la décision rendue par celle-ci son caractère judiciaire. Les erreurs qu'elle a faites ne rendaient pas sa décision nulle, mais plutôt annulable. La décision prise par l'employée de continuer son action, plutôt que de demander une révision de la décision, n'a pas porté un coup fatal à son action. Le manquement à la justice naturelle avait de l'importance relativement à l'exercice par le tribunal de son pouvoir discrétionnaire.

Les trois conditions préalables à la préclusion ont été établies. L'employée avait droit à ce que les facteurs pertinents à la question de savoir si le tribunal devait exercer son pouvoir discrétionnaire soient examinés de façon appropriée. Le législateur ne peut avoir eu l'intention que les procédures prévues par la loi soient le seul forum existant pour les plaintes des employés. Puisque l'action de l'employée a été intentée avant que l'agente des normes d'emploi ne rende sa décision, l'employeur savait qu'il aurait à répondre à des procédures parallèlles. L'objet de la loi était de fournir des moyens peu dispendieux et rapides pour résoudre des litiges relatifs à l'emploi. En accordant un poids excessif à la décision prise en vertu de la loi, dans le contexte de la préclusion découlant d'une question déjà tranchée, l'objet de la loi pourrait être compromis. Même si l'employée n'avait pas de droit d'appel à l'encontre de la décision de l'agente des normes d'emploi, elle a quand même fait défaut d'utiliser la possibilité qui lui était fournie, soit celle qui lui permettait de demander la révision de la décision. La procédure prévue par la loi fournissait peu de garanties pour les parties. L'agente n'avait pas les outils lui permettant de décider de questions de droit complexes. Au moment où l'employée s'est prévalue de la procédure prévue par la loi, elle était vulnérable et faisait face à un congédiement. Le législateur n'avait probablement pas l'intention que ce processus empêche les réclamations portant sur de larges sommes d'argent. En tant que telle, la réclamation de l'employée n'avait pas été évaluée ou décidée de façon appropriée. Invoquer la préclusion découlant d'une question déjà tranchée pourrait avoir comme résultat une grave injustice. Compte tenu de l'effet cumulatif de tous les facteurs pertinents, le tribunal devrait exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion.

Table of Authorities

Cases considered by/Jurisprudence citée par *Binnie J.*:

Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535, 26 C.C.E.L. (2d) 228, 32 B.C.L.R. (3d) 136 (B.C. S.C. [In Chambers]) — referred to

Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397, 28 D.T.C. 6278 (S.C.C.) — followed

Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41, [1991] 2 A.C. 93 (U.K. H.L.) — considered

Bell v. Miller (1862), 9 Gr. 385 (U.C. Ch.) — referred to

Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), *(*sub nom. *Bacich v. Braithwaite)* 42 C.C.E.L. (2d) 1, 176 N.S.R. (2d) 173, 538 A.P.R. 173, 39 C.P.C. (4th) 267 (N.S. C.A.) — referred to

British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 159 D.L.R. (4th) 50, 107 B.C.A.C. 191, 174 W.A.C. 191, 19 C.P.C. (4th) 1, 50 B.C.L.R. (3d) 1, 7 Admin. L.R. (3d) 209 (B.C. C.A.) — considered

Downing v. Graydon (1978), 21 O.R. (2d) 292, 78 C.L.L.C. 14,183, 92 D.L.R. (3d) 355 (Ont. C.A.) — referred to

Guay v. Lafleur (1964), [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226 (S.C.C.) — referred to

Hamelin v. Davis, 18 B.C.L.R. (3d) 85, [1996] 6 W.W.R. 318, 70 B.C.A.C. 81, 115 W.A.C. 81 (B.C. C.A.) — referred to

Harelkin v. University of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14 (S.C.C.) — followed

Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183, 98 C.L.L.C. 210-003 (Ont. Gen. Div.) — referred to

Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1, 109 Sask. R. 49, 42 W.A.C. 49, 103 D.L.R. (4th) 585 (Sask. C.A.) — considered

Machado v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132 (Ont. Gen. Div.) — referred to

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Poucher v. Wilkins (1915), 33 O.L.R. 125, 21 D.L.R. 444 (Ont. C.A.) — considered
R. v. Consolidated Maybrun Mines Ltd., 108 O.A.C. 161, 158 D.L.R. (4th) 193, 123 C.C.C. (3d) 449, 225 N.R. 41, 38 O.R. (3d) 576 (note), [1998] 1 S.C.R. 706, 7 Admin. L.R. (3d) 23, 26 C.E.L.R. (N.S.) 262 (S.C.C.) — considered
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R. v. Litchfield, 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321 (S.C.C.) — referred to
R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128, 65 D.L.R. 1, [1922] 2 W.W.R. 30, 37 C.C.C. 129 (Canada P.C.) — considered
R. v. Sarson, 197 N.R. 125, 107 C.C.C. (3d) 21, 135 D.L.R. (4th) 402, 36 C.R.R. (2d) 1, 91 O.A.C. 124, 49 C.R. (4th) 75, [1996] 2 S.C.R. 223 (S.C.C.) — referred to
R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97 (S.C.C.) — referred to
Raison v. Fenwick (1981), 120 D.L.R. (3d) 622 (B.C. C.A.) — referred to
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Rasanen v. Rosemount Instruments Ltd. (1994), 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 17 O.R. (3d) 267, 112 D.L.R. (4th) 683, 68 O.A.C. 284 (Ont. C.A.) — not followed
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Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer) (1994), 3 C.C.E.L. (2d) 153, (sub nom. *Susan Shoe Industries Ltd. v. Ricciardi)* 18 O.R. (3d) 660, (sub nom. *Susan Shoe Industries Ltd. v. Ontario (Minister of Labour))* 70 O.A.C. 347 (Ont. C.A.) — referred to
Thoday v. Thoday (1963), [1964] 1 All E.R. 341, [1964] P. 181 (Eng. C.A.) — referred to
Thrasyvoulou v. Environment Secretary (1989), [1990] 2 A.C. 273 (U.K. H.L.) — referred to
Wong v. Shell Canada Ltd. (1995), 35 Alta. L.R. (3d) 1, 15 C.C.E.L. (2d) 182, 174 A.R. 287, 102 W.A.C. 287 (Alta. C.A.) — considered

Statutes considered/Législation citée:

Courts of Justice Act/Tribunaux judiciaires, Loi sur les, R.S.O./L.R.O. 1990, c. C.43
s. 23(1) — referred to

Employment Standards Act/Normes d'emploi, Loi sur les, R.S.O./L.R.O. 1990, c. E.14
Generally/en général — considered

s. 1 "wages" — considered

s. 2(2) — considered

s. 6 — considered

s. 6(1) — considered

s. 65 [am./mod. 1991, c. 16, s. 9] — considered

s. 65(1) [rep. & sub./abr. et rempl. 1996, c. 23, s. 19(1)] — considered

s. 65(1)(c) [rep. & sub./abr. et rempl. 1991, c. 16, s. 9(1)] — considered

s. 65(7) [en./ad. 1991, c. 16, s. 9(2)] — considered

s. 67(1) [am./mod. 1991, c. 16, s. 10(1)] — considered

s. 67(2) [rep. & sub./abr. et rempl. 1991, c. 16, s. 10(2)] — considered

s. 67(3) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 67(5) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 67(7) [en./ad. 1991, c. 16, s. 10(2)] — considered

s. 68 [am./mod. 1991, c. 5, s. 16; am./mod. 1991, c. 16, s. 11; am./mod. 1993, c. 27 (Sched.)] — considered

s. 68(1) [am./mod. 1991, c. 5, s. 16; am./mod. 1991, c. 16, s. 11(1); am./mod. 1993, c. 27 (Sched.)] — considered

s. 68(3) [rep. & sub./abr. et rempl. 1991, c. 16, s. 11(2)] — considered

s. 68(7) — considered

Forest Act, R.S.B.C. 1979, c. 140

Generally — referred to

Regulations considered/Règlements cités:

Courts of Justice Act, R.S.O./L.R.O. 1990, c. C.43

Small Claims Court Jurisdiction, O. Reg. 626/00

s. 1(1)

APPEAL by employee from judgment reported 167 D.L.R. (4th) 385, 99 C.L.L.C. 210-016, 116 O.A.C. 225, 41 C.C.E.L. (2d) 19, 42 O.R. (3d) 235, 27 C.P.C. (4th) 91, 12 Admin. L.R. (3d) 1, 1998 CarswellOnt 4679, [1998] O.J. No. 5047 (Ont. C.A.), upholding motion to bar employee's action for unpaid wages and commissions on grounds of issue estoppel.

POURVOI de l'employée à l'encontre du jugement publié à 167 D.L.R. (4th) 385, 99 C.L.L.C. 210-016, 116 O.A.C. 225, 41 C.C.E.L. (2d) 19, 42 O.R. (3d) 235, 27 C.P.C. (4th) 91, 12 Admin. L.R. (3d) 1, 1998 CarswellOnt 4679, [1998] O.J. No. 5047 (C.A. Ont.), qui a maintenu la requête en irrecevabilité de l'action de l'employée pour salaire et commissions impayés au motif de préclusion découlant d'une question déjà tranchée.

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

1 The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or the "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent, Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions, which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994, met with her for about an hour. The appellant gave Ms Burke various documents, including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000 commission as claimed by you." The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the director for a review of Ms Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario (1998), 42 O.R. (3d) 235 (Ont. C.A.)

10 After reviewing the facts of the case, Rosenberg J.A., for the court, identified, at pp. 239-240, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Downing v. Graydon* (1978), 21 O.R. (2d) 292 (Ont. C.A.), to be "determinative of this issue."

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel:

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law:

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

III. Relevant Statutory Provisions

17 *Employment Standards Act*, R.S.O. 1990, c. E.14

> 1. In this Act,
>
> . . . . .
>
> "wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under

this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . . . .

6.-(1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

. . . . .

65.-(1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

. . . . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . . . .

67.-(1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . . . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . . . .

(7) The order of the adjudicator is not subject to review under section 68 and is final and binding on the parties.

68.-(1) An employer who considers themself aggrieved with an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery of service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72(2), apply for a review of the order by way of a hearing.

. . . . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . . . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *R. v. Farwell* (1894), 22 S.C.R. 553 (S.C.C.), at p. 558, *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at pp. 267-268. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G.S. Holmested and G.D. Watson, *Ontario Civil Procedure* (looseleaf updated 2000, release 3), vol. 3 Supp. (Toronto: Carswell, 1984), at 21§17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.).

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision- making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D.J. Lange in *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I. 103 (P.E.I. S.C.), at pp. 104-105, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C. C.A.), *Rasanen*, *supra*, *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.), *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326 (Ont. C.A.), and *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 85 (B.C. C.A.). See also *Thrasyvoulou v. Environment Secretary* (1989), [1990] 2 A.C. 273 (U.K. H.L.). Modifications were necessary because of the "major differences that can exist

between [administrative orders and Court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have, however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact *distinctly put in issue and directly determined* by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, *once determined*, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-268. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation," *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority of *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . . .

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the *Employment Standards Act* to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The *Employment Standards Act* applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it

is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director *may* appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "*peut nommer un arbitre de griefs pour tenir une audience*") puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (N.S. C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a *judicial* decision. According to the authorities (see, e.g., G.S. Bower, A.K. Turner and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), pp. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

(*The Doctrine of Res Judicata*, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar. Rev.* 214, at p. 215.)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Downing v. Graydon*, *supra*, *per* Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) The Nature of ESA Decisions under s. 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur* (1964), [1965] S.C.R. 12 (S.C.C.), at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday* (1963), [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (looseleaf updated 2001, release 2), vol. 1, para. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen* Abella J.A., at p. 280:

> *As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them*, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (Ont. Gen. Div.), *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Gen. Div.), *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. Gen. Div.), *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (Ont. Gen. Div.), at p. 60, reflects that position:

> The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In *Wong*, *supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (B.C. S.C. [In Chambers]).

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision-maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision-maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (Canada P.C.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at pp. 584-585. The decision remains a "judicial decision," although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Consolidated Maybrun Mines Ltd.*, *supra*, says that an act in excess of a jurisdiction which the decision-maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Consolidated Maybrun Mines Ltd.*, on which forum the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin*, *supra*, and collateral attack in *Consolidated Maybrun Mines Ltd.*, *supra*.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal

of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (Ont. C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision which Is Said To Create the Estoppel Was Final

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike *Harelkin*, *supra*, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA decision must nevertheless be treated as final for present purposes.

(c) The Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in which the Estoppel is Raised or Their Privies

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin*, *supra*, *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), *per* Laskin J.A., at pp. 339-340. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (B.C. S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, at 21§24, and G.D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

60 The concept of "privity," of course, is somewhat elastic. The learned editors of J. Sopinka, S.N. Lederman, A.W. Bryant in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at p. 1088, say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application." In my view, the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision-makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed at p. 11:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask - is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> . . . . .
>
> . . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at p. 188.

64 Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.), the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . .

65 In the present case Rosenberg J.A. noted in passing at para. 40 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at para. 69:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view, it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in *Consolidated Maybrun Mines Ltd.* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) The Wording of the Statute from which the Power To Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1), which provides that:

> No civil remedy of an employee against his or her employer is suspended *or affected* by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen*, *supra*, *per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings - including any available appeals - has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) The Purpose of the Legislation

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at p. 11, was that

> . . . a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursements] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American "Restatement of the Law," Second: Judgments (2d) (St. Paul, Minn.: American Law Institute Publishers, 1982), s. 83(2)(e), which refers to

> . . . procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . . [Factum, para. 71.]

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her: *Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer)* (1994), 18 O.R. (3d) 660 (Ont. C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen*, *supra*, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott*, *supra*, at pp. 341-342.

(e) The Expertise of the Administrative Decision-Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack:

> . . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal. (*Maybrun*, *supra*, para. 50.)

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-342:

> . . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

Appeal allowed.

Pourvoi accueilli.

Tab 20

2014 BCSC 1855
British Columbia Supreme Court

Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.

2014 CarswellBC 2916, 2014 BCSC 1855, [2014] B.C.W.L.D. 7241, [2014] B.C.W.L.D. 7242, [2015] 1 W.W.R. 606, 17 C.B.R. (6th) 41, 245 A.C.W.S. (3d) 21, 72 B.C.L.R. (5th) 294

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd., Petitioners and P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal, Respondents

G.C. Weatherill J.

Heard: September 24, 2014
Judgment: October 2, 2014
Docket: Vancouver S-139627

Counsel: J.D. Schultz, J.R. Sandrelli, for Receiver, Ernest & Young Inc.
D.E. Gruber, for Petitioners
J.D. Shields, for Valiant Trust Company
C.K. Wendell, for 0964502 B.C. Ltd.
S.A. Dubo, for Interior Savings Credit Union
R.H. Harrison, for Maynards Financial Ltd.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.5 Miscellaneous
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous
Two-phase retail, office and residential real estate development went into receivership — Receiver decided to complete phase one of development and sell it by "stalking horse" sale process — Receiver entered into agreement with stalking horse bidder — Receiver brought application for, inter alia, approval of stalking horse bidding process (bidding procedures order) and conditional order vesting title to development in bidder — Application granted in part on other grounds — Application for bidding procedures order and conditional vesting order dismissed — Receiver failed to prove stalking horse agreement was in best interests of creditors as whole — No course of action other than stalking horse bidding process appeared to have been considered, including traditional tendering process — There was no evidence on extent to which receiver tried to identify other

developers who might be interested in bidding through stalking horse bid — Dated appraisals might not accurately reflect current value of development — There was insufficient evidence as to reasonableness of termination fee.

Bankruptcy and insolvency --- Receivers — Miscellaneous

Two-phase retail, office and residential real estate development went into receivership — Receiver decided to complete phase one of development and sell it by "stalking horse" sale process — Receiver entered into agreement with stalking horse bidder — Receiver brought application for, inter alia, approval of stalking horse bidding process; increase in receiver's borrowing charge; and approval of receiver's activities — Application granted in part — Receiver's request for increase in borrowing charge granted, particularly given that more work would be required regarding valuation and marketing of development — Increase allowed on condition that financial terms for increase are no less favourable to creditors than current terms of receiver's borrowing charge — Receiver's first report approved, but it was premature to approve receiver's activities related to stalking horse bid — Receiver fulfilled its mandate with respect to completion of phase one, but failed to show stalking horse bid process was entered into prudently.

Table of Authorities

Cases considered by *G.C. Weatherill J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 1993 CarswellOnt 216, 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223 (Ont. Gen. Div.) — referred to

Bank of America Canada v. Willann Investments Ltd. (1996), 1996 CarswellOnt 2969 (Ont. C.A.) — referred to

Bank of Montreal v. Baysong Developments Inc. (2011), 2011 ONSC 4450, 2011 CarswellOnt 8285 (Ont. S.C.J.) — referred to

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 CarswellOnt 3158, 2012 ONSC 1750, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — referred to

Digital Domain Media Group Inc., Re (2012), 3 C.B.R. (6th) 320, 2012 BCSC 1567, 2012 CarswellBC 3245 (B.C. S.C. [In Chambers]) — referred to

Lang Michener v. American Bullion Minerals Ltd. (2005), 2005 BCSC 684, 2005 CarswellBC 1106 (B.C. S.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Words and phrases considered:

stalking horse sale process

[A] stalking horse sale process . . . involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. . . . If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

APPLICATION by receiver for approval of "stalking horse" bid and other relief.

***G.C. Weatherill J.*:**

Introduction

1 This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

2 The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

> a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;

b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;

c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;

d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and

e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

3 The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

4 The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

5 The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

6 The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

7 Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

8 The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

9 The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

10 In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

11 The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

12 The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

13 An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

a) Phase 1:	$21,575,000
b) Phase 2:	$6,830,000
	$28,405,000

14 The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

15 Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

16 In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

17 By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

a) a purchase price of $29.5 million;

b) a deposit of $1.0 million;

c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and

d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

18 The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

19 The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

20 The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7 [*CCM*];

Bank of Montreal v. Baysong Developments Inc., 2011 ONSC 4450 (Ont. S.C.J.) at para. 44 [*Baysong*]; *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567 (B.C. S.C. [In Chambers]).

21 The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para. 16:

> a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the efficacy and integrity of the receiver's sale process by which offers were obtained;
>
> c) whether there has been unfairness in the working out of the process; and
>
> d) the interests of all parties.

22 The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

23 The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

24 The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

25 The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed the deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

26 Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

27 He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

28 Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

29 Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

30 There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

31 To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

32 In this case, I have several concerns.

The Stalking Horse Process

33 No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

34 The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

35 The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

Termination Fee

36 While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the "range of reasonableness" as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

37 The foregoing notwithstanding, given the Receiver's function and role, the Court will often defer to the Receiver's recommendation unless there is a compelling reason to reject it. In Frank Bennett's *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> ...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 has made its decision. If the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

38 In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the "range", albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

39 I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

40 There is no evidence before me of any urgency regarding the sale of the Development.

41 Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

42 Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

43 At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

44 Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

45 The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000. Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

46 The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

47 On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

48 The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a)	Phase 1 completion costs:	
	i. completion payables:	$200,000
	ii. parking lot and courtyard landscaping:	$100,000
b)	interest and fees on financing:	
	i. Interest accrued to date:	$150,000
	ii. future fees and interest:	$100,000
c)	Professional fees:	$450,000
d)	fees from leasing activities:	$125,000
e)	engagement of Colliers for SH Process:	$50,000
f)	other consulting fees:	$75,000
g)	office, utility and operating expenses:	$52,500
h)	contingency:	$55,000
	TOTAL	$1,357,500

49 The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

50 The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

51 I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

52 I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

53 The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

54 The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (Ont. Gen. Div.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (Ont. C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 (B.C. S.C.) at para. 21.

55 I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

56 After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

57 Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

58 The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

59 The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

60 The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

61 The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

62 The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

Application granted in part.

End of Document

Tab 21

Most Negative Treatment: Reversed
Most Recent Reversed: Concrete Equities Inc., Re | 2012 ABCA 266, 2012 CarswellAlta 1572, 542 A.R. 12, 566 W.A.C. 12, 96 C.B.R. (5th) 139, 220 A.C.W.S. (3d) 268, [2012] A.W.L.D. 4627, [2012] A.W.L.D. 4631, [2012] A.W.L.D. 4632, 354 D.L.R. (4th) 683 | (Alta. C.A., Sep 21, 2012)

2012 ABQB 19
Alberta Court of Queen's Bench

Concrete Equities Inc., Re

2012 CarswellAlta 42, 2012 ABQB 19, [2012] A.W.L.D. 867,
[2012] A.W.L.D. 870, 212 A.C.W.S. (3d) 627, 85 C.B.R. (5th) 156

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended, Section 13(2) of the Judicature Act, R.S.A. 2000, c. J-2, as amended and Section 99(a) of the Business Corporations Act, R.S.A. 2000, c. B-9, as amended

And In the matter of Concrete Equities Inc., Wealthcrete Investment Corporation, Concrete Associates Investment Corporation, Concrete Associates II Investment Corporation, Concrete Associates III Investment Corporation, Concrete Associates IV Investment Corporation, Concrete Associates V Investment Corporation, El Golfo Investment Corporation, Costa Koraal Investment Corporation, Luna Morada Investment Corporation, Concrete Equities Executive Club Inc., 1456775 Alberta Ltd., Concrete Place Properties Ltd., and Concrete Associates VIII Corp.

Darcy Sandhu, 934608 Alberta Ltd. and 587901 Alberta Ltd. (Plaintiffs) and MEG Place LP Investment Corporation, Safeguard Real Estate Investment Fund V Limited Partnership and Concrete Associates IV Investment Corporation (Defendants)

B.E. Romaine J.

Judgment: January 10, 2012
Docket: Calgary 0901-11048, 1101-03927

Counsel: Michael Marion, Matti Lemmens for Plaintiffs
Alexis Teasdale for Defendants

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.4 Practice and procedure
IX.4.d Disallowance of claims
IX.4.d.i Notice of disallowance
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.iii Bankruptcy proceedings

2012 ABQB 19, 2012 CarswellAlta 42, [2012] A.W.L.D. 867, [2012] A.W.L.D. 870...

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Notice of disallowance Service of notice of disallowance — When serving notice of disallowance of claim, trustee in bankruptcy cannot rely on address for service set out in proof of claim where he has subsequently received information that alerted him or should have alerted him to possibility of change in identity of claimant's agent — Once trustee is aware of appointment of new agent for claimant, service on that new agent must be effected in accordance with s. 135(3) of Bankruptcy and Insolvency Act and R. 113 of Bankruptcy and Insolvency General Rules — Service of notices of disallowance on former agent of claimant is not sufficient.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Bankruptcy proceedings

Where limited partnership, through its receiver and acting under authorization of court in amended final order under Companies' Creditors Arrangement Act, files proofs of claim in bankruptcies, thus engaging mandatory process set out under Bankruptcy and Insolvency Act, disallowances that follow in ordinary course from those claims cannot reasonably be considered to be caught by stay of proceedings.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.) — considered

Dixon's Boatbuilders Ltd., Re (2000), 2000 CarswellNS 330, *(*sub nom. *Dixon's Boatbuilders Ltd. (Bankrupt), Re)* 194 N.S.R. (2d) 194, *(*sub nom. *Dixon's Boatbuilders Ltd. (Bankrupt), Re)* 606 A.P.R. 194, 20 C.B.R. (4th) 67 (N.S. S.C.) — distinguished

Gully (Trustee of) v. TD Canada Trust (2002), 36 C.B.R. (4th) 58, 2002 BCSC 1170, 2002 CarswellBC 1873 (B.C. S.C. [In Chambers]) — distinguished

Haywood Securities Ltd. v. Witwicki (1995), 32 C.B.R. (3d) 103, 7 B.C.L.R. (3d) 372, *(*sub nom. *Haywood Securities Ltd. v. Witwicki (Bankrupt))* 56 B.C.A.C. 120, *(*sub nom. *Haywood Securities Ltd. v. Witwicki (Bankrupt))* 92 W.A.C. 120, 1995 CarswellBC 389 (B.C. C.A.) — followed

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1597, 2010 ONSC 1304, 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 135(3) — pursuant to

s. 135(4) — considered

s. 187(1) — considered

s. 187(9) — considered

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

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 113 — pursuant to

APPLICATION for declaration that disallowance of claims by trustee in bankruptcy constituted breach of stay of proceedings under *Companies' Creditors Arrangement Act* and were of no force or effect, or alternatively, for order declaring service of notices of disallowance by trustee in bankruptcy to be invalid.

***B.E. Romaine J.*:**

Introduction

1 This application arises from complicated and unusual insolvency proceedings involving a number of real estate limited partnerships. While the facts are complex, the main issue is whether a trustee in bankruptcy serving a notice of disallowance of claim may rely on an address for service set out in a proof of claim in circumstances where he has received information that indicates the possibility of a change in the identity of the agent of the claimant.

Facts

2 On July 29, 2009, this Court granted an Initial Order placing the five general partners of the Safeguard Real Estate Investment Fund I - V Limited Partnerships and other related entities (the "Concrete Equities Group") into protection under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. One of the debtor general partners was Concrete Associates IV Investment Corporation ("Concrete IV"), the predecessor to the applicant MEG Place Limited Partnership Investment Corp. ("MEG") as general partner to LP V. On the same day, certain interim receivership orders that had been previously granted over the limited partnerships were amended, restated and consolidated into a Receivership Order that operated concurrently with the CCAA proceedings. Ernst & Young Inc. ("E & Y") was appointed as Monitor and Receiver under the Initial Order and the Receivership Order. The Initial Order included the usual stay provisions.

3 In accordance with a December 14, 2009 Claims Process Order, the Trustee in Bankruptcy of Varun Aurora and David Humeniuk, two key individuals in the management of the Concrete Equities Group, filed claims in the CCAA proceedings against LP V. So did 587901 Alberta Ltd., Darcy Sandhu and 934608 Alberta Ltd. 934608 filed a claim on its own behalf and as assignee of the claims of Vincent De Palma, another principal of the Concrete Equities Group.

4 The Monitor disallowed the Humeniuk claim and the Aurora claim in February, 2010, reserving all rights of set-off and counterclaims of Concrete IV and LP V against Mr. Aurora and Mr. Humeniuk. The Trustee in Bankruptcy filed appeals of these disallowances, which have not yet been heard. A Registrar in Bankruptcy granted an order in March, 2010 that permitted Mr. Sandhu and 934608 to pursue the Humeniuk claim and the Aurora claim.

5 The Humeniuk claim, the Aurora claim, the 587901 claim, the Sandhu claims, the 934608 claim and the De Palma claim are referred to as the "Disputed Claims" in this application.

6 During the course of the CCAA proceedings involving the Concrete Equities Group, the Monitor and Receiver concluded that a plan was not required for LP V because there were few affected creditors, and it advocated the granting of a final order for this limited partnership without a plan.

7 In June, 2010, this Court granted final orders in the CCAA proceedings. The Amended Final Order dated June 29, 2010 provided as follows:

> (a) The Disputed Claims and certain claims filed by David Aurorawere excepted from the order and were directed to be resolved inaccordance with the procedure previously set out in the ClaimsProcess Order, with MEG as the new general partner of LP Vreplacing the word "Monitor" therein;
>
> (b) All other creditor claims against LP V were compromised;
>
> (c) The Receiver and Monitor was expressly authorized to participate in the Humeniuk and Aurora bankruptcies by lodging claims with the Trustee in such amounts and on account of such claims as the Receiver deemed advisable;
>
> (d) MEG became entitled to hold various assets of LP V subject tocertain limitations on the use and encumbering of those assetspending the determination of the Disputed Claims and the DavidAurora claims;
>
> (e) The Receiver and Monitor was to deliver the books and records of LP V to MEG;

(f) E&Y was discharged as Monitor and Receiver "as of the Order Implementation Date and upon satisfying its obligations pursuant to this Order". The Order Implementation Date was defined as the date the Monitor filed the Monitor's Certificate; and

(g) The stay of proceedings provided in the Initial Order with respect to LP V was extended until after the determination of the Disputed Claims and the David Aurora claims.

8 Members of the service list in the CCAA proceedings, including counsel for the Trustee in Bankruptcy of Humeniuk and Aurora, were served with a copy of the Amended Final Order on June 29, 2010.

9 On July 13, 2010, in accordance with the Amended Final Order, E&Y submitted proofs of claim in the Humeniuk and Aurora bankruptcies on behalf of Concrete IV and LP V. These proofs of claim provided that notices or correspondence with respect to the claims were to be forwarded to counsel for E&Y.

10 The process that led to the appointment of MEG as general partner of LP V, replacing Concrete IV, is relevant to what next occurred. Originally, certain investors in the Concrete Equities Group opposed the receivership application with respect to these limited partnership and companies, and submitted instead that a corporation controlled by Steven Butt be allowed to assume the role of general partner of the members of the Concrete Equities Group. Despite this opposition, an interim receivership order was granted. Mr. Butt became involved in the receivership as a member of the Concrete Investors' Steering Committee, a group of interested investors formed to consult with the Receiver and provide information on the receivership to other investors. The Steering Committee was represented by Bennett Jones LLP.

11 The Steering Committee continued to participate in the CCAA proceedings when they were commenced, and Mr. Butt continued as a member of the Steering Committee. In that capacity, it is clear that Mr. Butt was aware of the Disputed Claims, the Humeniuk and Aurora bankruptcies, the Amended Final Order and the proofs of claim filed by E & Y on behalf of Concrete IV and and LP V in the Humeniuk and Aurora bankruptcies.

12 Mr. Butt incorporated MEG on June 4, 2010 so that it could become the new general partner of LP V when the receivership and the CCAA proceedings were wound down. Mr. Butt is the sole officer, director and shareholder of MEG, which lists the offices of Bennett Jones LLP as its registered office. Mr. Butt acknowledges that he was aware that any claims that Concrete IV or LP V might have against Mr. Aurora, Mr. Humeniuk or Mr. De Palma would be transferred to MEG upon the discharge of the Monitor and Receiver.

13 On December 13, 2010, the Trustee in Bankruptcy of Humeniuk and Aurora delivered by courier and mailed two Notices of Disallowance of the proofs of claim filed by E&Y in the bankruptcies to counsel for E&Y. Counsel for E&Y emailed copies of these disallowances to Bennett Jones on the same date, advising that E&Y had been discharged as Receiver of all Concrete Equities Group entities but one and would not be taking steps in relation to the disallowances.

14 Mr. Butt deposes that, at this point in time, he had not retained counsel for MEG with respect to the Disputed Claims. Specifically, Mr. Butt says that, while Bennett Jones was counsel to the Steering Committee at the time the Notices of Disallowance were forwarded to it by counsel for E&Y and Mr. Butt was a Steering Committee contact and advisor, he had not instructed Bennett Jones on behalf of MEG as the general partner of LP V. Mr. Yorke-Slater of Bennett Jones, who was acting as counsel to the Steering Committee at this time, advises that he recalls forwarding the emailed disallowances to Mr. Butt, but Mr. Butt deposes that he does not recall receiving them.

15 At any rate, no one appealed the Notices of Disallowance. In fact, no-one has formally appealed them to the date of this application, nor has there been an application to extend the time to appeal. Mr. Aurora and Mr. Humeniuk were discharged from bankruptcy in December, 2010.

16 Mr. Sandhu, 934608 and 587091 (the "Plaintiffs" in this capacity) filed a Statement of Claim (the "Action") in March, 2011 naming MEG, LP V and Concrete IV as defendants (the "Defendants"), alleging claims arising from advances made to

Concrete Equities or its principals, including the claims filed by the estates of Aurora, Humeniuk and De Palma against LP V now controlled by the Sandhu group. A courtesy copy was provided to Bennet Jones on March 24, 2011. Mr. Butt deposes that it then became apparent to him that the Disputed Claims were still being pursued against LP V, and he retained Bennett Jones on behalf of the Defendants with respect to the Disputed Claims in April, 2011. By order of May 18, 2011, the Plaintiffs were granted leave to serve the Statement of Claim.

17 On May 3, 2011, Bennett Jones asked the Trustee in Bankruptcy of Humeniuk and Aurora to provide copies of the proofs of claim and advise of their disposal. The Trustee sent copies of the claims filed by E&Y to Bennett Jones via courier on June 2, 2011, and advised that the Trustee had issued Notices of Disallowance on the claims and that E&Y had not appealed them. The Defendants filed their Statement of Defence on June 15, 2011, claiming, among other things, the right to set-off against the claims of Mr. Aurora and Mr. Humeniuk. In a Reply to Defence dated June 30, 2011, the Plaintiffs claimed that the set-off claims were barred because the Notices of Disallowance had not been appealed. On July 11, 2001, Bennett Jones requested copies of the Disallowances from counsel to the Plaintiffs and received emailed copies on the same day. This application was filed on August 17, 2011.

18 MEG and LP V apply for the following relief:

> (a) a declaration that the actions taken by the Trustee in bankruptcy ofHumeniuk and Aurora in sending the disallowances of certainclaims made on behalf of MEG and LP V against the estates ofAurora and Humeniuk constituted a breach of the stay ofproceedings imposed by the Initial Order in the CCAAproceedings, and a declaration that the disallowances shall have noforce or effect so far as they purport to affect the CCAAproceedings or the Action, which purports to be an extension of theCCAA proceedings; or alternatively
>
> (b) an order declaring service of the Notices of Disallowance by the Trustee invalid and providing that service of the Disallowances is effective as of the date of the order.

Issues

19 The issues in this application are thus as follows:

> (a) whether the Notices of Disallowance constitute a breach of the stay of proceedings provided for in the Initial Order, and therefore, whether they are of any force or effect for the purposes of the CCAA proceedings and the Action;
>
> (b) whether the Notices of Disallowance were properly served onMEG pursuant to section 135(3) of the *BIA* and Rule 113 of the*Bankruptcy and Insolvency General Rules*, CRC 1978, c 368 asamended, and therefore, whether they are valid; and
>
> (c) if the Notices of Disallowance were not properly served, whetherthe Court should exercise its discretion to deem that notice wasadequately provided.

Analysis

(a) Breach of Stay of Proceedings

20 This part of the application can be dispensed with summarily.

21 LP V through its Receiver, acting under the authorization of the Court in the Amended Final Order, filed proofs of claim in the bankruptcies of Mr. Aurora and Mr. Humeniuk, and thus engaged the mandatory process set out under the BIA. The Disallowances that followed in the ordinary course cannot reasonably be considered to be caught by the stay imposed by the Initial Order and extended by the Amended Final Order.

22 The Disallowances were issued long after the Amended Final Order was granted in the proceedings, at which time the only remaining issues to be resolved were the claims controlled by Mr. Sandhu and Mr. David Aurora, which were expressly contemplated in the Amended Final Order.

23 This situation is not analogous to the issue with respect to the meaning of "proceedings" in a stay order discussed in *Nortel Networks Corp., Re*, 2010 CarswellOnt 1597 (Ont. S.C.J. [Commercial List]), or *AbitibiBowater Inc., Re*, 2010 CarswellQue 2812 (C.S. Que.). To the extent the Notices of Disallowance are "proceedings" that might otherwise be subject to the stay, they are steps in proceedings that were specifically contemplated by the Amended Final order during the CCAA proceedings. They were steps that could be anticipated and that followed logically from the Monitor and Receiver filing the claims in the bankruptcies.

24 I also note that there was no plan of arrangement involving LP V, and that the purpose of the stay provisions of the Initial Order, to allow a breathing space for LP V to develop such a plan, had become moot by the time the Notices of Disallowance were issued and the Amended Final Order was granted.

25 The Amended Final Order extended the stay with respect to LP V specifically in order to allow the Disputed Claims to be resolved while LP V was under the protection of the CCAA. It could not be reasonably contemplated that the extension of the stay would apply to the Trustee's consideration of the proofs of claim.

(b) Service of the Notices of Disallowance

26 Section 135(3) of the *BIA* provides that if a trustee disallows a claim, he "shall forthwith provide *in the prescribed manner to the person whose claim ... was disallowed*" a notice of disallowance (emphasis added). The prescribed manner of service of notices of disallowance set out in Rule 113 is by service or by registered mail or courier.

27 "Person" includes a partnership and in this case, the person whose claim was being disallowed by the Notices of Disallowance was LP V.

28 MEG submits that at the time the Trustee in Bankruptcy of Humeniuk and Aurora sent the disallowances by courier and email to counsel for E&Y in December, 2010, the Trustee knew or ought to have known from receipt of the Final Amended Order in June, 2010 that MEG had become the general partner of LP V, and that MEG and not E&Y should have been served with the disallowances. Therefore, MEG submits, the disallowances were not properly served.

29 The Plaintiffs who now control the Humeniuk and Aurora claims against LP V submit that the Trustee was entitled to provide the Notices of Disallowance to the address listed in the proofs of claim, that it did so in this case, and that therefore electronic service by email on counsel to E&Y (which is allowed under the *Alberta Rules of Court* in force in December, 2010) was properly effected.

30 The Plaintiffs rely on case law that they submit confirms that a trustee is entitled to provide a notice of disallowance to an address listed in the proof of claim: *Gully (Trustee of) v. TD Canada Trust*, 2002 CarswellBC 1873 (B.C. S.C. [In Chambers]) at para. 18; *Dixon's Boatbuilders Ltd., Re*, 2000 CarswellNS 330 (N.S. S.C.) at para. 20.

31 In *Gully*, the trustee served a notice of disallowance on an address set out in a proof of claim by a bank creditor by fax and ordinary mail, thus failing to comply with Rule 113. Despite this, the court found service to be sufficient, curing the deficiency by relying on s. 187(1) of the BIA and finding that the failure to comply with Rule 113 in the circumstances was an irregularity, not a nullity.

32 The bank creditor had admitted receiving the notice of disallowance, and had ignored a letter from the trustee advising of the strict limitations on time to appeal and recommending that the creditor seek legal advice. The decision is distinguishable in that notice was provided to the proper creditor representative but by an irregular method of service.

33 *Dixon's Boatbuilders* is a case about apparent authority of an agent. Service in that case had been properly made on a private mail box address given in the proof of claim, but the mail box company did not deliver the notice to the creditor before the period for filing an appeal had expired. Neither Section 135(3) nor Rule 113 were in issue, since the disallowance was sent to the proper person, but had gone astray.

34 The issue in this application is different, being whether the Trustee can rely on an address for service set out in a proof of claim despite having subsequently received information that alerted him or should have alerted him to the possibility of a change in the identity of the claimant's agent. I find that he cannot do so. Once the Trustee is aware of the appointment of a new agent, service on that new agent must be effected in accordance with Section 135(3) and Rule 113. Service of the Notices of Disallowance on the Monitor and Receiver as the former agent of LP V is not sufficient for the purposes of the Act and the Rule.

35 The Plaintiffs submit that failing to allow a trustee the ability to rely on the claimant's address set out in a proof of claim will add uncertainty and unnecessary expense to the bankruptcy process, and that it should not be the case that trustees must make enquiries to ensure that an address provided in the proof of claim is still the appropriate address. This decision does not require a trustee to make enquiries in the normal course. However, in this case, the Trustee was advised through receipt of the Amended Final Order in June, 2010 that the general partner of LP V was now MEG, and that the duties of the Monitor and Receiver were shortly coming to an end. It was not an onerous duty to impose on the Trustee in this case the obligation of checking to see whether MEG had assumed its duties pursuant to the Amended Final Order at the time he sent out the Notices of Disallowance in December, 2010.

36 The Plaintiffs also submit that Bennett Jones had as ostensible authority to accept service of the Notices of Disallowance as agent of MEG and LP V, even if it had not been formally retained. The scope of Bennett Jones' authority may well have been confusing in the circumstances. However, even if Bennett Jones had such apparent authority, the Trustee did not directly serve Bennett Jones as agent for MEG, as required by the Act or Rule, or not at least until July 11, 2011.

37 There is a troubling inconsistency in the evidence with respect to the authority of Bennett Jones in December, 2010. Mr. Butt testified on cross-examination on affidavit that the investigation and advancement of the claims by Concrete IV and LP V against the bankruptcy estates of Aurora and Humeniuk were part of Bennett Jones' retainer in acting for the Steering Committee. MEG attempted to resile from that testimony at the hearing of the application, suggesting it was inconsistent with the Steering Committee's status and overall mandate. However, the submission that Bennett Jones as counsel to the Steering Committee was actually the agent for LP V, and that LP V had thus been properly served, ultimately fails for the same reason as the ostensible authority submission: Bennett Jones was not directly served with the Notices of Disallowance by the Trustee.

38 The Plaintiffs submit that, in any event, service of the Notices of Disallowance was effected on July 11, 2011 when counsel for the Plaintiffs emailed copies of the Notices of Disallowance to Bennett Jones. The Plaintiffs submit that this constituted service as required by Rule 113, section 135(3) of the *BIA* and the *Rules of Court*.

39 These copies were provided by counsel to the Plaintiffs, not by the Trustee in Bankruptcy of Humeniuk and Aurora, and in the context of pre-hearing proceedings directly related to the issue of valid service. The copies were not accompanied by any warning that this would now constitute proper service, and it must be inferred that there was an implied understanding between counsel that the issue of service was to be resolved through this application.

40 In summary on this issue, the Notices of Disallowance were not properly served on MEG, and have not been properly served to the date of this decision. The time to appeal such Notices of Disallowance as set out in Section 135(4) of the *BIA* has not yet commenced.

(c) Deeming Service to be Adequately Provided

41 The Plaintiffs submit that, even if the Trustee did not comply with the strict requirements of service, the Court has the jurisdiction under s. 187(9) of the *BIA* to deem that notice has been properly provided.

42 Rule 187(9) of the *BIA* provides that no bankruptcy proceeding shall be invalidated by any irregularity unless the Court is of the opinion that substantial injustice has been caused by the irregularity that cannot be remedied by order.

43 The parties agree that the question of the Court's authority to cure an irregularity pursuant to s. 187(9) depends on whether the irregularity is a matter of form or of substance: *Haywood Securities Ltd. v. Witwicki*, 1995 CarswellBC 389 (B.C. C.A.) at para. 6. It is also clear that determining whether "substantial injustice" has been caused by an irregularity involves a weighing of the equities between the parties.

44 In *Haywood*, a decision to cure an irregularity through s. 187(9) would have resulted in a bankrupt changing status from discharged to undischarged, which the Court found was clearly a matter of substance and not of form. The bankrupt had not received a notice of objection to discharge made by one of his creditors.

45 In this case, Mr. Butt, the principal of MEG, had actual knowledge of the Notices of Disallowance through membership on the Steering Committee and through receipt of copies of the disallowances from Bennett Jones as counsel to the Steering Committee. It may be that Mr. Butt did not recognize the implications of the Notices of Disallowance, but he cannot be said to have lacked knowledge. The irregularity in services is thus an irregularity of form and not of substance, and s. 187(9) is available to the Plaintiffs.

46 However, I must weigh the equities in deciding whether to cure the irregularity in service. The effect of doing so would be to deprive MEG as new general partner of LP V of its right to pursue set-off against the Plaintiffs in this action, a right that was expressly reserved in the CCAA proceedings. I also note that the Defendants do not seek to reopen the bankruptcies of Mr. Humeniuk and Mr. Aurora, or to share in any dividend to other creditors. On the other hand, the Plaintiffs would merely lose the right to rely on the Disallowances during the trial of the Action and would continue to have available to them the same submissions and arguments that the Trustee would have had if an appeal of the Disallowances had been heard in the bankruptcies. While this may lengthen the trial of the Action, the equities thus appear to favour refusing to cure the irregularity in service on the basis that a substantial injustice has been caused by such irregularity that cannot be remedied by an order that service was sufficient.

47 I am aware that a decision not to cure the irregularity in service affects the integrity of the process in respect to these two bankruptcies, and should not be taken lightly. I make such a decision reluctantly, given the unusual circumstances of this case.

48 I have taken into account that MEG as represented by Mr. Butt is responsible for the interests of many investors in LP V, and that Mr. Butt's failure of diligence has implications, not for MEG as primary creditor, but for LP V. I also take into account that the CCAA and receivership proceedings were complex and unusual, and that the implications of the Notices of Disallowance on later litigation were not readily apparent. Remedying service in this case would not be in accordance with the fundamental purpose of CCAA proceedings in preventing undue manoeuvering for position among creditors.

Conclusion

49 I find that the Notices of Disallowance have no force or effect in so far as they purport to affect the CCAA proceedings; in particular, the reservation of the Disputed Claims in accordance with the Claims Procedure, with MEG in the role of the Monitor. As the Notices of Disallowance were not properly served during the course of the bankruptcies of Mr. Humeniuk and Mr. Aurora, and those bankruptcies have now been terminated, the Notices of Disallowance have no further effect. There is thus nothing to prevent the Defendants from pursuing the set off of these claims during the course of litigating the Action.

Order accordingly.

Tab 22

2016 ABQB 665
Alberta Court of Queen's Bench

Lightstream Resources Ltd., Re

2016 CarswellAlta 2278, 2016 ABQB 665, [2017] A.W.L.D. 3,
[2017] A.W.L.D. 5, 273 A.C.W.S. (3d) 474, 41 C.B.R. (6th) 204

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of Lightstream Resources Ltd, 1863359 Alberta Ltd, LTS Resources Partnership, 1863360 Alberta Ltd and Bakken Resources Partnership

A.D. Macleod J.

Heard: November 15-16, 2016
Judgment: November 25, 2016
Docket: Calgary 1601-12571

Counsel: M. Barrack, R. Bell, K. Bourassa, for Lightstream
T. Pinos, C. Simard, S. Voudouris, S. Kerzne, for FrontFour & Mudrick
K. Kashuba, for First Lien Creditors
J. Wadden, D. Conklin, for Apollo Management LP & GSO Capital Partners

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.A General principles

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Plaintiffs, two unsecured creditors of debtor company, made oppression claims under Alberta Business Corporations Act (ABCA) seeking order forcing exchange of securities with debtor on same terms previously afforded to two other creditors who had exchanged unsecured notes for secured notes (Secured Notes Transaction) — Debtor sought Companies' Creditors Arrangement Act (CCAA) protection — Plaintiffs applied for order to exclude their claims from CCAA stay and have them heard before any CCAA proceedings — Hearing was held to answer two preliminary questions — In context of CCAA proceedings, court has jurisdiction to recognize plaintiffs' claim as secured claim after granting of Initial Order and to make order varying Secured Notes Transaction and requiring debtor to issue additional Secured Notes to remedy alleged oppressive conduct, but that jurisdiction is limited by scheme of CCAA — Discretion to make order recognizing plaintiffs' claim as secured claim and varying Secured Notes Transaction not exercised on facts pleaded — Even if oppression claim was made out, appropriate remedy was damages and would not include equitable remedy sought — It would be contrary to purpose of CCAA to grant

equitable remedy which would adversely affect other creditors — Plaintiffs were bound to fail and there was no issue to be tried — To grant remedy sought would be contrary to law.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — General principles

Plaintiffs, two unsecured creditors of debtor company, made oppression claims under Alberta Business Corporations Act (ABCA) seeking order forcing exchange of securities with debtor on same terms afforded by debtor to two other creditors who had previously exchanged unsecured notes for secured notes — Debtor sought Companies' Creditors Arrangement Act (CCAA) protection — Plaintiffs applied to exclude their claims from CCAA stay and have them heard before any CCAA proceedings — Hearing was held to answer two preliminary questions — In context of CCAA proceedings, court has jurisdiction to recognize plaintiffs' claims as secured claims and to make order varying Secured Notes Transaction and requiring debtor to issue additional Secured Notes to remedy alleged oppressive conduct, but that jurisdiction is limited by scheme of CCAA — Discretion to make order recognizing plaintiffs' claim as secured claim and varying Secured Notes Transaction not exercised on facts pleaded — Plaintiffs were bound to fail and there was no issue to be tried — While there were representations made by debtor to unsecured creditors that it would be fair business practice to offer exchange transaction to all unsecured noteholders, debtor ultimately concluded that there was no obligation to do so — Section 242(3)(e) of ABCA empowers court to order exchange of securities, but in doing so, court should consider all factors affecting fairness — Here, remedy would adversely affect other creditors because they insisted on exclusivity and insisted that others could participate only later and on less favourable terms — Granting remedy sought would adversely affect remaining unsecured note holders, would impose debt on debtor unilaterally and would be contrary to scheme and object of CCAA — Even if oppression claim was made out, appropriate remedy was damages and would not include equitable remedy sought.

Table of Authorities

Cases considered by *A.D. Macleod J.*:

BCE Inc., Re (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560 (S.C.C.) — followed

Barnabe v. Touhey (1995), 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 1995 CarswellOnt 1167 (Ont. C.A.) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372 (S.C.C.) — referred to

Pembina Pipeline Corp. v. CCS Corp. (2014), 2014 ABCA 390, 2014 CarswellAlta 2106 (Alta. C.A.) — referred to

Shefsky v. California Gold Mining Inc. (2016), 2016 ABCA 103, 2016 CarswellAlta 649, 31 Alta. L.R. (6th) 1, [2016] 7 W.W.R. 423, 399 D.L.R. (4th) 290, 55 B.L.R. (5th) 198, 616 A.R. 290, 672 W.A.C. 290 (Alta. C.A.) — referred to

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

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450 (Ont. C.A.) — considered

Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.)* 572 A.R. 317, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.)* 609 W.A.C. 317 (Alta. C.A.) — referred to

Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 242 — referred to

s. 242(3)(e) — considered

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

Generally — referred to

s. 11 — considered

s. 19(1) — considered

s. 42 — considered

RULING on preliminary questions regarding oppression claim against debtor company under *Alberta Business Corporations Act* and proceedings under *Companies' Creditors Arrangement Act*.

***A.D. Macleod J.*:**

Introduction

Lightstream Resources Ltd and its subsidiaries ("Lightstream") are under creditor protection pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") by virtue of an Order of this Court dated September 26, 2016. Lightstream is an oil producer which sought creditor protection because of protracted low oil prices which it, like many others, has found financially challenging.

2 On October 11, 2016 a comeback hearing took place and with respect to claims by Mudrick Capital Management ("Mudrick") and FrontFour Capital Corp ("FrontFour") I directed that this hearing be held, the purpose of which is to answer two preliminary questions related to their claims. Mudrick and FrontFour are sophisticated investment firms.

3 Their oppression claims invoke Section 242 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "*ABCA*"). They are both asking this Court to order an exchange of securities with Lightstream as if they had participated in an earlier transaction with two other creditors who had exchanged unsecured notes for secured notes and provided $200 million US dollars to Lightstream in July 2015 (the "Secured Notes Transaction").

4 Mudrick and FrontFour seek the Order pursuant to subsection (3)(e) of section 242 which provides that, to rectify oppressive conduct, the Court may order an issue or exchange of securities.

5 The two questions are:

. In the context of CCAA proceedings is there jurisdiction in the Court to recognize the Plaintiffs' claim as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Noted to remedy alleged oppressive conduct?

2. If there is jurisdiction to make an Order recognizing the Plaintiffs' claim as a secured claim and varying the Secured Notes Transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and supplemented to represent the highest and best factual case of the Plaintiffs?

6 Some of the ground work necessary to achieve a compromise and an arrangement under the *CCAA* had been done prior to commencing the *CCAA* proceedings. Secured creditors had tentatively agreed to an arrangement which might see Lightstream survive provided that certain matters fell into place by the end of December 2016. Accordingly, time is in short supply as it often is in proceedings of this type.

7 The oppression proceedings had been commenced in July of 2015 and documents have been produced and questioning is complete. The matter was virtually ready for trial at the time of the Stay Order.

8 It is useful at this stage to review the chronology of events which give rise to the claim for oppression. When reviewing the chronology as it relates to Lightstream's representations, it is important to understand that it is primarily the evidence of Mudrick and FrontFour because for the purpose of this application I am to take the best view of the Plaintiffs' cases. Lightstream witnesses take issue with much of the evidence alleging misrepresentation but that evidence is left out of the chronology. If I answer both of the questions put forward in the affirmative, a trial will take place in December 2016 in which I will have a full opportunity to assess all of the evidence.

Chronology

9 On January 30, 2012 Lightstream issued $900 million in unsecured notes pursuant to an Indenture agreement. Lightstream repurchased $100 million in unsecured notes in 2014, leaving $800 million outstanding.

0 FrontFour met with Lightstream in January of 2014 to discuss the unsecured notes and the state of Lightstream's balance sheet. In December of 2014 an internal email in FrontFour discussed the risk of being "primed" (which means having secured debt added to Lightstream's balance sheet, which would rank ahead of the unsecured notes) FrontFour believed the risk was minimal.

On January 21, 2015, Lightstream held a conference call with Mudrick in which Lightstream explained that it had the capacity to carry $1.5 billion in total secured debt, but that liquidity was not an issue, so Lightstream did not need or intend to restructure its debt at that time.

2 On January 22, 2015 Mudrick purchased a series of Lightstream's unsecured notes on the secondary market. All told, Mudrick purchased $32,200,000 of unsecured notes between January 22, 2015 and the date of the July 2015 exchange transaction.

3 FrontFour followed suit with its first purchase of unsecured notes on February 2, 2015. FrontFour currently holds $31,750,000 worth of unsecured notes.

4 On February 3, Lightstream's CFO prepared an internal email identifying a number of transaction alternatives to restructure Lightstream's debt, including an exchange transaction involving unsecured notes. In respect of the exchange transaction, the CFO noted that such a transaction "might require to be a tender for fairness to all note holders".

5 On February 11, 2015, FrontFour held a conference call with Lightstream in which the parties discussed the possibility of a third party unsecured note holder initiating an exchange transaction. Lightstream advised that, while they had the capacity to issue additional debt securities, no such transaction had been contemplated and Lightstream had ample liquidity.

6 Mudrick met with Lightstream on February 18, 2015 to discuss Lightstream's liquidity situation. Lightstream maintained that they had sufficient liquidity.

7 In an internal email dated February 22, 2015, FrontFour managers discussed a conversation with Lightstream's CFO advising that nothing in the Indenture prevented Lightstream from issuing additional senior unsecured notes.

8 On March 8, 2015 an internal memorandum circulated FrontFour which stated that Lightstream's ability to issue senior debt securities was "limited" and that the current trading price of the unsecured notes presented an opportunity for "equity-like returns".

9 In early March of 2015, unsecured note holders, Apollo Management LP ("Apollo") and GSO Capital Partners ("GSO"), approached Lightstream about a possible exchange transaction of their unsecured notes for secured notes.

20 On March 13, 2015 FrontFour met with Lightstream. FrontFour emphasized that if Lightstream was planning on an exchange transaction of unsecured notes for secured notes with selective note holders, all unsecured note holders should have the opportunity to participate in the transaction. Lightstream maintained that it did not intend a debt exchange because of its favorable liquidity situation, and if a transaction were to occur, the transaction would be offered to all unsecured noteholders.

2 In May of 2015, Lightstream retained a division of Royal Bank of Canada ("RBC") as financial advisor for the purposes of a potential debt exchange transaction.

22 On May 9, 2015, Apollo sent Lightstream a term sheet proposal containing the proposed terms for a secured notes exchange transaction. Apollo and GSO both advised Lightstream that they were not prepared to have other unsecured noteholders participate in any exchange transaction, beyond certain follow-on exchanges. Apollo and GSO collectively held $465 million in unsecured notes, and Lightstream's view was that any transaction without their participation would not likely have a material upside for Lightstream.

23 Lightstream held its Annual General Meeting on May 14, 2015. Lightstream executives were asked about the company's capacity to layer secured debt on top of the unsecured notes. Lightstream stated that it would be possible to layer additional secured debt, but that this debt would have a higher cost, and at this point Lightstream was not "enamoured" about adding on additional debt to add liquidity that was not necessary.

24 On May 19, 2015 an internal FrontFour email circulated acknowledging an awareness that Lightstream was in talks with its creditors. The email posed the question: "shouldn't we work to insert ourselves into creditor talks?"

25 On May 26, 2015, RBC told Lightstream that it would need to seek incremental liquidity in 2016 and that Lightstream should consider the Apollo and GSO transaction against the importance of maintaining senior secured financing flexibility.

26 Lightstream spoke to Mudrick on May 27, 2015 to the effect that it was comfortable with its liquidity. Lightstream also said that any issuance of secured notes in exchange for the existing unsecured notes was unlikely. After this meeting, Mudrick circulated an internal email indicating that although Lightstream did not say an exchange transaction was likely, Lightstream did seem more inclined to do one than before.

27 On May 29, 2015 an internal email at FrontFour outlined secured note issuances carried out in the energy sector in recent months, and posed the question "how much debt can be put ahead of us in [Lightstream]?"

28 By the end of May, Mudrick considered selling its position in the unsecured notes to avoid the negative consequences of an exchange transaction of unsecured for secured notes. Based on assurances from Lightstream, Mr. Kirsch, a managing director of Mudrick decided not to sell. FrontFouralso says that it did not sell its position as a result of the assurances it had received from Lightstream that such an exchange transaction would not occur without them.

29 In June 2015 all the parties were in New York and FrontFour and Mudrick each received assurances that while the company had been receiving more reasonable financing offers, that there was no contemplated debt exchange, and if there were such an exchange, Lightstream would offer it to all of the unsecured noteholders. Indeed Mudrick was assured that to do otherwise would be an "un- Canadian" way of doing business.

30 On June 4, 2015, RBC emailed Lightstream a presentation in which it addressed Apollo and GSO's proposal for an exclusive secured note exchange. The presentation highlighted some of Lightstream's 2017 liquidity issues, and advised that Lightstream make efforts to rectify the liquidity shortfall.

3 On June 5, 2015, Lightstream emailed Apollo and GSO its comments respecting the proposed exchange transaction. The parties agreed on June 10, 2015 that the terms for any follow-on deal could not be offered on terms more favorable than those accepted by Apollo and GSO.

32 On June 10, 2015, Mudrick emailed Lightstream and asked that he be kept apprised of any debt exchange proposals so that Mudrick could participate in the discussions. That same day, Mudrick circulated an internal email indicating Mudrick's confidence in Lightstream but also with an awareness of the risk to the value of Mudrick's position if a debt exchange transaction were to occur.

33 On June 11, 2015 RBC provided Lightstream with an assessment of the proposed exchange transaction by Apollo and GSO. They concluded that the deal would provide liquidity through 2016, and up to the end of 2017. Later that day, Lightstream sent Apollo and GSO a signed letter of agreement with the final term sheet.

34 On July 2, 2015 Lightstream entered into a note purchase and exchange agreement with Apollo and GSO. The deal exchanged $465 million of unsecured notes for $395 million of secured second lien notes, and issued an additional $200 million of secured notes. The press release associated with the exchange stated that the transaction would provide Lightstream with the ability to reduce its outstanding borrowing under its credit facility, give the company financial flexibility in the low-price commodity environment, and potentially accelerate its drilling program in the event commodity prices recover.

35 On July 6, 2015 Mudrick circulated an internal email in which members of the firm stated that Lightstream "just did the exchange we thought might be coming."

36 Before the end of July 2015, Mudrick and FrontFour both filed actions claiming oppression by Lightstream in relation to the debt exchange transaction executed with Apollo and GSO. Both Mudrick and FrontFour alleged that they were oppressed because it was improper to offer the debt exchange transaction exclusively to Apollo and GSO, and to leave them out, particularly in light of the alleged misrepresentations made by Lightstream management. In addition, the exchange transaction was allegedly in breach of the unsecured note Indenture agreement.

37 Among the remedies sought by FrontFour and Mudrick to rectify the alleged oppression was an order by the court compelling Lightstream to allow FrontFour and Mudrick the opportunity to participate in the debt exchange transaction on the same terms negotiated by Apollo and GSO.

38 Since then, Mudrick has purchased approximately $36 million US dollars worth of the unsecured notes on the market.

39 On September 26, 2016 Lightstream brought an application seeking *CCAA* protection, including a stay of all proceedings against it. Mudrick and FrontFour brought an application seeking an order to exclude their claims against Lightstream from the stay, and to have the issues raised in their claims heard before any proceedings under the *CCAA*. This court granted the stay but on October 11 ordered the threshold issues referenced above be determined in the *CCAA* proceedings.

Framework of Analysis

40 Because of the obvious time constraints under which we are working, this is a pragmatic exercise. We often refer to this as "real time litigation" which does not give us the luxury of time for extended reflection.

4 While this was not framed as a summary dismissal application it proceeded like one. Lightstream, Mudrick and FrontFour along with Apollo and GSO put forward that part of the record upon which they rely. This included affidavits by representatives of Mudrick and FrontFour, excerpts from questioning, and documents produced as well as answers to undertakings. I received extensive briefs and was favored with oral presentations over two days.

42 I think it is appropriate to apply the same test with respect to the two questions as the Court would apply in a summary judgment application. That test has been variously described as whether there is a genuine issue to be tried or whether the plaintiffs are bound to fail. As was appropriate, I am confident that each side put its best foot forward with respect to the existence or non-existence of material issues to be tried. *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) see also *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) and *Pembina Pipeline Corp. v. CCS Corp.*, 2014 ABCA 390 (Alta. C.A.).

43 I will outline the requirements necessary to apply the oppression remedy recognizing this Court is being asked to grant a particular remedy in the context of ongoing *CCAA* proceedings.

44 The function of the supervising judge in this context is to supervise matters during the course of the stay of proceedings and this includes adjudicating with respect to claims such as the ones advanced here by Mudrick and FrontFour. They argue that as of the date of the exchange transaction in July 2015 and before the *CCAA* proceedings they were entitled to the remedy sought, i.e. to participate in the secured notes transaction on the same basis as those which did. Implicit in their arguments is that, if successful on this application and the subsequent trial, their claims as secured creditors can be dealt with under section 19(1) of the *CCAA*.

CCAA Process

45 The *CCAA* is a broadly worded remedial piece of legislation. The Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) wrote about the broad scope of the *CCAA* at paragraph 59:

> The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

46 The *CCAA's* general language provides the Court with discretion to make orders to further the *CCAA's* purpose. The source of much of the Court's discretion originates from section 11 of the *CCAA* and is supplemented by other statutory powers that may be imported into the section 11 discretion by way of section 42: *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.) at para 33.

47 Section 11 states:

> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

48 Under section 11, the court may issue any order that it considers appropriate in the circumstances. Our Supreme Court addresses appropriateness in this context in *Century Services* at para 70:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company.
>
> . . .

49 The Ontario Court of Appeal addressed the scope of section 11 in *Stelco Inc., Re*, at para 44. The Court acts as a referee and maintains a level playing field while the company and its creditors attempt to achieve a compromise. While the Court has much discretion, it is limited by the remedial object of the *CCAA* and the Court must not usurp the roles of the directors or management.

50 The Ontario Court of Appeal revisited the discussion of the scope of section 11 in *U.S. Steel Canada Inc., Re*, 2016 ONCA 662 (Ont. C.A.) and made the following comment, at para 82:

> There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

5 An essential element of negotiating a compromise or arrangement is the stay of proceeding associated with the initiation of a *CCAA* proceeding. This allows for a status quo as between creditors so that the insolvent company has an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor: *Woodward's Ltd., Re*, [1993] B.C.W.L.D. 769 (B.C. S.C.) [1993 CarswellBC 75 (B.C. S.C.)] at para 17. Any order under section 11 should be made with the view to facilitating a fair compromise or an arrangement.

The Oppression Remedy under the CCAA

52 Section 42 of the *CCAA* allows for the import of remedies from other statutory schemes:

> **42** The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 FrontFour and Mudrick take the position that the oppression remedy pursuant to section 242 of the *ABCA* may be imported into a *CCAA* proceeding by way of section 42 of the *CCAA*. *Stelco Inc., Re* describes this proposition in detail at paragraph 52:

> The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 [now s. 42] as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 [now s. 42] mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances. [emphasis added]

54 While the Ontario Court of Appeal in *Stelco Inc., Re* addresses the *CCAA* in the context of the *CBCA*, the same logic applies to the *ABCA*. I also agree that, while the oppression remedy *can* be a tool under the *CCAA*, it should be utilized in only the appropriate circumstances. Circumstances that qualify as appropriate will be those that accord with the purpose and objectives of the *CCAA* process. Thus, while this Court has jurisdiction to apply the oppression remedies the exercise of this discretion is limited to cases in which the remedy serves the purpose and scheme of the Court's function under the *CCAA*. This analysis will usually involve two questions. Was the conduct oppressive and, if so, what is the appropriate remedy in the context of the *CCAA*?

The Oppression Claim

55 FrontFour and Mudrick assert that because they held identical notes and they were so assured, they had a reasonable expectation that they would be included in the transaction executed among Lightstream and Apollo and GSO. FrontFour and Mudrick argue that by failing to include them in the exchange transaction, Lightstream acted oppressively.

56 Under the *ABCA* the oppression remedy is set out in section 242. The Supreme Court of Canada in *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) provided a two-part framework for analysing an oppression claim (at para 68):

. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was violated by conduct, and falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

57 The Alberta Court of Appeal outlined three governing principles under which a court is subject to when exercising its broad equitable jurisdiction under the oppression remedy: *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 (Alta. C.A.), at para 22:

• First: not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression: *BCE* at paras 68, 89-94.

• Second: not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": *Naneff v. Con-Crete Holdings Ltd.* at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": *Stahlke v. Stanfield*, 2010 BCSC 142 (B.C. S.C.) at para 23, aff'd 2010 BCCA 603 (B.C. C.A.) at para 38, (2010), 305 B.C.A.C. 18 (B.C. C.A.).

• Third: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: *Stahlke* at para 22; *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) at para 36, (1998), 44 B.L.R. (2d) 115 (Ont. C.A.); *BCE* at para 40.

(i) Reasonable Expectations

58 The claimant must identify the expectation they had and must demonstrate that such expectations are reasonable in all of the circumstances. Evidence of an expectation will depend upon the facts of each case. In the context of this case, the basis of FrontFour and Mudrick's alleged reasonable expectation derives from Lightstream's representations and assurance, and the Indenture agreement governing the unsecured notes.

59 *BCE* sets out factors helpful in determining whether a reasonable expectation exists. These factors are:

• general commercial practice

• the nature of the corporation

• the relationship between the parties

• past practice

• steps the claimant could have taken to protect himself

• any representations and agreements, and

• the fair resolution of conflicts between corporate stakeholders

General Commercial Practice

60 A departure from the general commercial business practice that has the effect of undermining or frustrating a complainant's legal rights can give rise to a remedy: *BCE* at para 73.

6 FrontFour and Mudrick argue that there is no evidence that debt exchanges done on a selective basis is the general commercial practice. It was their belief that such an exchange should be offered to all unsecured noteholders.

62 Lightstream takes the position that the absence of a prohibition against selective debt exchanges is evidence that selective debt exchanges are permissible. Lightstream points to an internal email sent by FrontFour on May 29, 2015 which listed recent secured note issuances in the energy industry and posed the question "how much debt can be put ahead of us?" in respect of FrontFour's Lightstream unsecured notes. This, according to Lightstream, is evidence of FrontFour's knowledge that an exchange transaction was possible and in accordance with general commercial practice. There is little doubt that the Plaintiffs were aware that a selective exchange transaction was a possibility.

The Nature of the Corporation

63 This factor carries more weight in instances where a small, closely held corporation deviates from corporate formalities. In the context of this case, Lightstream is a large public company and it is presumed that such a company would comply with corporate norms and formalities.

64 Lightstream takes the view that it is relevant to consider that FrontFour and Mudrick are also sophisticated firms that are in the business of managing significant amounts of money by, among other things, buying and trading securities on the secondary market. If FrontFour and Mudrick were nervous about a potential debt exchange, they could have sold their position.

Relationship between the Parties

65 The parties had some familiarity with one another. FrontFour and Mudrick held a sizable enough position in Lightstream's unsecured debt that it allowed them access to Lightstream's CFO and other executives on a regular basis. FrontFour and Mudrick claim that such a relationship implied a reasonable expectation of honesty and candor. On the other hand, professional investors who work daily in a market rife with misinformation ought to beware.

Past Practice

66 FrontFour and Mudrick claim that no transaction like the debt exchange transaction has occurred in the past. Lightstream points to the repurchase of $100 million in unsecured notes in 2014 as evidence of a transaction done selectively, and not on a pro-rata basis.

Preventative Steps

67 FrontFour and Mudrick claim that by continually asking Lightstream for inclusion and any exchange transaction they took the appropriate preventative steps to avoid its loss.

68 On the other hand, there is a significant amount of evidence which indicates that FrontFour and Mudrick were aware that in exchange transactions such as the one that took place was being considered by Lightstream. Despite that, they chose not to sell their notes, they say, because of the assurances both public and private

Representation and Agreements

69 In addition to the assurances, FrontFour and Mudrick also claimed that the wording of the Indenture agreement supporting the original issue of the unsecured notes contributed to their reasonable expectation that they would participate in any exchange transaction.

70 I was informed that if this issue does go to trial the interpretation of the Indenture agreement would be the subject of expert evidence. It is a complicated agreement with lengthy provisions and terms. In light of the fact the parties intend to call

expert evidence, this hearing is not the place to make a definitive finding as to what it says on this issue. Nevertheless, there is no evidence before me that anyone associated with the Plaintiffs ever raised the wording of the Indenture agreement with anyone associated with Lightstream prior to the exchange transaction in July 2015. Nor is there any evidence that either Plaintiff raised it internally. Finally, there is no evidence that anyone with Lightstream thought that the Indenture agreement was an obstacle to the transaction. Indeed, it is clear from the evidence that the Lightstream thought it could do so and so informed the Board of Directors in June 2015.

7 Finally, the Indenture agreement contains a "no action" clause which prescribes specific steps as preconditions to initiating an action relating to the Indenture or notes. It required the Trustee of the Indenture to be notified so that the Trustee could take carriage of the action on behalf of the class. I will return to this clause later.

Fair Resolution of Conflicting Interests

72 Lightstream asserts that its decision to execute the debt exchange transaction was a business decision done in the best interest of the corporation. As an overture to FrontFour and Mudrick, Lightstream offered them the opportunity to participate in the exchange of unsecured to secured notes. FrontFour and Mudrick rejected this opportunity because the terms of the exchange were less favorable than the terms of the first exchange transaction. Nevertheless, Lightstream points to this as an attempt at a fair resolution for conflicting interests.

Was there a Reasonable Expectation?

73 Arguably on the evidence, Mudrick and FrontFour were repeatedly told by Lightstream that no exchange transaction was contemplated, but if there was one, all of the unsecured note holders would be able to participate. At the same time, the evidence is that both Mudrick and FrontFour were aware that a selective exchange transaction was in play. However, they each say that they did not take steps to sell their positions because of the repeated assurances given to them by Lightstream management. Moreover, those assurances continued while the impugned transaction was being negotiated. In the absence of hearing the evidence from those witnesses involved, I cannot conclude that the Plaintiffs are bound to fail on this issue. In other words I think that whether or not there was a reasonable expectation and whether it caused a loss as alleged, are genuine issues for trial.

(ii) Oppression, Unfair Prejudice, or Unfair Disregard

74 The second part of the framework examines whether the evidence establishes that the alleged reasonable expectation was violated by Lightstream conduct, and falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

75 When a conflict between the interests of corporate stakeholders arises, it falls to the corporation to resolve the dispute in accordance with their fiduciary duty to act in the best interest of the company, viewed as a good corporate citizen: *BCE* at para 81.

76 *BCE* also states, at paragraph 83:

> Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods* per Weiler J.A., at p. 192.
>
> There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

77 FrontFour and Mudrick claim that Lightstream completely and unfairly disregarded their interests by going forward with the selective debt exchange transaction. They further assert that the exchange transaction was not necessary in light of Lightstream's available liquidity. To go forward with an unnecessary transaction to the exclusion of the rest of the unsecured noteholders qualifies as unfair disregard, according to FrontFour and Mudrick.

78 Lightstream takes the position that the selective debt exchange transaction was a good faith business decision made with a view to the best interests of the corporation.

79 Lightstream hired financial experts to evaluate the company's liquidity in the context of Apollo and GSO's term sheet. In May of 2015, the financial advisor made a presentation to Lightstream in which it recognized the need for incremental liquidity in 2016, and that the Apollo and GSO transaction should be viewed as a potential solution to this problem. On June 11, 2015, the financial advisor provided its assessment of the Apollo and GSO transaction and concluded that the deal would provide liquidity through 2016 and up to year end 2017.

80 While there were representations made by Lightstream to FrontFour and Mudrick that it would be a fair business practice to offer the exchange transaction to all unsecured noteholders, Lightstream ultimately believed that there was no obligation to do so. At the June 11, 2015 meeting of Lightstream's Board of Directors, the meeting at which the debt exchange transaction was given the go-ahead, the directors discussed the need to offer the transaction to all unsecured noteholders. According to the meeting's minutes, "management confirmed that there was no requirement under either the unsecured note Indenture or applicable U.S. securities laws to make the same offer to all unsecured noteholders."

8 Apollo and GSO held more than half of the outstanding unsecured notes. Apollo and GSO had said that they would proceed with the transaction only if it was done on a selective basis. The deal, according to Lightstream's financial advisors, would provide liquidity into 2017. Management of the company considered any obligation to offer the transaction to all unsecured noteholders and concluded that none existed.

82 I would not second guess the Board of Directors on the issues of whether the transaction was necessary or whether it was in the best interest of Lightstream. I defer to their business judgment. Nevertheless, there is no evidence that the Board was told that Mudrick and FrontFour, holders of a significant amount of the unsecured notes, were repeatedly told by Lightstream that they would be included in the transaction. If indeed those assurances had been given, the Board should have been so informed. Had they been so informed the Board may have or maybe should have taken a different decision. Accordingly, on that issue too, I cannot conclude that the Plaintiffs are bound to fail.

Appropriate Remedy

83 A finding of oppression may give rise to equitable remedies aimed at rectifying the oppression and putting the oppressed in the position they would have been had it not occurred. In this case the Plaintiffs assert that the oppression was the discriminatory way in which they were treated in the face of the Indenture, the representations and the assurances. They argue that they had the right to expect that they would be included in any exchange transaction. In the end the exchange transaction which occurred was only with Apollo and GSO. It is argued that the only just way to rectify the oppression is to order Lightstream to issue them their pro rata share of secured notes and they have filed an undertaking to contribute their share of cash to Lightstream.

84 On the other hand, Lightstream and Apollo and GSO argue that even if there is a basis for granting an oppression remedy, it would clearly be a case for damages and in any event, an order directing Lightstream to issue securities and incur further debt is a remedy which is extraordinary, inappropriate and contrary to the function of this Court in supervising the *CCAA* proceedings. They argue that if this action were outside of the *CCAA* proceedings an adequate and thus appropriate remedy would be damages. They further argue that within the *CCAA* proceedings the remedy sought is contrary to the scheme of the *CCAA*.

85 I have reviewed the very excellent briefs filed the by the parties and listened carefully to their arguments. I agree with the position advanced by Lightstream, Apollo and GSO to the effect that even if a claim for oppression is made out the appropriate remedy is damages. It would not include the equitable remedy sought. Moreover, in the context of the *CCAA* proceedings, it would be inappropriate to grant the relief sought.

86 Damages are adequate to compensate the Plaintiffs for their loss. Both Plaintiffs claim that if they had known about the transaction they would have sold their notes. The market consensus at that time was that an exchange transaction with existing unsecured noteholders would adversely affect the market price of the remaining notes and the market price at the relevant times

is ascertainable. The Plaintiffs claim that because of the assurances received from Lightstream, publicly and privately, they chose not to sell the notes. Accordingly, an award of damages is adequate to compensate the Plaintiffs for their loss. Investments have no intrinsic value beyond their financial return.

87 If the transaction is found to be oppressive as against the Plaintiffs, it may also be oppressive as against the remaining unsecured notes, the value of which is approximately $150 million US dollars. The remedy sought would apply only to the Plaintiffs and thus the remedy may itself amount to oppression against the remaining unsecured note holders as well as a breach of the Indenture. In those circumstances, the Court would not grant the equitable remedy sought, particularly where the Plaintiffs failed to notify the Trustee of Indenture as required.

88 Section 242(3)(e) of the *ABCA* empowers the Court to order an exchange of securities but in doing so, the Court should consider all of the factors affecting fairness. Here, the remedy would adversely affect Appollo and GSO because they insisted on exclusivity and insisted that others could participate only later and on less favorable terms. Neither Appollo nor GSO is alleged to have wronged the Plaintiffs. The remedy would also adversely affect the remaining unsecured note holders who have done nothing wrong. Finally, the remedy would impose debt upon Lightstream unilaterally.

89 To grant the remedy sought would also be contrary to the scheme and object of the *CCAA*. I accept the argument that Lightstream's insolvency is an inappropriate reason to grant an equitable remedy in favor of two creditors particularly when it affects others and Lightstream. I agree with the Ontario Court of Appeal in *Barnabe v. Touhey*, [1995] O.J. No. 3456 (Ont. C.A.) where it said:

> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

90 In other words, the appropriate remedy is damages and, accordingly, it would be contrary to the purpose of the *CCAA* to grant an equitable remedy which would adversely affect other creditors.

9 The Plaintiffs argue that the policy of the *CCAA* argues in their favor because to not grant it will encourage aggressive creditors to jockey for position prior to *CCAA* proceedings. First of all, there is nothing before me to suggest what occurred before the exchange transaction in July 2015 was "jockeying" as opposed to a bona fide transaction. Indeed, no claim is made against Apollo or GSO. More importantly, what is being sought here by the Plaintiffs is an order of this Court that would put them in a better position than the remaining unsecured note holders. I am mindful of the words of Farley, J in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) where he said at para 6:

> It has been held that the intention of the *CCAA* is to prevent any maneuvers for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such maneuvers could give an aggressive creditor a advantages to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely the plan will succeed . . .

In my view, that would be the effect of granting the order sought.

92 In the result, I answer the questions as follows:

> . In the context of CCAA proceedings is there jurisdiction in the Court to recognize the Plaintiffs' claim as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Noted to remedy alleged oppressive conduct?

Yes. The Court has jurisdiction but a limited one. It is defined by the scheme of the CCAA. Whether oppression occurred and whether the Plaintiffs suffered a loss are triable issues.

2. If there is jurisdiction to make an Order recognizing the Plaintiffs' claim as a secured claim and varying the Secured Notes Transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and supplemented to represent the highest and best factual case of the Plaintiffs?

No. On this question, the Plaintiffs are bound to fail and there is no issue to be tried. To grant the remedy sought would be contrary to law.

93 The parties may speak to costs.

Order accordingly.

Tab 23

2009 QCCS 6463
Cour supérieure du Québec

AbitibiBowater inc., Re

2009 CarswellQue 14221, 2009 QCCS 6463, EYB 2009-171386

In the matter of the plan of compromise or arrangement of:Abitibibowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other petitioners listed on schedules « A », « B » and « C », Debtors-Respondents, c. Communications, Energy & Papeworkers Union of Canada (CEP) and its local 60-N and 161, George Randell. Wilson Pike, Everett Lambert, Leo Atwood, Raymond Taylor, Willis Blake, William Butt, Gerald Pearce, Leonard Higgins, Lloyd Pinsent, Harris Rowsell and Sandy Loveless, Petitioners, et Ernst & Young Inc., Monitor-Mis en cause

Gascon J.C.S

Audience: 25 mai 2009 - 26 mai 2009
Jugement: 26 mai 2009
Motifs oraux: 26 mai 2009
Motifs écrits: 1 juin 2009
Dossier: C.S. Qué. Montréal 500-11-036133-094

Avocat: *Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud*, for Debtors (Respondents)
Me Gilles Paquin, for Monitor
Me Bernard Boucher, for Citibank N.A. (London Branch)
Me Alain Riendeau, for Silver Oak Capital LLC et al
Me Michael J. MacNaughton, for Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers, for Ad hoc Committee of Bondholders
Me Danny Venditti, for Communications, Energy & Papeworkers Union Of Canada
Me Laval Dallaire, for Jean-Sylvain Lebel
Me S. Richard Orzy, for Official Committee of Unsecured Creditors of Abitibibowater Inc. et al
Me Denis Cloutier, for Municipalities of : St-David-de-Falardeau, Girardville, Normandin, St-Thomas-Didyme, De La Doré, Petit-Saguenay and Ville Saguenay, Ville D'alma, Ville de Roberval et Dolbeau-Mistassini

Sujet: Insolvency

***Gascon J.C.S*:**

REASONS FOR JUDGMENT RENDERED ORALLY ON MOTION TO LIFT STAY OF PROCEEDINGS (# 96)

INTRODUCTION

1 The Petitioners, the Communications, Energy and Paperworkers Union of Canada (*CEP*), its locals 60N and 161, as well as some of its members, present a Motion to lift the stay of proceedings [1] imposed by the Initial Order of this Court dated April 17, 2009.

2 This Initial Order was issued under the terms of the *CCAA* [2]. One of its purposes is to notably allow the Debtors to file a plan of arrangement for the benefit of all their creditors and, potentially, the communities in which they operate as well.

3 The CEP and its members are amongst those creditors. Here, 122 of these members, all former employees of the Debtors, seek the Court's exercise of its statutory discretion to lift the stay of proceedings, so as to order the Debtors to fulfil their obligations under two Early Retirement Incentive Programs (*ERIPs*) established for the benefit of Petitioners [3] .

THE FACTS

4 In a nutshell, the purpose of the ERIPs signed respectively in 1999 and 2004 was to help diminish the impact of the reorganization of the Debtors' workforce through the advancement of mechanization of harvesting on their operations, as well as the automation and technical changes that continued to impact their employees.

5 As a result, under the ERIPs, employees who had reached age 58 and over and who met the criteria of eligibility received $1,600 or $1,400 per month under age 60 and $1,400 or $1,200 per month until age 65.

6 As well, employees participating in the ERIPs were covered by benefits (such as life insurance and prescription drugs) paid either 100% by the employer or 65% by the employer and 35% by the employee, depending upon the applicable program.

7 Prior to entering the ERIPs, employees were required to cash in all their accumulated vacations, exhaust their long-term disability benefits, and exhaust as well all employment insurance benefits.

8 Presently, a total of 122 employees remain covered under the two (2) ERIPs.

9 Yet, further to the stay of proceedings that forms part of the Initial Order, the Debtors ceased all payments under the ERIPs as they no longer had the funds necessary to make such. According to the Debtors, the sums owed pursuant to the ERIPs form part of pre-filing collective bargaining agreements in respect of what are now permanently closed facilities.

10 It is the Court's understanding that the Petitioners' situation is by no means unique. Unfortunately, a similar decision has been applied by the Debtors with respect to all its severance obligations or other early retirement incentive programs, in all cases for the same reasons.

THE POSITIONS OF THE PARTIES

11 The CEP contends that the stay of proceedings should be lifted for the 122 former employees involved because they all show necessity for the ERIPs payments, they suffer undue hardship and they are severely prejudiced.

12 The CEP argues that they do not receive sufficient income to cover their basic essentials. Numerous detailed affidavits support these assertions.

13 The Petitioners claim that their situation is special, their circumstances uncommon, and their sacrifices greater than that of other creditors of the Debtors.

14 AbitibiBowater replies that it does not have the means to pay. Furthermore, it could not treat the Petitioners any different than the other stakeholders. AbitibiBowater believes that maintaining the equilibrium between everyone is the best manner to achieve a successful restructuring that would benefit everyone better than a bankruptcy, including the Petitioners.

ANALYSIS AND DISCUSSION

15 This is not an easy situation. No Court, including this one, is insensitive to the real difficulties, socially, economically or personally, in which a matter like this one places many individuals, first and foremost the Petitioners in this case.

16 Yet, the sympathy a Court may feel towards the sad situation of many should not and could not distract it from its supervisory role, and particularly, from its key objective of maintaining, during this restructuring process, a fair but delicate balance between the positions of everyone, no matter how painful it could sometimes be.

17 In the Court's opinion, and notably with respect to the individual Petitioners involved here, no doubt a successful restructuring is most likely a better end result than a bankruptcy of the Debtors.

18 That being so, the Court believes that, at the stay of proceedings stage, the stakeholders are better served by an equal treatment of their respective positions than by the granting of an undue advantage or preference to some.

19 In this process, to deal with everyone in a rather similar way enhances the chances of success of the restructuring, limits the potential conflicts between stakeholders and prevents some to withdraw from or fight the process because they feel they are unfairly treated.

20 In essence, here, Petitioners are seeking a preference over other similarly situated unsecured creditors. This should always be looked at with caution.

21 Certainly, CEP's Counsel is right in saying that there is no statutory test under the *CCAA* to guide the Court in deciding whether or not to lift the stay of proceedings in a given circumstance.

22 However, it remains that lifting the stay is an exception to the general rule and that convincing reasons must exist to grant it. This is even more true when, like here, the process undertaken progresses well and enjoys so far a large support from the stakeholders.

23 As Paperny J. stated in *Canadian Airlines Corp. (Re)* [4], before granting a stay, a Court should consider the particular facts involved and remember that it is required to balance a variety of interests and problems. One should never lose sight of the global picture.

24 In that regard, a Court should try to keep at its minimum the manoeuvres for positioning amongst creditors during the restructuring process. Rather, it should play its supervisory role by trying to preserve a delicate *status quo* while moving along the process swiftly towards a successful compromise or arrangement.

25 Of course, preservation of a *status quo* does not necessarily mean inflexible rigidity. For instance, in some situations, if undue hardship caused by the stay itself is showed and strong necessity for immediate payment is established, a Court may consider it appropriate to lift the stay.

26 However, in this Court's opinion, the situations where only these two criteria of undue hardship and immediate necessity for payment would justify the lifting of the stay will be rare.

27 Seldom, if ever, will a restructuring process not cause definite hardship on most stakeholders. As well, rarely will stakeholders not be able to establish some level of necessity for the payment of what is owed to them.

28 If the sole criteria of undue hardship and necessity for payment would suffice to lift the stay of proceedings in a *CCAA* restructuring, Courts, debtors and monitors would likely end up devoting indefinite time and energy trying to assess the levels of prejudice caused to one or the other, instead of focusing upon the end result, that is, to develop and submit a plan and gather consensus around a fair and reasonable compromise for all.

29 This would undoubtedly have an adverse impact upon many restructuring efforts.

30 From that perspective, trying to please everyone on the basis of undue hardship or utmost necessity may end up resulting in displeasing all. This is why this should be approached with caution and, in this Court's view, with great reservation.

31 Turning to the present case, the Court is not convinced that its statutory discretion should be exercised along the lines suggested.

32 Yes, hardship exists for many here. Yet, in many of the situations described, hardship arises, if only partially, from pre-existing conditions or independent conditions of Petitioners that the stay of the Initial Order itself did not necessarily cause.

33 Yes, necessity for payment exists. Yet, it remains far from obvious that it is of such a magnitude as to render untenable the delay of a few months before the likely filing of a plan.

34 In the meantime, certainly times will be difficult. Nobody denies it. But times would be worse if the Debtors were to collapse and go bankrupt.

35 From that standpoint, the idea of saying yes to some and no to others is not the best way to deal with the situation. In fact, it would only open the door to many similar requests and destabilize the restructuring process. This should be avoided.

36 The Court prefers to say to all: wait and be patient. The process is under way. The Court, with the help of the Monitor, closely watches and supervises the process. The Debtors realize that time is of the essence. This is the better approach.

37 It is no consolation to Petitioners, but the situation at stake is not unheard of. Notwithstanding that, and without surprise, CEP's Counsel cannot submit any precedent in the case law that would support his position. Certainly, this is therefore not the preferred way to deal with a situation like this one.

38 In all due respect to the contrary view, the Court believes that this matter should not be treated any differently.

38 *FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT*:

39 *DISMISSES* the Motion;

40 *WITHOUT COSTS*.

APPENDIX

SCHEDULE « A »

ABITIBI PETITIONERS

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY,*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

SCHEDULE « B »

BOWATER PETITIONERS

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

SCHEDULE « C »

18.6 CCAA PETITIONERS

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

SCHEDULE « D »

PARTNERSHIPS

1. *BOWATER CANADA FINANCE LIMITED PARTNERSHIP*

2. *BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP*

3. *ABITIBI-CONSOLIDATED FINANCE LP*

Notes de bas de page

1 Motion to Lift Stay of Proceedings dated May 13, 2009.

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

3 Exhibits P-1 and P-2.

4 (2000) 19 C.B.R. (4th) 1 (Alta Q.B.).

Fin du document

Tab 24

TITLE PAGE

PRACTICE AND PROCEDURE
Before
ADMINISTRATIVE TRIBUNALS

ROBERT W. MACAULAY, Q.C.
and

JAMES L.H. SPRAGUE, B.A., LL.B.
and

LORNE SOSSIN, B.A., M.A., Ph.D., LL.B., LL.M., J.S.D

CONTRIBUTORS

Judy Algar	*Patricia Auron*	*Laura Boujoff*
Gay A. Brown	*Peter Budd*	*Douglas Colbourne*
Irène Dicaire	*Roger R. Elliott*	*Daria Farr*
Marvin J. Huberman	*David P. Jacobs*	*Irving Kleiner*
Leslie MacIntosh	*Charles Mathis*	*Steve B. McCann*
Paul Pudge	*Lucia Shatat*	*Sharon Silberstein*
Judith A. Snider	*David Wood*	

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A person who wishes to argue that a discretionary decision is incorrect because the decision-maker misunderstood or misapplied the principles respecting the exercise of discretion the burden will be on that person to establish the breach. In illustration see *Terasen Pipelines (Corridor) Inc. v. R&M Schroter Enterprises Ltd.*, 2013 CarswellAlta 1658, 2013 ABQB 482 (Alta. Q.B.) where the Alberta Court of Queen's Bench held that the burden of proof that the Alberta Surface Rights Board improperly fettered its discretion by following directions contained in an earlier memorandum rests with the proponent of that allegation. (The onus was not met in this case.)

Similarly see *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care),* 2013 CarswellOnt 15719, 2013 SCC 64, 366 D.L.R. (4th) 62 (S.C.C.) where the Supreme Court of Canada stated that: "A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate..." The Court also held that: "Regulations benefit from a presumption of validity..." which "places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory to justify them" and "favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible,* the regulation is construed in a manner which renders it *intra vires.*"

5B.5(a) Discretion Must Be Exercised

Legal Topics

Generally, when Parliament gives discretion to an official it intends that that official exercise the discretion when the situation arises and all of the legislative conditions for the exercise of that discretion have been complied with.[48] Thus in *PHS Community Services Society v. Canada (Attorney General)*, 2011 CarswellBC 2443, 2011 SCC 44 (S.C.C.) the Supreme Court of Canada, in considering the propriety of a Minister's refusal to licence

Vancouver's safe drug injection site, stated that a decision-maker with the discretionary authority to grant or reject applications has a duty to consider those applications. They cannot simply be ignored.

> 124 To recap, the Minister had before him a formal application dated May 2, 2008. He was obliged, as he conceded, to consider all applications. The Minister treated the application before him as denied; it was spent, and a duty to reconsider could only be triggered by a new application. The only rational conclusion is that the Minister had considered the application for an exemption that was then before him, and had decided not to grant it.
>
> [emphasis added]

At the same time declining to deal with an application for which all of the legislative pre-conditions have not yet been met is not equivalent to ignoring the application. Until the pre-conditions are met the situation for which the discretion was granted does not arise.[49]

Having said that, the legislative scheme in which the grant of discretion must be considered. Is the decision-maker given the discretion to decide whether it is appropriate even to consider exercising the discretion as well as the discretion as to how it might be exercised if the choice was made to exercise it. Or does the legislation give the decision-maker no discretion as to whether or not some discretionary decision should be made and instead impose upon the decision-maker the duty to exercise that discretion while leaving the merits of the exercise in the decision-maker's judgment (i.e. discretion). Put more technically, is the grant of discretion put in the nature of a duty to consider whether discretion should be exercised when the occasion arises or is the grant of discretion a mere power to consider its exercise when felt appropriate. On this point see the earlier discussion in chapter 5 under heading 5.4 "Types of Grants of Authorities: Duties and Powers". In *Bagshaw v. Canada (Attorney General)*, 2012 CarswellNat 495, 2012 FC 291 in the face of a scheme simply gave

Tab 25

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018
Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

Subject: Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous
Insolvent oil company (S) went into receivership in February 2017 and court approved sale process — S's major shareholder RD sent Alberta Energy Regulator (AER) proposed sales process order — AER added condition that successful bidder be at arm`s length to S to which RD opposed with concern it would improperly fetter receiver`s ability to conduct sales process in commercially reasonable manner for benefit of all creditors and stakeholders and also that "at arm's length" was vague term — AER refused to allow second company 203 with virtually same principals as S to transfer some of S's wells to itself and refused to allow third company WR to assume S`s well licences unless it could prove it was not related — Receiver applied for court order approving sale of assets and vesting order to WR and based on AER history, sought specifics from Redwater order to be incorporated respecting AER authority — Application granted — Portions of Redwater order incorporated into application properly interpreted, did not give AER authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in insolvency — While AER had discretion to review transfer applications, it must do so within provincial law in force — In deciding whether or not concerns expressed by third parties during 30-day review process warrant further delay in approval process, AER could not take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require hearing — AER failed to establish their concern that WR Ltd bid was example of unfairness of allowing insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid costs of public obligations — With respect to court's jurisdiction to restrain AER from exercising its discretion regarding licence transfer applications, Supreme Court in AbitibiBowater made it clear that, while regulatory body has discretion on how best to ensure that regulatory obligations were met, and court should

avoid interfering, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings" — In most recent amendments to insolvency legislation, decisions of AbitibiBowater and Redwater tried to delineate boundary between creditor and regulatory claims in environmental sphere, but difficult issues remain that must be determined.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — considered

Alberta Energy Regulator v. Grant Thornton Limited (2017), 2017 ABCA 278, 2017 CarswellAlta 1568, 57 Alta. L.R. (6th) 37, 52 C.B.R. (6th) 1, 9 C.P.C. (8th) 238 (Alta. C.A.) — referred to

Alberta Treasury Branches v. COGI Limited Partnership (2016), 2016 ABQB 43, 2016 CarswellAlta 73, 33 C.B.R. (6th) 22 (Alta. Q.B.) — considered

Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered

Cansearch Resources Ltd v. Regent Resources Ltd (2017), 2017 ABQB 535, 2017 CarswellAlta 1601, 52 C.B.R. (6th) 114, 60 Alta. L.R. (6th) 373, 7 P.P.S.A.C. (4th) 278 (Alta. Q.B.) — considered

Grant Thornton Ltd. v. Alberta Energy Regulator (2016), 2016 ABQB 278, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 33 Alta. L.R. (6th) 221, [2016] 11 W.W.R. 716 (Alta. Q.B.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 CarswellAlta 2352, 2017 CarswellAlta 2353 (S.C.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 24(1) — referred to

s. 24(2) — referred to

s. 106(1) — considered

s. 106(3) — referred to

s. 108 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 18(1) — referred to

s. 18(3) — referred to

s. 51 — referred to

s. 52 — considered
Responsible Energy Development Act, S.A. 2012, c. R-17.3
Generally — referred to
Securities Act, R.S.A. 2000, c. S-4
s. 1(l) "control person" — referred to
Traffic Safety Act, R.S.A. 2000, c. T-6
Generally — referred to
Rules considered:
Alberta Energy Regulator Rules of Practice, Alta. Reg. 99/2013
Generally — referred to

APPLICATION by receiver of insolvent company for order approving sale of insolvent's assets.

***B.E. Romaine J.*:**

I. Introduction

1 In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER lending up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

II. Facts

2 The history of this receivership is relevant to the issues that were before me.

3 Rothwell Development Corporation is a major shareholder of Sydco Energy Inc, holding, in combination with the principals of Rothwell, about 65% of its shares. It is also Sydco's major secured creditor. As at February 10, 2017, Sydco owed Rothwell in excess of $15.9 million.

4 In 2016, it had been apparent for some time to Rothwell that Sydco was in financial difficulty. In October 2016, Rothwell engaged James Catherwood and Warren Coles to become employees of Sydco in order to perform an operational review and to determine whether Sydco could be continued as a long-term going concern business. Mr. Catherwood and Mr. Coles had not had any relationship with Sydco prior to this and were not shareholders of Sydco. They were retained because of their knowledge of and experience in the oil and gas industry. In early February 2017, Rothwell, in consultation with its legal and financial advisors, Mr. Catherwood and Mr. Coles, determined that Sydco was no longer viable as a going concern. Rothwell obtained an order putting Sydco into receivership on February 23, 2017. At the time, Sydco had 443 wells, 108 producing, 117 suspended, 143 abandoned, and the remaining shut-in or special status.

5 Mr. Catherwood and Mr. Coles were engaged by the Receiver to continue managing Sydco's business under the Receiver's direction, and to assist with the sale of Sydco's assets. The Court approved a sales process on February 23, 2017.

6 In advance of the receivership application, Rothwell's counsel communicated with Patricia Johnston Q.C., the Executive Vice President and General Counsel of the AER. He sent her a draft of the proposed sales process order, which included a provision permitting the submission of a credit bid. Ms. Johnston advised that she required a condition in the order that the successful bidder be at arm's length to Sydco. Rothwell's counsel did not agree to the proposed condition, indicating that the proposed Receiver was concerned that it would be "an improper fetter on the ability of the Receiver to conduct a sales process

in a commercially reasonable manner for the benefit of all creditors and stakeholders" and also that the term "arm's length" was vague. Ms. Johnston responded that:

> ... the AER will typically not approve the transfer of assets from a Licensee to a Purchaser that is non-arm's length in insolvency situations unless both parties have zero non-compliances.
>
> If this caveat is not included in the sales process ... prospective non-arm's length purchasers of Sydco AER licensed assets might be in store for an ugly surprise when they come to the AER for approval of related AER licenses if Sydco has any non-compliances.

7 Ms. Johnston followed this email with the advice that:

> ... if the seller (Sydco) has a liability management rating of less than 1.0 before or after the transaction, it is considered to be non-compliant with AER requirements. In that scenario, it is extremely unlikely the AER would permit a transfer of licenses to a non-arm's length transferee.

8 Five parties submitted bids in response to the sales process, which was thorough and conducted through an experienced sales agent. Unfortunately, none of the bids were for the purchase of all of the assets. The best bid by far was a credit bid submitted by Rothwell through 2032951 Alberta Ltd, a company incorporated for the purpose by Wayne Hekle, the President and one of the principals of Rothwell (the "203 bid").

9 The Receiver determined that the 203 bid provided the best possible recovery for the receivership estate of Sydco for, among others, the following reasons:

> a) the bid submitted by 203 included many more petroleum and natural gas assets of Sydco than any of the competing bids, with the result that:
>
> i. the impact on the Orphan Well Fund would be significantly less as a result of the proposed sale to 203; and
>
> ii. a larger portion of Sydco's arrears of pre-receivership municipal realty taxes would be assumed by 203 than by the competing bidders;
>
> b) the consideration offered by 203 exceeded that offered by any other bidder; and
>
> c) 203 represented that it would be able to obtain a BA Code, which is necessary for a corporation to hold AER issued licences to operate wells, facilities and pipelines, from the AER, and that, upon completion of the purchase and sale transaction, would have a liability management rating in excess of 2.0 as required by AER Bulletin Nos. 2016-16 and 2016-21. 203 had applied for a BA Code on April 13, 2017, before its bid was accepted by the Receiver.

10 After 203 was selected as the successful bidder, the Receiver renounced those Sydco assets for which no bids had been submitted, including over 300 non-producing wells. Based on the decisions in *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2016 ABQB 278 (Alta. Q.B.) *("Redwater Trial Decision")* and *Orphan Well Assn. v. Grant Thornton Ltd.*, 2017 ABCA 124 (Alta. C.A.), leave to appeal to SCC granted, [2017] S.C.C.A. No. 231 (S.C.C.) ("*Redwater Appeal Decision*"), which upheld the *Redwater Trial Decision*, the Receiver excluded the renounced assets from its calculation of Sydco's liability management rating, leaving Sydco with a rating of 2.02. Thus, Sydco met the requirement of AER Bulletin 2016-21, which requires that as a condition for obtaining the AER's approval to transfers of licenses, both the transferee and the transferor must have a liability management ratio of 2.0 or higher immediately following the transfer.

11 There is little dispute that, in the normal course, the AER would inform an applicant for a BA Code of its decision on an application within 30 days. However, in this case, it took 109 days for 203 to receive a decision.

12 In the meantime, since the AER had indicated that at least one officer of 203 had to be resident in Alberta, Mr. Catherwood became President and CEO of 203. The AER was informed that Rothwell was the sole shareholder of 203 and that Mr. Hekle was the only director.

13 Mr. Catherwood's affidavit details a record of 203's frequent inquiries of the AER as to the status of its application for a BA Code in the months that followed, with only one response on June 20, 2017, indicating that:

> [a]s set out in Bulletin 2016-21, the AER will consider and process all applications for license eligibility under Directive 067 as non-routine. Non-routine applications require a minimum of 30 days to complete our review and are subject to longer timelines depending on the complexity of the application. ... Please be advised that we are experiencing an unusually high volume of applications and endeavor to process within the 30 days.

14 The next day, Mr. Hekle received a letter from an "Insolvency Management Specialist" at the AER indicating the following:

> James Catherwood and yourself are listed as directors in Section D of *Directive 067 - Schedule 1 AER Business Associate Code License Eligibility Type* and/or the Alberta Corporate Registry for 2032951 AB. Further to this, you and Mr. Catherwood have been associated with another company, namely Sydco Energy Inc. (Sydco) that is currently in receivership proceedings and has disclaimed assets. Please submit a written explanation detailing why Sydco failed to meet its end-of-life obligations while under your control and direction, and why it would be appropriate for the AER to consider approval of this application.
>
> AER may request additional security as deemed appropriate in order to offset the estimated costs of suspending, abandoning or reclaiming a well, facility, well site or facility site and as otherwise provided for in Part 1.1 of the *Oil and Gas Conservation Rules*.
>
> Failure to provide the required information by July 7, 2017 will result in the application being closed without further notice.

15 Mr. Catherwood responded on June 27, 2017, advising the AER that Mr. Hekle was the sole director of 203. Mr. Catherwood also attached a lengthy chronology of events from Sydco's incorporation to its receivership. This chronology included the following details:

> a) In September 2012, Grant and Wayne Hekle, together with their corporation Rothwell, owned in excess of 83% of the shares of Sydco. The Hekles reside in Manitoba. The principals of Sydco were Bruce Curlock and Ron Gerlitz, who managed the company.
>
> b) In November 2012, the Canadian Western Bank called Sydco's operating loan of approximately $6.25 million.
>
> c) In December 2012, Rothwell acquired $4 million of the Sydco debt from the Canadian Western Bank. In 2013, Rothwell bought out the remainder of the debt and advanced additional funds to Sydco in 2013 and 2014.
>
> d) In March, 2016, Rothwell commissioned a forensic financial audit of Sydco. PriceWaterhouseCoopers LLP recommended that Mr. Coles, as an experienced chief financial officer in the oil and gas business, perform the audit.
>
> e) In July 2016, upon completion of the audit, Rothwell removed Mr. Curlock as a director and officer of Sydco, and asked the remaining directors to resign.

16 Mr. Catherwood advised the AER that neither he nor Mr. Hekle had control or direction over Sydco prior to the fall of 2016, and thus were not responsible for Sydco's insolvency or its failure to meet its end-of-life obligations.

17 With respect to the AER's reference to "additional security" in the June 21, 2017 letter, Mr. Catherwood wrote:

> With respect, any arbitrary and unlimited additional security deposit to the AER pursuant to AER Bulletin 2016-21 is not reasonable under the circumstances, as is the AER's request that the Corporation agree in advance to whatever presently

unknown security deposit may in future be requested by the AER. The Corporation does not yet have any oil and gas assets and it would be unreasonable to expect the Corporation to agree to such terms given that it would be highly prejudicial and put the Corporation at a competitive disadvantage to the rest of industry. Furthermore, given the experience of the management team of the Corporation and that they did not control or direct Sydco at the relevant time, there should be no requirement for any additional security deposit.

18 On July 11, 2017, Mr. Catherwood, Mr. Coles, and their counsel met with Ms. Johnston and two other AER employees. Mr. Catherwood described the meeting in his affidavit. According to this affidavit, one of the AER employees confirmed that the AER tries to achieve a 30-day turnaround on Directive 067 applications and that the employee had no explanation for the delay with respect to 203's application.

19 Mr. Catherwood deposes that he explained the involvement of the Hekles and Rothwell with Sydco in detail, including how Rothwell had bought the Canadian Western Bank debt in an attempt to avoid a receivership. He also explained the Hekles' reliance on Sydco's former management until the fall of 2016.

20 According to Mr. Catherwood's affidavit, Ms. Johnston advised the 203 delegation that:

a) because Mr. Coles and Mr. Catherwood had become part of Sydco, the AER would use its discretion to refuse to issue BA Codes to any company in which either of them were involved in future; and

b) the situation was different from a situation where the lender was a traditional lender, like the ATB, because traditional lenders do not apply for BA Codes.

21 Mr. Catherwood was not cross-examined on his affidavit. At the hearing, Ms. Johnston stated that she did not believe she would have said this.

22 In response to his comment at the meeting that, if a credit bid did not proceed, there may be unintended consequences that would be worse for the Orphan Well Fund, Mr. Catherwood deposes that Ms. Johnston said that the AER "would not give second chances to principals who were associated with entities that have disclaimed assets to the Orphan Well Association."

23 On July 31, 2017, the AER granted 203's application for a BA Code with the following conditions:

a) 203 would only be permitted to acquire AER licensed assets "from arm's length transferors"; and

b) 203 "must post full security for all liabilities associated with any AER licenses it acquires regardless of [203's] post transaction liability management rating".

24 The decision letter states that the conditions imposed were directly related to the fact that the principals of 203 and Sydco were virtually the same and to Sydco's outstanding non-compliances. The AER in its brief states that the "fact that the outstanding non-compliances related to unpaid levies and outstanding end of life liabilities" is irrelevant.

25 As Mr. Catherwood notes, these conditions made the BA Code approval useless to 203. The security requirement would require 203 to post security of about $19.4 million, which is far more than the amount of the credit bid, and the requirement that such a full security provision would apply to future licenses would leave 203 unable to compete in the oil and gas industry in Alberta. 203 advised the Receiver that it could not meet the condition that it obtain a BA Code that would allow it to purchase the Sydco assets.

26 On August 11, 2017, counsel for Rothwell and 203 advised the Receiver's counsel that Wormwood Resources Ltd, a corporation wholly owned by Fred Rumak, might be willing to step into the shoes of 203 and complete the purchase, provided that the 203 purchase and sale agreement was amended to make Wormwood the purchaser, reduce the purchase price slightly, exclude certain assets that Wormwood was not interested in purchasing, and make certain other inconsequential amendments. Wormwood is a newly incorporated corporation that had been seeking acquisition opportunities. It holds an unconditional BA Code.

27 On August 22, 2017, Wormwood, by assignment agreement, agreed to purchase a portion of the Rothwell secured debt equivalent to the agreed purchase price for the Sydco assets, an interest in the Rothwell loan agreement and the security to govern and secure such purchased debt. 203 assigned its interest in the purchase and sale agreement for the Sydco assets to Wormwood with the Receiver's consent. Rothwell financed Wormwood's acquisition of the Rothwell debt security and the purchase and sale agreement in return for a debenture from Wormwood.

III. Positions of the Parties

28 The Receiver recommended the Wormwood transaction for, among others, the following reasons:

a) all other bids submitted in the sale process had expired;

b) the amendment to the purchase price was relatively minor and the amended purchase price was still greater than the purchase prices offered in the bids submitted by any of the bidders other than 203;

c) Wormwood has a BA Code that is not subject to conditions imposed by the AER that would have the effect of preventing the completion of the transaction;

d) based on the calculations of the Receiver's consultants, the post-closing liability management rating of Wormwood, excluding the assets that have been renounced by the Receiver, would be 2.27, and therefore Wormwood would be in compliance with the requirements of AER Bulletin 2016-21;

e) the proposed transaction results in a significantly larger proportion of the assets being sold than any of the competing bids;

f) the negative impact of Sydco's insolvency upon the Orphan Well Fund and the municipalities in which the assets are located is less as a result of the completion of the Wormwood transaction than it would have been had the Receiver accepted any of the bids submitted by the parties other than 203 in the sale process;

g) it is not known whether, had the Receiver accepted any of the competing bids, the AER would have approved an application to transfer licenses in respect thereof; and

h) given that Rothwell only assigned a portion of the Rothwell debt to Wormwood, after the completion of the Wormwood transaction, it would still be Sydco's only primary secured creditor. Although Rothwell will suffer a significant shortfall in recovery of the indebtedness owing to it, it supports the transaction.

29 However, given the history of the matter, and the fear that the AER would delay or place conditions upon an application by the Receiver requesting a transfer of the licenses, the Receiver requested an approval and vesting order that departs from the usual form of order, in that it includes the following specific paragraphs taken in large part from the May 19, 2016 Order issued as a result of the*Redwater Trial Decision*

18. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations in relation to those PNG Assets that were renounced by the Receiver, ... (the "**Renounced PNG Assets**").

19. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses... shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purpose of calculating the liability management rating ("**LMR**") of Sydco either before or after the transfer, and shall not consider any of the following:

(a) any obligation of Sydco to pay a security deposit...;

(b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;

(c) the renunciation by the Receiver of the Renounced PNG Assets, or any other renunciation by the Receiver of the assets of Sydco pursuant to section 14.06(4) of the *BIA;*

(d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order;

(e) Sydco's status under the AER's *Directive 019 - Compliance Assurance* or any successor thereof, prior to the pronouncement of the Receivership Order;

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund"... including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, find, penalty or charge of any kind whatsoever (collectively, the "Sydco Characteristics"); or

(g) the imposition of any condition to approving such transfer requiring the payment or rectification of any of the above.

20. The Court directs the AER to not deny applications to transfer licenses based on the Sydco Characteristics, and to not impose conditions on such transfer requiring the posting of security for any and all liabilities associated with those licenses.

21. The Court declares that the provisions of the *OGCA [Oil and Gas Conservation Act]*, the *Pipeline Act* and Directive 006 are inapplicable to the extent they require or permit the AER to deny applications by the Receiver to transfer licenses based on the Sydco Characteristics or impose conditions on such transfer requiring that they be paid or complied with.

22. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

23. The Court directs that the AER shall make a determination on any application for license transfers pursuant to the Sales Process (provided the purchaser meets all of the requirements of the AER to hold the applicable licenses) promptly after receipt of a duly accepted electronic license transfer request from the Receiver or Purchaser and in any event within thirty (30) days of the submission of the application by the Receiver or the Purchaser.

24. The Court directs that any refusal by AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.

30 The AER responded to the application materials on August 28, 2017 by indicating that these paragraphs were unnecessary and inappropriate, in that the AER was well aware of the *Redwater* decisions, and that:

Should the Receiver and Wormwood submit license transfer applications, the AER will consider same in accordance with the laws in effect without the need of a court order. In considering license transfer applications, the AER would primarily focus its review on the compliance history of Wormwood as transferee of licenses and its directors and officers and ensuring that Wormwood satisfies AER requirements at the time of the license transfer going forward. This is consistent with the AER's current and past practice in reviewing license transfer applications both before and since the issuance of the *Redwater* decision [emphasis added]

> In specific response to proposed paragraph 23 of the draft [approval and vesting order], the AER advises that as per section 31 of the *Responsible Energy Development Act*, section 5.2 of the *AER Rules of Practice*... and AER Bulletin No. 2017-13, the AER now publishes notice of license transfers applications for a minimum period of 30 days. Accordingly, the AER cannot disposition license transfer applications prior to 30 days following publication, or later if the AER receives statements of concern relating to the application. However, the AER can advise that it will make best efforts to issue a decision as soon as possible following expiry of the 30 day period and would encourage the receiver to submit the applicable transfer applications as soon as possible in order to commence the notice period and address any timing concerns. However, it bears reiterating that, if the AER receives any statements of concern in response to the applications, it must consider and follow its process regarding same. Should you choose to submit a license transfer application now, the AER can confirm it will not issue a decision on the matter until such time as it receives an order confirming court approval of the proposed sale.

31 The Receiver's counsel attempted to reach agreement with the AER on a time period in which the AER would respond to an application to transfer, and attempted to explain its concerns about whether the AER was respecting the *Redwater* decisions, citing issues that have arisen with the AER in connection with various receivership proceedings since the release of the decision. The Receiver also questioned why the AER continued to include renounced assets in its monthly calculation of Sydco's liability management ratings. In response, the AER indicated that "in each and every case where the AER has appeared before the court to object to the various matters outlined in your letter, it has done so in a manner consistent with its position in its current and outstanding appeal in the *Redwater* proceedings."

32 Ms. Johnston attempted to explain why the AER continued to include renounced assets in the calculation of Sydco's liability management rating, and indicated that the AER was prepared to agree to language requiring it to dispose of an application within five business days of the expiration of the 30-day public notice period of any application for transfer of AER licenses held by Sydco, provided the AER is not in receipt of any statements of concern in response to such application. She noted, however, that in the event that the AER received one or more statements of concern, it would process the applications and related statements as per its normal process.

33 The AER continued to take the position that paragraphs 18 through 24 were "self serving and completely irrelevant to the proposed transferee" and requested their deletion. Ms. Johnston noted, however, that "based and in reliance on representations by counsel for Wormwood", the AER was prepared to confirm that Wormwood was arm's length with respect to 203.

34 The representation referred to by Ms. Johnston was an e-mail from Wormwood's counsel that stated that "Fred Rumak owns 100% of the issued and outstanding shares in Wormwood Resources, and that he is the sole director of that company." That e-mail also confirmed that the only legal relationship as between [203] and Wormwood relates to the assignment of the purchase and sale agreement to Wormwood by 203 and ancillary matters necessary to implement the asset purchase.

35 In a letter dated August 30, 2017, the Receiver repeated its concerns about the AER's interpretation of the *Redwater* decisions, and asked for guidance on how the AER interprets "arm's length". The Receiver advised that, in its view, paragraphs 18 to 24 of the draft order were consistent with the *Redwater* decisions.

36 Ms. Johnston responded on August 31, 2017 that

> ... the AER considers a party to be non-arm's length if it has common directors, officers, insiders or controlling shareholders, consistent with the *Securities Act* Multi-lateral Instrument 61-101, [the "Securities Instrument definition"]... the definition of "related party" in that instrument excludes a person that is "solely a bona fide lender" from the definition.

37 She also indicated that, if the AER receives a response to a public notice of application, it must determine whether an objecting party may be directly and adversely affected by the application and, if so, may decide that a hearing is appropriate.

38 The Receiver submitted that the AER's opposition to the proposed form of order was of concern and added force to its submission that the paragraphs are necessary and would avoid the necessity for further applications to deal with rejections of, or conditions placed upon, transfer applications that are inconsistent with the *Redwater* decisions. The Receiver also submitted

that the AER's insistence that it will only approve license transfers to parties that are arm's length to Sydco is contrary to the *Redwater* decisions, and was further evidence of a need to include the special provisions in the order.

39 The Receiver noted that Wormwood is not a related party to Rothwell, Sydco or 203 under the Securities Instrument definition of control. However, the Receiver remained concerned that the arm's length requirement was an attempt to force the payment of abandonment obligations with respect to assets that have been renounced under section 14.06(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3 *(BIA)*, for the following reasons:

a) although none of the officers, directors or shareholders of Sydco have been named under section 106(1) of the *Oil and Gas Conservation Act*, RSA 2000, C 0-6 ["*OGCA*"], or charged with or convicted of offences under section 108 of the *OGCA* or section 52 of the *Pipeline Act*, RSA 2000, cP-15, the AER appears to be intent on "piercing the corporate veil" of Sydco;

b) in justifying its decision, the AER referred to the unpaid abandonment liabilities of Sydco and therefore, the "contravention" of these officers, directors and shareholders is simply that they were officers, directors and shareholders of an entity that, as a result of its insolvency, had insufficient funds to pay all of its abandonment, reclamation and remediation liabilities;

c) the AER's conduct in imposing conditions on the grant of a BA Code as it did with 203 has the appearance of contravening the single proceeding model of insolvency legislation by essentially preventing such officers, directors and shareholders from investing in other oil and gas producers in Alberta if abandonment, reclamation and remediation obligations remain unpaid;

d) in these proceedings, the direct effect of the AER's actions was to prevent the completion of a purchase and sale transaction between the Receiver and 203, notwithstanding that the transaction was clearly to the benefit of the creditors and other stakeholders of Sydco; and

e) it stretches credulity to suggest there is any reason for the AER's actions other than to ensure the abandonment, reclamation and remediation obligations of Sydco are repaid, notwithstanding that there are insufficient funds in the estate to do so in accordance with the AER's priority ranking under the *BIA*.

40 The Receiver described a number of recent receivership applications where it submits that the AER took positions contrary to the *Redwater Trial Decision*, including *Re Verity Energy Ltd*. (Action No 1501-04191); *Nordegg Resources Inc*. (Action No. 1601-07435); *Cansearch Resources Ltd v. Regent Resources Ltd* (Action No. 1601-16147); and *Alberta Treasury Branches v. COGI Limited Partnership* [2016 CarswellAlta 73 (Alta. Q.B.)] (Action No. 1501-12220).

41 The Receiver also noted that, after the *Redwater Appeal Decision*, the AER changed its decision process for transfer applications to provide for a longer standardized review period of 30 days, and to provide that, if within that 30-day period, a statement of concern is filed, the AER has the discretion to require a hearing, all of which has the potential of being an impediment to transactions.

42 The AER in its brief submitted that an application for court approval of a sales and vesting order is not the appropriate forum to challenge the AER's legislation and potential exercise of discretion should a license transfer application be submitted. The AER conceded that it took positions inconsistent with the*Redwater Trial Decision* in previous applications, but said that its positions in the *Verity*, *Regent*, *Nordegg* and *COGI* matters were consistent with its position on the *Redwater* appeal, on the basis that, since it had an outstanding appeal and a stay application, it "must act consistent with its position in those proceedings and take steps to mitigate the harm arising from [the *Redwater Trial Decision*]."

43 The AER noted that the order arising from the *Redwater Trial Decision* provides the AER with discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, but it did not refer to the entirety of the provision in question, which reads:

> 11. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Redwater's AER licenses... shall not consider any of the following:
>
> (d) The compliance record of Redwater. its directors. officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order (but not including any legitimate health, safety and environmental matters associated with the specific Retained Licensed Assets ... that are the subject of a particular license transfer application) provided that the AER shall have the discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, as the term "control" is defined in the *Securities Act* RSA 2000, c S-4.
>
> [emphasis added]

44 The AER submitted that, to the extent that Wormwood is not arm's length to Sydco, the AER was entitled to consider that fact "as it goes to the risk associated with permitting Wormwood to be a licensee", and should be allowed to condition approval accordingly "to mitigate such harm". It submitted that if Wormwood is arm's length, the Receiver should not have a problem amending the approval order to achieve the AER's objective, which it describes as follows:

> The Receiver has refused to amend the [approval order] to address the AER's concerns that the amendments prohibit the AER from considering the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to the proposed transfer of Sydco's licenses ...

45 The AER made it clear at the hearing that it seeks continuing discretion with respect to license transfers, including the right to deny or approve with conditions a license transfer where the AER has concerns regarding the past conduct of the principals of the holder of a current AER license. In other words, the AER takes the position that, despite the wording of section 11(d) of the *Redwater* order, which prohibits the AER from considering the compliance record of directors, officers, employees, security holders and agents of the debtor company in approving a transfer of a license, the language at the end of section 11(d) allows the AER to do so where the transferee is non-arm's length to any of those parties that are caught by the definition of non-arm's length adopted by the AER.

46 The AER submitted that this case was the type of situation described in the dissent of Martin, J.A. in the*Redwater Appeal Decision*, where she commented on the unfairness of allowing an insolvent entity to preserve any assets and avoid the costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

48 The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

49 It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision*specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormword Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

b) the interests of all parties;

c) the efficacy and integrity of the process by which offers are obtained; and

d) whether there has been unfairness in the working out of the process.

51 The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

52 Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face, interpreted in context and in accordance with the *Redwater* decisions, which have precedential effect.

C. Should the Approval Order Include the Redwater Provisions?

53 Given the history of this matter, I find that it is both reasonable and prudent for the Receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order.

54 The original winning bidder, 203, chosen by the Receiver as being in the best interests of stakeholders, encountered lengthy and inexplicable delay in the consideration of its application for a BA Code. Inquiries were left unanswered, meetings with AER staff were tense and confrontational and the conditions attached to the approval of 203's application prevented it from completing its credit bid.

55 The relationship between the AER, the Receiver and Wormwood, the new bidder, has also been fraught with conflict and uncertainty over the AER's position and its stated intentions.

56 It is no secret that the AER disagrees with the *Redwater* decisions, and its conduct in this receivership illustrates its resistance to the principles set out in these decisions. However, as noted by Wakeling, J.A. in refusing the AER's application for a stay of enforcement of the *Redwater Appeal Decision* pending appeal to the Supreme Court of Canada, 2017 ABCA 278 (Alta. C.A.) at paras 11 and 121:

> A Court of Appeal judgment resolves not only the dispute that the parties presented to a court for resolution but the basis for resolution provides a principle that governs all future similar disputes. I cannot stay the precedential effect of a Court of Appeal opinion and create a new legal regime that affects other receivers and trustees in bankruptcy and other secured

> creditors who pursue their rights in different and future debt enforcement proceedings. To do so would mean that similar cases are adjudged differently. This [is] not an attribute of the legal system committed to the rule of law ...
>
> The rights of receivers and bankruptcy trustees, secured creditors and the Alberta Energy Regulator whose interests are juxtaposed will in the future be adjudged according to the principles set out in *Grant Thornton Ltd v Alberta Energy Regulator* unless the Supreme Court of Canada grants leave to appeal and allows the appeal. It is inconsequential what the law was three, five or twenty-five years ago.

57 The AER naturally has concerns about the impact of orphaned and abandoned wells on the public purse, but it must, in insolvency situations as in all others, act in accordance with the law of Alberta, which now includes the principles and declarations set out in the *Redwater* decisions.

58 This receivership has already encountered many obstacles, from the lack of a market for most of Sydco's assets to the delay caused by the now-abandoned 203 bid, and it is reasonable for the Receiver to attempt to control further delay and cost by having the *Redwater* provisions spelled out in the vesting and approval order.

59 Eventually, the parties were able to agree to some minor modifications in the order requested by the Receiver. The final order provisions that refer to the AER are set out in Appendix A to this decision.

D. What Do Sections 11(d) of the Redwater Order and Section 19(d)] of the Sydco Order Mean?

60 Does section 11(d) of the *Redwater* order, now included as section 19(d) in the Sydco order, allow the AER to take the compliance record of a debtor's directors, officers, employees, security holders and agents into account when exercising its authority to approve, deny or impose conditions upon any transfer of a debtor's AER licenses?

61 The AER clearly takes the position that it can do so if a shareholder of a debtor has control of the transferee of such license within the meaning of "control" under the *Securities Act* definition. In fact, it submits that it has the power to do so with respect to a debtor's directors and officers as well. This interpretation of Section 11 (d) would mean that, although the AER could not take the compliance record of such individuals or entities into account when considering the granting or transfer of licences to an arm's length entity, it could do so if the transferee is non-arm's length. In other words, the AER takes the position that the exception that ends the declaration in section 11(d) of the order allows it to take into account the prohibited factor of what occurred as a result of the receivership if the transferee is a non-arm's length party. This position is set out clearly in the AER's August 28, 2017 letter and in its stated objective in argument that it should be allowed to consider the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to a proposed transferee.

62 This interpretation of section 11 (d) cannot succeed.

63 First, it is inconsistent with and contrary to the *Redwater* decisions and the decision of the Supreme Court of Canada in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (S.C.C.), and contrary to the rehabilitation goals of insolvency legislation. Second, the AER's interpretation of section 11(d) of the *Redwater* provisions would preclude receivers from accepting credit bids from parties who fall within the AER's definition of non-arm's length, and thus interfere with a valid tool in insolvency that enables the Receiver to obtain the best outcome for stakeholders and creditors.

64 With respect to the inconsistency of the AER's interpretation of Section 11(d) with the *Redwater* decisions, the Court of Appeal in *Redwater* recognized that the purpose of the BIA includes providing the bankrupt with a "fresh start", free of the burden of crushing debt: para 42. It noted that the fresh start is subject to some limits, including that any regulatory or environmental obligations that are not provable in bankruptcy will continue to bind the bankrupt. However, with respect to whether such obligations can be transferred to third parties, Slatter, J.A. commented that, while the fresh start concept does not apply to corporations that cease to exist after a bankruptcy, "(a)ny regulatory or environmental obligations that were not provable in bankruptcy may exist in theory, but there is no entity against which they could be enforced:" para 44. Even if any of the AER claims could be considered to have survived the bankruptcy, they cannot be enforced against the directors, officers, security holders or agents of Sydco when it ceases to exist. However, it is clear that the claims of the AER at issue in this

proceeding are all claims provable in bankruptcy. Thus, they cannot be revived and enforced against a third party, even if that third party is non-arm's length to the debtor. What the AER is attempting to do by considering the compliance record of officers, directors, shareholders and agents of insolvent companies before granting them, or corporations associated with them, new licences is to seek to enforce the claims against third parties, rather than the debtor who was responsible for the abandonment. This is contrary to the polluter-pay principle endorsed by the Supreme Court in *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.) at para 40, contrary to the fresh start objective of the *BIA* and contrary to the single proceeding model of insolvency legislation.

65 The Court of Appeal also described what the AER was trying to do in the *Redwater Appeal Decision* at para 82:

> Therefore, what the Regulator is attempting to do is attach conditions on the 20 AER licences that might be transferred, which really relate to the 107 wells that have been disclaimed by the Trustee and are not being transferred. The effect is to transfer economic value from the producing wells to the non-producing wells in order to enforce the environmental obligations attached to the latter. This clearly has the effect of disrupting the distribution scheme under the *BIA*. Even if the Trustee must take the licences "warts and all", there is no justification for the Regulator transferring warts from one licence to another.
>
> [emphasis added]

66 Any attempt to connect eligibility for future licences to environmental obligations provable in a bankruptcy, or assets renounced as part of an insolvency proceeding, is another attempt to transfer "warts from one licence to another," again with the effect of frustrating the rehabilitative objectives of the *BIA* and disrupting the distribution scheme.

67 The Court of Appeal's position on the AER's submission that it is entitled to consider the compliance record of individuals associated with an insolvent corporation is made clear in para 88 of the*Redwater Appeal Decision*

> In this appeal, the regulatory regime controlling the transfer of AER licences is also premised on the assumption that there is no obligation outstanding. That obligation is the actual or potential cost of abandoning the well. However, if the environmental obligation is provable in bankruptcy, it cannot be enforced indirectly outside the bankruptcy regime under the Regulator's licensing scheme: *Moloney; 407 ETR*. The Alberta Energy Regulator's licensing scheme depends on the enforcement of environmental liabilities outside the bankruptcy regime, in violation of the "single proceeding" model. The Regulator cannot sidestep the problem by artificially distinguishing between "managing obligations" and "recovering claims". The Regulator cannot establish a parallel process to collect claims.
>
> [emphasis added]

68 Slatter, JA conceded at paragraph 84 that the Regulator can control the transfer of AER licenses of bankrupt companies, but, he said, not by placing financial conditions on transfer that disrupt priorities under the *BIA*. He noted that the Regulator can limit transfers to qualified transferees, but cannot, however, indirectly interfere with the disposition of the value of the assets in bankruptcy by placing financial preconditions on the transfer of permissive AER licenses.

69 It could be argued that this is what the AER in effect did by placing draconian financial conditions on 203's application for a BA Code, As Slatter, J A commented at para 76 of the *Redwater Appeal Decision* "the reality of the Regulator's position should prevail over any narrow and technical interpretation". As a result of these restrictions, the AER stymied a credit bid by a related party that would have been better for both creditors and the Orphan Well Fund. That issue, however, is not before me. Rather than appealing the 203 decision, the bidder found an acceptable way to credit bid through an arm's length third party.

70 However, the reality of the AER's stated intention to consider the compliance record of principals, directors, employees and agents of insolvent companies in making decisions with respect to the transfer of licences is that it is an impermissible, after-the-fact method of attempting to collect debts discharged in bankruptcy not from the debts but from third parties associated with the debtor.

71 The AER's position that it remains free to exercise its discretion to deny BA Codes or the transfer of licenses to the directors, officers, controlling shareholders or "agents" of a debtor that, as a result of its insolvency, had insufficient funds to pay all of its abandonment and remediation liabilities is doing exactly what the Court of Appeal in *Redwater* said it could not do: indirectly enforcing outside the bankruptcy regime an environmental obligation that has been, or will be, compromised in the bankruptcy and can no longer be enforced.

72 In *Moloney*, Gascon, J noted at para 28:

> Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly ...

73 In *Moloney*, a provision of the Alberta *Traffic Safety Act* allowed the Registrar to suspend the debtor's driver's license and vehicle permits until a judgment debt that had been released in bankruptcy was paid. The Province submitted that this was not a debt enforcement scheme, but merely an additional monetary condition to obtain the privilege of driving, that it was "inherently regulatory in nature". The Supreme Court disagreed, noting that the distinction Alberta sought to make was irrelevant, that the section was clearly aimed at the repayment of a judgment debt, and that "even if it were aimed at recovering of the resulting regulatory charge, such charge would nonetheless be a claim provable in bankruptcy, and as such, it would remain a debt subject to the bankruptcy process": para 50.

74 Gascon, J. noted at para 56:

> Therefore, whether one considers the province's claim as a judgment debt or as the resulting regulatory charge, it is still provable in bankruptcy. It follows that the effect of s. 102 is to allow a judgment creditor to deprive the debtor of his or her driving privileges until the debt is paid. In the end, the provision thus compels the payment of a provable claim. Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine "choice": *R. v White*, [1999], 2 S.C.R. 417, at para. 55. The effect of the provincial scheme undoubtedly amounts to coercion in that regard.

75 The enhanced scrutiny proposed by the AER has equally severe consequences for its subjects: a serious interference with their ability to work or invest in the oil and gas industry. Mr. Catherwood justifiably describes this in his affidavit as "blackballing". The effect is coercive and intimidating. It is also a tool that is focused not on the debtor but on individuals who were involved with the debtor, whether or not they had any personal responsibility for the debtor's insolvency. In this case it is clear that Mr. Catherwood and Mr. Coles could have had no such responsibility, yet it appears that they would be caught by the policy. Rothwell, as a shareholder of Sydco attempted by assuming the Canadian Western Bank debt and investing more money in Sydco to prevent an insolvency, yet it would appear to be caught by the policy.

76 The Supreme Court in *Moloney* found that the impugned provision of the *Traffic Safety Act* created an operational conflict between the provincial and federal provisions, and thus was constitutionally inoperative by reason of the doctrine of federal paramountcy. However, Gascon, J went further to consider whether the provision fell within the frustration of federal purpose category, noting at para 77 that the effect of the provision directly contradicted and defeated the financial rehabilitation of the debtor, and that the province's use of the provision undermined that purpose. He cited *Houlden, LW, B Morawetz and Janis Sarra, Bankruptcy and Insolvency Law of Canada*, 4th ed (rev), Toronto: Carswell, 2013 as follows:

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to integrate into business life of the country as a useful citizen free from the crushing burden of debts ...

77 He commented further at para 82 on the Province's submission that Parliament's power over bankruptcy does not extend to the regulation of driving privileges:

> The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

78 Thus, section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, read in context and in accordance with the law as established in the *Redwater* decisions and by the Supreme Court in *Moloney*, does not entitle the AER to refuse to grant a BA Code or to transfer licenses on the basis of the compliance record of Sydco, its directors, officers, employees, security holders and agents as such compliance record relates to claims provable in bankruptcy, or on the basis of the Receiver's renouncement of Sydco assets during the course of the receivership, as this would be an indirect method of enforcing a debt discharged on bankruptcy.

79 Second, the AER's interpretation of section 11(d) of the *Redwater* provisions and section 19(d) of the Sydco order would preclude receivers from allowing credit bids from parties who fall within the AER's definition of non-arm's length.

80 In addition to being an interference with one of the ways in which the Receiver can fulfil its duties to maximize the return to creditors of the estate, the policy would discourage any efforts made by non-arm's length parties, such as occurred here with Rothwell, to invest further in a debtor in an attempt to save the debtor from insolvency, to preserve employment and to continue to pay unsecured creditors. This is contrary to the goals of the insolvency regime and crosses the boundary between legitimate regulatory function and interference in the insolvency process. This presumably unintended consequence creates a trap for the unwary, and eliminates a common-sense solution that preserves value that is in frequent use in receiverships and reorganizations.

81 In summary section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, properly interpreted, do not give the AER the authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in an insolvency. Likewise, the AER may not consider the compliance record of the debtor, its directors, officers, employees, security holders and agents in determining their eligibility for future license grants or transfers if such compliance record refers to debts discharged or assets renounced through bankruptcy. Thus, the provisions of Directive 006 that appear to allow the AER to do so are inoperative by reason of the *Redwater* and *Moloney* decisions. While the AER continues to have discretion to review transfer applications, it must exercise that discretion in accordance with the law in force in this Province. This does not prevent the AER from reviewing such applications in accordance with non-prohibited factors.

82 It follows that, in deciding whether or not concerns expressed by third parties during the 30 day review process warrant any further delay in the approval process, the AER cannot take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require a hearing.

V. Conclusion

83 The AER submits that it is concerned that the Wormwood bid is an example of the unfairness of allowing an insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid the costs of public obligations. There is no evidence that this is a valid concern in this case: the evidence is to the contrary. Rothwell purchased the bank debt of Sydco in an attempt to rescue the company. It sent in new management to determine whether a receivership could be avoided. None of the individuals or entities that are the subject of the AER's focus in this proceeding can be said to have been responsible for Sydco's insolvency. Rothwell may have been acting in its own interests in attempting to salvage Sydco, but it still stands to lose a substantial amount of its investment.

84 If this was one of those proceedings where receivership was a voluntary step to avoid environmental liabilities, which, as the Court of Appeal notes in *Redwater* is not an easy solution to financial problems, "there is enough judicial discretion in the

insolvency regime to prevent abuses": para 105. It is the Court's responsibility to deal with this type of abuse of the insolvency regime. The AER has the power to object to a sale by the Receiver to a control party in a situation where it alleges that this kind of abuse is present, and the Court has the authority to consider the possibility of abuse in determining whether to grant orders in the process. Much of the relief that may be granted to insolvent entities under the *BIA* or the *CCAA* is dependent upon evidence of good faith or fairness in the process and can be denied upon evidence of abuse.

85 With respect to whether this Court has the jurisdiction to restrain the AER from exercising its discretion regarding licence transfer applications, the Supreme Court in *AbitibiBowater* made it clear that, while generally a regulatory body has discretion to decide how best to ensure that regulatory obligations are met, and the court should avoid interfering with that discretion, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings": *AbitibiBowater* at para 48.

86 The current environmental regulatory regime in Alberta allows oil and gas companies to defer the financial consequences of addressing environmental liabilities relating to individual wells as long as their portfolio of assets is able to achieve a positive liability management rating. It is clear that, while this may not have caused difficulties when energy prices were high, in this period of economic downturn in Alberta caused primarily by the substantial and sustained drop in energy prices, the result has been a greatly increased number of abandoned and orphaned wells. There are hard choices to make at the intersection of insolvency law with environmental, pension and employment law, and attempting to balance competing public interest objectives is a difficult task for an insolvency court. The pain of insolvency trickles down to many stakeholders, including unresolved environmental conditions, unfunded or underfunded pension plans, terminated employees, affected trades-people and small businesses, shareholders large and small and even entire communities that may rely on an insolvent industry for their financial welfare.

87 There are compelling arguments for super priority for many of these stakeholder groups, but, as pointed out in the *Redwater Appeal Decision*, Parliament considered the competing policies and "undoubtedly was concerned that giving environmental claims a super priority would drive away lenders, and deprive highly leverage industries (like the oil and gas industry) of necessary financing": para 96.

88 Parliament in the most recent amendments to insolvency legislation, the Supreme Court in its decision in *AbitibiBowater* and now the Alberta Court of Queen's Bench and the Court of Appeal in *Redwater* have tried to delineate the boundary between creditor and regulatory claims in the environmental sphere, but there are still difficult issues that must be determined. This decision attempts to address one of them.

Application granted.

Appendix A

LICENSE TRANSFER PROCESS

1. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations under the *Oil and Gas Conservation Act*, RSA 200, c 0-6 ("*OGCA*") or the *Pipeline Act*, RSA 2000, c P-15 in relation to any wells, pipelines, facilities and sites in which Sydco has an interest that were renounced by the Receiver pursuant to section 14.06(4)(c) of the *BIA* the (the "*Renounced PNG Assets*")

2. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses pursuant to sections 24(1), 24(2), and 106(3) of the *OGCA*, sections 18(1), 18(3) and 51 of the *Pipeline Act*, Article 6 of *Directive 006: Licencee Liability Rating (LLR) Program and License Transfer Process* ("*Directive 006*"), and Articles 4, 8 and 10 of Directive 006, shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purposes of calculating the liability management rating ("*LMR*") of Sydco either before or after the transfer, and shall not consider any of the following:

> (a) any obligation of Sydco to pay a security deposit under section 5 of Directive 006 or section 8 of Appendix II to Directive 006 or under the *OGCA* or *Pipeline Act;*

(b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;

(c) the renunciation by the Receiver pursuant to section 14.06(4) of the *BIA* of Renounced PNG Assets;

(d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order, other than with respect to any legitimate health, safety and environmental matters associated with the Purchased Assets licensed under the *OGCA* or *Pipeline Act* that are subject to a license transfer application by the Receiver and/or Purchaser pursuant to the Sale Agreement, provided that nothing herein shall prevent the AER from exercising a discretion to deny, or to place conditions on any approval of, an application to transfer licenses in respect of Purchased Assets where, as of the effective date of transfer, a control person (as such term is defined in section 1(1) of the *Securities Act*, RSA 2000, Chapter S-4) of Sydco is also a control person of the Purchaser;

(e) Sydco's status under the AER's *Directive 019 - Compliance Assurance* or any successor thereof, including whether or not Sydco is in a "Global Refer" or "Refer" status; or

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund" (as that term is defined in the *OCGA)*, including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, fine, penalty or charge of any kind whatsoever

(collectively, the "Sydco Characteristics"), provided that section 19(d) shall not have precedential effect on or bind this Court with respect to any application by the Receiver for an approval and vesting order other than with respect to the Transaction.

3. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

4. The Court directs that the AER shall make a determination on any application to it to approve transfers of licenses by the Receiver or the Purchaser in connection with the Transaction (a "*License Transfer Application*") within five (5) business days following the expiry of the thirty (30) day notice of application period in respect of such License Transfer Application, provided that in the event that a party files a statement of concern in respect of such License Transfer Application, then the AER will communicate to the Receiver and Purchaser within five (5) business days following a final determination by the AER or any other body contemplated by the *Alberta Energy Regulator Rules of Practice*, AR 99/2013 of the determination on the License Transfer Application

5. The Court directs that any refusal by the AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.

Tab 26

Most Negative Treatment: Distinguished
Most Recent Distinguished: Coty inc. c. Costco Wholesale Canada Ltd. | 2020 QCCS 1898, 2020 CarswellQue 5558, 2020 CarswellQue 8464, EYB 2020-354987 | (C.S. Qué., Jun 22, 2020)

2017 SCC 34, 2017 CSC 34
Supreme Court of Canada

Google Inc. v. Equustek Solutions Inc.

2017 CarswellBC 1727, 2017 CarswellBC 1728, 2017 SCC 34, 2017 CSC 34, [2017] 10 W.W.R. 1, [2017] 1 S.C.R. 824, [2017] B.C.W.L.D. 4056, [2017] B.C.W.L.D. 4399, [2017] B.C.W.L.D. 4522, [2017] B.C.W.L.D. 4523, [2017] B.C.W.L.D. 4524, [2017] S.C.J. No. 34, 154 C.P.R. (4th) 1, 279 A.C.W.S. (3d) 822, 3 C.P.C. (8th) 219, 410 D.L.R. (4th) 625, 72 B.L.R. (5th) 100, 98 B.C.L.R. (5th) 1

Google Inc. (Appellant) and Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. (Respondents) and Attorney General of Canada, Attorney General of Ontario, Canadian Civil Liberties Association, OpenMedia Engagement Network, Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (formerly known as Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association, Society of Professional Journalists, Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, Center for Technology and Society, Wikimedia Foundation, British Columbia Civil Liberties Association, Electronic Frontier Foundation, International Federation of the Phonographic Industry, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, International Confederation of Societies of Authors and Composers, International Confederation of Music Publishers, Worldwide Independent Network and International Federation of Film Producers Associations (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: December 6, 2016
Judgment: June 28, 2017
Docket: 36602

Proceedings: affirming *Equustek Solutions Inc. v. Jack* (2015), 135 C.P.R. (4th) 173, [2015] 11 W.W.R. 45, 386 D.L.R. (4th) 224, 2015 CarswellBC 1590, 2015 BCCA 265, 641 W.A.C. 240, 373 B.C.A.C. 240, 39 B.L.R. (5th) 175, 75 B.C.L.R. (5th) 315, 71 C.P.C. (7th) 215, Frankel J.A., Groberman J.A., Harris J.A. (B.C. C.A.); affirming *Equustek Solutions Inc. v. Jack* (2014), [2014] B.C.J. No. 1190, 28 B.L.R. (5th) 265, 63 B.C.L.R. (5th) 145, 2014 BCSC 1063, 2014 CarswellBC 1694, [2014] 10 W.W.R. 652, 374 D.L.R. (4th) 537, L.A. Fenlon J. (B.C. S.C.)

Counsel: William C. McDowell, Marguerite F. Ethier, Scott M. J. Rollwagen, for Appellant
Robbie Fleming, Michael Sobkin, for Respondents
Jeffrey G. Johnston, for Intervener, the Attorney General of Canada

Sandra Nishikawa, John Corelli, Brent Kettles, for Intervener, the Attorney General of Ontario
Mathew Good, for Intervener, the Canadian Civil Liberties Association
Cynthia Khoo, for Intervener, the OpenMedia Engagement Network
Iris Fischer, Helen Richards (written), for Interveners, the Reporters Committee, for Freedom of the Press, the American Society of News Editors, the Association of Alternative Newsmedia, The Center, for Investigative Reporting, Dow Jones & Company, Inc., the First Amendment Coalition, First Look Media Works, Inc., the New England First Amendment Coalition, the News Media Alliance (formerly known as the Newspaper Association of America), AOL Inc., the California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, the Online News Association and the Society of Professional Journalists
Paul Schabas, Kaley Pulfer (written), for Interveners, Human Rights Watch, ARTICLE 19, Open Net (Korea), the Software Freedom Law Centre and the Center, for Technology and Society
David T.S. Fraser, Jane O'Neill (written), for Intervener, the Wikimedia Foundation
Justin Safayeni, Carlo Di Carlo, for Intervener, the British Columbia Civil Liberties Association
David Wotherspoon, Daniel Byma, for Intervener, the Electronic Frontier Foundation
Dan Glover, Miranda Lam, for Interveners, the International Federation of the Phonographic Industry, Music Canada, the Canadian Publishers' Council, the Association of Canadian Publishers, the International Confederation of Societies of Authors and Composers, the International Confederation of Music Publishers and the Worldwide Independent Network
Gavin MacKenzie, Brooke MacKenzie, for Intervener, the International Federation of Film Producers Associations

Subject: Civil Practice and Procedure; Constitutional; Corporate and Commercial; International; Property; Torts; Human Rights
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.v Advertising
Remedies
II Injunctions
II.6 Extra-territorial operation of injunctions
Remedies
II Injunctions
II.8 Practice and procedure
II.8.a Jurisdiction
Remedies
II Injunctions
II.9 Form and operation of order
II.9.c Persons bound
Headnote
Remedies --- Injunctions — Form and operation of order — Persons bound — Third parties
D Inc. was distributor of E Inc.'s networking devices — After D Inc. allegedly used E Inc.'s trade secrets and conspired with others to design and manufacture competing product it shipped to customers ordering E Inc.'s products, E Inc. brought action against D Inc. and obtained interlocutory injunction freezing D Inc.'s assets and prohibiting D Inc. from using E Inc.'s intellectual property — D Inc. left jurisdiction without complying — After E Inc. obtained order prohibiting D Inc. from carrying on business on Internet, non-party, G Inc., de-indexed D Inc.'s Canadian websites — D Inc. moved content to new pages within websites so customers could still access websites through G Inc.'s non-Canadian URLs — E Inc. obtained interim injunction from BC Supreme Court (BCSC) compelling G Inc. to globally de-index D Inc.'s websites — BCSC agreed that G Inc.'s search engine was facilitating D Inc.'s customers' access to its websites and that injunction with worldwide effect was only way to protect E Inc. from irreparable harm — BC Court of Appeal (BCCA) dismissed G Inc.'s appeal, finding injunction did not violate principles of comity, that there was sufficient basis to uphold finding that G Inc. did business in BC and that BCSC had in personam jurisdiction over G Inc., that BCSC had inherent jurisdiction to grant injunction with extra-territorial effect against

non-party resident in foreign jurisdiction where just or convenient to do so, and that injunction was only practical way to prevent D Inc. from flouting court's orders — BCCA found there was fair question to be tried, that irreparable harm was established, that G Inc. facilitated harm and would suffer no material inconvenience, and that balance of convenience favoured granting injunction — G Inc. appealed — Appeal dismissed — Decision to grant interlocutory injunction was discretionary, entitled to high degree of deference, and was just and equitable in circumstances — Injunctive relief was available against non-party — Non-party violating court order could be treated as if party bound by order — Impact on non-party was valid consideration in deciding whether to grant injunction but did not affect authority to make order — Norwich orders and Mareva injunctions were analogous orders available to compel non-parties to disclose information or documents in their possession or to assist parties — Injunction here flowed from need for G Inc.'s assistance to prevent facilitation of D Inc.'s ability to defy court orders and do irreparable harm to E Inc. — Without injunction, G Inc. would clearly continue to facilitate ongoing harm.

Remedies --- Injunctions — Form and operation of order — Extra-territorial operation

D Inc. was distributor of E Inc.'s networking devices — After D Inc. allegedly used E Inc.'s trade secrets and conspired with others to design and manufacture competing product it shipped to customers ordering E Inc.'s products, E Inc. brought action against D Inc. and obtained interlocutory injunction freezing D Inc.'s assets and prohibiting D Inc. from using E Inc.'s intellectual property — D Inc. left jurisdiction without complying — After E Inc. obtained order prohibiting D Inc. from carrying on business on Internet, non-party, G Inc., de-indexed D Inc.'s Canadian websites — D Inc. moved content to new pages so customers could access websites through G Inc.'s non-Canadian URLs — E Inc. obtained interim injunction from BC Supreme Court (BCSC) compelling G Inc. to globally de-index D Inc.'s websites — BCSC held that injunction with worldwide effect was only way to protect E Inc. from irreparable harm — BC Court of Appeal (BCCA) dismissed G Inc.'s appeal, finding injunction did not violate principles of comity, that there was sufficient basis to uphold finding that G Inc. did business in BC and that BCSC had in personam jurisdiction over G Inc., that BCSC had inherent jurisdiction to grant injunction with extra-territorial effect against non-party resident in foreign jurisdiction, and that injunction was only practical way to prevent D Inc. from flouting court's orders — BCCA found that underlying action met Supreme Court of Canada's RJR-MacDonald test for interlocutory injunction — G Inc. appealed — Appeal dismissed — Court with in personam jurisdiction could grant injunction enjoining that person's conduct anywhere in world where it was necessary to ensure injunction's effectiveness — Internet had no borders: its natural habitat was global — Only way to ensure interlocutory injunction attained its objective was to have it apply where G Inc. operated: globally — Injunction restricted to Canada or G Inc.ca would not prevent irreparable harm — Order only required G Inc. to make changes where search engine was controlled, something G Inc. did with ease, so there was no harm to G Inc. on "inconvenience" scale arising from global reach of order — It remained open to G Inc. to have order varied or vacated but G Inc. had not done so.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Advertising

D Inc. was distributor of E Inc.'s networking devices — After D Inc. allegedly used E Inc.'s trade secrets and conspired with others to design and manufacture competing product it shipped to customers ordering E Inc.'s products, E Inc. brought action against D Inc. and obtained interlocutory injunction freezing D Inc.'s assets and prohibiting D Inc. from using E Inc.'s intellectual property — D Inc. left jurisdiction without complying — After E Inc. obtained order prohibiting D Inc. from carrying on business on Internet, non-party, G Inc., de-indexed D Inc.'s Canadian websites — D Inc. moved content to new pages so customers could access websites through G Inc.'s non-Canadian URLs — E Inc. obtained interim injunction from BC Supreme Court (BCSC) compelling G Inc. to globally de-index D Inc.'s websites — BCSC held that injunction with worldwide effect was only way to protect E Inc. from irreparable harm — BC Court of Appeal (BCCA) dismissed G Inc.'s appeal, finding injunction did not violate principles of comity, that there was sufficient basis to uphold finding that G Inc. did business in BC and that BCSC had in personam jurisdiction over G Inc., that BCSC had inherent jurisdiction to grant injunction with extra-territorial effect against non-party resident in foreign jurisdiction, and that injunction was only practical way to prevent D Inc. from flouting court's orders — BCCA found that underlying action met Supreme Court of Canada's RJR-MacDonald test for interlocutory injunction — G Inc. appealed — Appeal dismissed — Order did not require removal of speech that, on its face, engaged freedom of expression values — Freedom of expression had not been accepted as requiring facilitation of unlawful sale of goods.

Remedies --- Injunctions — Rules governing injunctions — Jurisdiction of court — Whether court having jurisdiction — Miscellaneous

Réparations --- Injonctions — Forme et application de l'ordonnance — Personnes assujetties — Tiers

D inc. était le distributeur des dispositifs de réseautage de E inc. — Après que D inc. eût apparemment utilisé les secrets commerciaux de E inc. et comploté avec d'autres pour concevoir et fabriquer un produit concurrent qu'il a expédié aux clients qui avaient commandé les produits de E inc., E inc. a déposé une action à l'encontre de D inc. et obtenu une injonction interlocutoire visant à geler les biens de D inc. et à lui interdire d'utiliser la propriété intellectuelle de E inc. — D inc. a quitté la province sans se conformer à l'injonction — Après que E inc. eût obtenu une ordonnance interdisant à D inc. de faire des affaires sur l'Internet, G inc., un tiers, a délisté les sites Internet canadiens de D inc. — D inc. a déplacé son contenu vers de nouvelles pages de ses sites Internet, permettant ainsi à ses clients d'accéder librement à ses sites Internet au moyen des URL de G inc. se rapportant à des adresses situées à l'extérieur du Canada — Cour suprême de la Colombie-Britannique (CSC-B) a accordé à E inc. une injonction provisoire ayant effet à l'échelle de la planète ordonnant à G inc. de cesser le listage des sites Internet de D inc. — CSC-B était d'accord pour dire que le moteur de recherche de G inc. permettait aux clients de D inc. d'accéder plus facilement à ses sites Internet et que l'émission d'une injonction ayant des effets à l'échelle mondiale était la seule manière d'empêcher E inc. de subir un préjudice irréparable — Cour d'appel de la Colombie-Britannique (CAC-B) a rejeté l'appel interjeté par G inc., estimant que l'injonction ne contrevenait pas aux principes de courtoisie, qu'il y avait suffisamment d'éléments permettant de confirmer que G inc. faisait des affaires en Colombie-Britannique et que la CSC-B avait compétence personnelle à l'égard de G inc., que la CSC-B avait compétence inhérente pour émettre une injonction ayant des effets extraterritoriaux à l'encontre d'un tiers résidant dans une juridiction étrangère lorsque les circonstances le permettaient et que l'injonction était la façon possible d'empêcher D inc. de faire fi des diverses ordonnances judiciaires — CAC-B a conclu que la question méritait de faire l'objet d'un procès, que la présence d'un préjudice irréparable avait été démontrée, que G inc. facilitait l'infliction du préjudice et ne subirait aucun inconvénient majeur et que la prépondérance des inconvénients penchait en faveur de l'octroi d'une injonction — G inc. a formé un pourvoi — Pourvoi rejeté — Décision d'accorder une injonction interlocutoire était une décision discrétionnaire qui commandait un degré élevé de déférence et qui était juste et équitable dans les circonstances — Injonction était une réparation que l'on pouvait utiliser à l'encontre d'un tiers — Tiers qui contrevenait à une ordonnance judiciaire pouvait être traité comme s'il était lié par l'ordonnance — Si l'effet d'une injonction sur des tiers était une considération dont on pouvait valablement tenir compte avant d'accorder une injonction, cet élément n'avait pas aucune incidence sur le pouvoir de rendre une telle ordonnance — Ordonnances de type Norwich et celles de type Mareva étaient semblables et pouvaient être utilisées pour obliger des tiers à communiquer des renseignements ou des documents qu'ils ont en leur possession ou pour venir en aide aux parties — Injonction en l'espèce découlait du fait que le concours de G inc. était nécessaire pour ne pas faciliter la violation d'ordonnances judiciaires par D inc. et causer un préjudice irréparable à E inc. — Sans cette injonction, il était clair que G inc. continuerait de faciliter ce préjudice continu.

Réparations --- Injonctions — Forme et application de l'ordonnance — Application extraterritoriale

D inc. était le distributeur des dispositifs de réseautage de E inc. — Après que D inc. eût apparemment utilisé les secrets commerciaux de E inc. et comploté avec d'autres pour concevoir et fabriquer un produit concurrent qu'il a expédié aux clients qui avaient commandé les produits de E inc., E inc. a déposé une action à l'encontre de D inc. et obtenu une injonction interlocutoire visant à geler les biens de D inc. et à lui interdire d'utiliser la propriété intellectuelle de E inc. — D inc. a quitté la province sans se conformer à l'injonction — Après que E inc. eût obtenu une ordonnance interdisant à D inc. de faire des affaires sur l'Internet, G inc., un tiers, a délisté les sites Internet canadiens de D inc. — D inc. a déplacé son contenu vers de nouvelles pages de ses sites Internet, permettant ainsi à ses clients d'accéder librement à ses sites Internet au moyen des URL de G inc. se rapportant à des adresses situées à l'extérieur du Canada — Cour suprême de la Colombie-Britannique (CSC-B) a accordé à E inc. une injonction provisoire ayant effet à l'échelle de la planète ordonnant à G inc. de cesser le listage des sites Internet de D inc. — CSC-B a conclu que l'émission d'une injonction ayant des effets à l'échelle mondiale était la seule manière d'empêcher E inc. de subir un préjudice irréparable — Cour d'appel de la Colombie-Britannique (CAC-B) a rejeté l'appel interjeté par G inc., estimant que l'injonction ne contrevenait pas aux principes de courtoisie, qu'il y avait suffisamment d'éléments permettant de confirmer que G inc. faisait des affaires en Colombie-Britannique et que la CSC-B avait compétence personnelle à l'égard de G inc., que la CSC-B avait compétence inhérente pour émettre une injonction ayant des effets extraterritoriaux à l'encontre d'un tiers résidant dans une juridiction étrangère lorsque les circonstances le permettaient et que l'injonction était la façon possible d'empêcher D inc. de faire fi des diverses ordonnances judiciaires — CAC-B a conclu que l'action sous-jacente satisfaisait au test de type RJR-MacDonald établi par la Cour suprême du Canada pour les injonctions interlocutoires — G inc. a formé un pourvoi — Pourvoi rejeté — Tribunal ayant compétence personnelle pouvait accorder une injonction dictant une conduite à adopter n'importe où dans le monde si cela était nécessaire pour assurer l'efficacité de l'injonction — Internet n'avait pas de frontières et son habitat

naturel était mondial — Seule façon de s'assurer que l'injonction interlocutoire atteignît son objectif était de la faire appliquer là où G inc. exerçait ses activités, c'est-à-dire mondialement — Si l'injonction se limitait au Canada seulement ou à G inc.ca, la réparation ne pourrait pas empêcher le préjudice irréparable — Ordonnance exigeait seulement que G inc. prît des mesures à l'endroit où son moteur de recherche était contrôlé, quelque chose que G inc. faisait assez facilement, de sorte que la portée mondiale de l'ordonnance ne causait pas à G inc. un préjudice susceptible de faire partie des « inconvénients » — Il était loisible à G inc. de faire modifier ou annuler l'ordonnance, mais G inc. ne l'avait pas fait.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Liberté d'expression — Publicité

D inc. était le distributeur des dispositifs de réseautage de E inc. — Après que D inc. eût apparemment utilisé les secrets commerciaux de E inc. et comploté avec d'autres pour concevoir et fabriquer un produit concurrent qu'il a expédié aux clients qui avaient commandé les produits de E inc., E inc. a déposé une action à l'encontre de D inc. et obtenu une injonction interlocutoire visant à geler les biens de D inc. et à lui interdire d'utiliser la propriété intellectuelle de E inc. — D inc. a quitté la province sans se conformer à l'injonction — Après que E inc. eût obtenu une ordonnance interdisant à D inc. de faire des affaires sur l'Internet, G inc., un tiers, a délisté les sites Internet canadiens de D inc. — D inc. a déplacé son contenu vers de nouvelles pages de ses sites Internet, permettant ainsi à ses clients d'accéder librement à ses sites Internet au moyen des URL de G inc. se rapportant à des adresses situées à l'extérieur du Canada — Cour suprême de la Colombie-Britannique (CSC-B) a accordé à E inc. une injonction provisoire ayant effet à l'échelle de la planète ordonnant à G inc. de cesser le listage des sites Internet de D inc. — CSC-B a conclu que l'émission d'une injonction ayant des effets à l'échelle mondiale était la seule manière d'empêcher E inc. de subir un préjudice irréparable — Cour d'appel de la Colombie-Britannique (CAC-B) a rejeté l'appel interjeté par G inc., estimant que l'injonction ne contrevenait pas aux principes de courtoisie, qu'il y avait suffisamment d'éléments permettant de confirmer G inc. faisait affaires en Colombie-Britannique et que la CSC-B avait compétence personnelle à l'égard de G inc., que la CSC-B avait compétence inhérente pour émettre une injonction ayant des effets extraterritoriaux à l'encontre d'un tiers résidant dans une juridiction étrangère lorsque les circonstances le permettaient et que l'injonction était la façon possible d'empêcher D inc. de faire fi des diverses ordonnances judiciaires — CAC-B a conclu que l'action sous-jacente satisfaisait au test de type RJR-MacDonald établi par la Cour suprême du Canada pour les injonctions interlocutoires — G inc. a formé un pourvoi — Pourvoi rejeté — Ordonnance ne visait pas la suppression de propos qui, à première vue, faisaient intervenir des valeurs liées à la liberté d'expression — Il n'a pas été reconnu que la liberté d'expression exigeait qu'on facilitât la vente illégale de biens.

Réparations --- Injonctions — Règles régissant les injonctions — Compétence du tribunal — Si le tribunal a compétence — Divers

D Inc. was the distributor of E Inc.'s networking devices. After D Inc. allegedly used E Inc.'s trade secrets and conspired with others to design and manufacture a competing product which it shipped to customers who ordered E Inc.'s products, E Inc. brought action against D Inc. and obtained an interlocutory injunction freezing D Inc.'s assets and prohibiting D Inc. from using E Inc.'s intellectual property. D Inc. left the jurisdiction without complying with the injunction.

E Inc. asked G Inc. to de-index D Inc.'s websites. G Inc. agreed to do so if E Inc. obtained an order prohibiting D Inc. from carrying on business on the Internet. E Inc. obtained the order G Inc. requested and G Inc. de-indexed D Inc.'s Canadian websites. D Inc. responded by moving its content to new pages within its websites, leaving customers free to access its websites through G Inc.'s non-Canadian URLs.

E Inc. obtained an injunction from the BC Supreme Court (BCSC) to cease indexing or referencing D Inc. websites in search results on its internet search engines until the conclusion of the trial or further order of the court. The BCSC noted that G Inc. controlled 70-75 per cent of global searches on the Internet, that D Inc.'s ability to sell its counterfeit product was, in large part, contingent on customers being able to locate its websites through G Inc.'s search engine, and that an injunction with worldwide effect was the only way to protect E Inc. from irreparable harm being facilitated through G Inc.'s search engine.

The BC Court of Appeal (BCCA) dismissed G Inc.'s appeal and upheld the injunction, accepting the BCSC's conclusion that it had in personam jurisdiction over G Inc. and could make an order with extraterritorial effect, agreeing that courts of inherent jurisdiction could grant equitable relief against non-parties, and noting that an interlocutory injunction against G Inc. was the only practical way to prevent D Inc. from flouting the court's orders. The BCCA found no identifiable countervailing comity or freedom of expression concerns preventing such an order from being granted.

G Inc. appealed.

Held: The appeal was dismissed.

Per Abella J. (McLachlin C.J.C. and Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. concurring): The decision to grant an interlocutory injunction was a discretionary one which was entitled to a high degree of deference. Injunctions were flexible, drastic remedies available against non-parties. Any non-party violating a court order could be treated as if it were a party bound by the order, as that violation indicated the non-party was conducting itself so as to obstruct the course of justice. While the impact of an injunction on a non-party was a valid consideration in deciding whether to grant the injunction, that did not affect the court's authority to grant the injunction. Norwich orders and Mareva injunctions were analogous orders available to compel non-parties to disclose information or documents in their possession or to assist parties. In this case, the injunction flowed from E Inc.'s need for G Inc.'s assistance to prevent the facilitation of D Inc.'s ability to defy court orders and do irreparable harm to E Inc. Without the injunction, G Inc. would clearly continue to facilitate ongoing harm.

A court with in personam jurisdiction could grant an injunction enjoining that person's conduct anywhere in the world where it was necessary to ensure the injunction's effectiveness. The Internet had no borders — its natural habitat was global. The only way to ensure the injunction attained its objective was to have it apply where G Inc. operated — globally. Restricting the injunction to Canada or to G Inc.ca would deprive it of its intended ability to prevent irreparable harm. There was no equity in ordering an interlocutory injunction without any realistic prospect of it preventing irreparable harm. The injunction's worldwide effect did not tip the balance of convenience in G Inc.'s favour. The order did not require G Inc. to take any steps around the world but only where its search engine was controlled, something G Inc. acknowledged it could do and did do with relative ease, so no harm to G Inc. could be placed on its "inconvenience" scale arising from the global reach of the order. Nor did the order interfere with G Inc.'s content-neutral character as it did not require G Inc. to monitor content on the Internet or find G Inc. liable for facilitating access to the impugned websites. G Inc.'s argument the global injunction violated international comity was merely theoretical.

Freedom of expression issues were not engaged in such a way as to tip the balance of convenience towards G Inc., as the order was not to remove speech but to de-index websites that violated court orders. The court had not, to date, accepted that freedom of expression required facilitation of the unlawful sale of goods. Since the injunction was the only effective way to mitigate harm to E Inc. and preserve E Inc. itself pending resolution of the underlying litigation, and since any countervailing harm to G Inc. was minimal to non-existent, the injunction was to be upheld.

Per Côté and Rowe JJ. (dissenting): While the BCSC had jurisdiction to issue the interlocutory injunction, it should not have issued it. The order enjoined a non-party which neither aided nor abetted D Inc.'s wrongdoing, held no assets of E Inc.'s, and had no information relevant to underlying proceedings. The order was effectively a final redress against G Inc. but the BCSC did not conduct the extensive review of the merits of the underlying action mandated by the Supreme Court of Canada in 1994 for interlocutory injunctions effectively finally determining the underlying action. E Inc. had shown that damages were inadequate but not that D Inc. designed or sold counterfeit versions of its product, or that this resulted in trademark infringement or unlawful appropriation of trade secrets.

The injunction provided E Inc. with more equitable relief than it sought against D Inc. in the underlying claim and little incentive to seek a lesser injunctive remedy later, as evidenced by E Inc.'s choice to not seek default judgment in the five years since it was given leave to do so.

The necessity of court supervision suggested restraint in granting the order. D Inc. was continually launching new websites to replace de-listed ones and the order had already been amended at least seven times to capture D Inc.'s new sites. The order was ineffective in enforcing the initial order requiring D Inc. to cease doing business on the Internet or in reducing harm to E Inc., as D Inc.'s websites could still be found through other means. Before pursuing this equitable remedy, E Inc. should have pursued the alternative legal remedy in France where D Inc. had assets, as was suggested to it by the BCCA. E Inc. could also seek injunctive relief against ISPs to enforce the initial order and initiate contempt proceedings in France or any other jurisdiction with link to illegal websites.

D inc. était le distributeur des dispositifs de réseautage de E inc. Après que D inc. eût apparemment utilisé les secrets commerciaux de E inc. et comploté avec d'autres pour concevoir et fabriquer un produit concurrent qu'il a expédié aux clients qui avaient commandé les produits de E inc., E inc. a déposé une action à l'encontre de D inc. et obtenu une injonction interlocutoire visant à geler les biens de D inc. et à lui interdire d'utiliser la propriété intellectuelle de E inc. D inc. a quitté la province sans se conformer à l'injonction.

E inc. a demandé à G inc. de délister les sites Internet de D inc. G inc. a accepté de donner suite à cette demande si E inc. réussissait à obtenir une ordonnance interdisant à D inc. de faire des affaires sur l'Internet. E inc. a réussi à obtenir l'ordonnance

demandée par G inc. et G inc. a délisté les sites Internet canadiens de D inc. D inc. a répondu en déplaçant son contenu vers de nouvelles pages de ses sites Internet, permettant ainsi à ses clients d'accéder librement à ses sites Internet au moyen des URL de G inc. se rapportant à des adresses situées à l'extérieur du Canada.

La Cour suprême de la Colombie-Britannique (CSC-B) a accordé à E inc. une injonction ordonnant que cesse le listage et le référencement des sites Internet de D inc. dans les résultats des moteurs de recherche sur Internet, et ce, jusqu'à l'issue du procès ou jusqu'à nouvelle ordonnance de la cour. La CSC-B a fait remarquer que G inc. contrôlait entre 70 et 75 p. 100 des recherches mondiales dans Internet, que la capacité de D inc. de vendre son produit contrefait dépendait, en grande partie, du fait que les clients étaient capables de trouver ses sites Internet grâce au moteur de recherche de G inc. et que l'émission d'une injonction ayant des effets à l'échelle mondiale était la seule manière d'empêcher E inc. de subir un préjudice irréparable qui était facilité par le moteur de recherche de G inc.

La Cour d'appel de la Colombie-Britannique (CAC-B) a rejeté l'appel interjeté par G inc. et a confirmé l'injonction, acceptant la conclusion tirée par la CSC-B qu'elle avait compétence personnelle à l'égard de G inc. et pouvait rendre une ordonnance ayant des effets extraterritoriaux, reconnaissant que les tribunaux investis d'une compétence inhérente pouvaient accorder une réparation en equity contre des tiers et faisant remarquer qu'une injonction interlocutoire contre G inc. était la seule façon possible d'empêcher D inc. de faire fi des diverses ordonnances judiciaires. La CAC-B a estimé qu'il n'y avait aucune considération identifiable en matière de courtoisie ou de liberté d'expression susceptible de faire contrepoids qui empêchait l'octroi d'une telle ordonnance.

G inc. a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Abella, J. (McLachlin, J.C.C., Moldaver, Karakatsanis, Wagner, Gascon, Brown, JJ., soucrivant à son opinion) : La décision d'accorder une injonction interlocutoire était une décision discrétionnaire qui commandait un degré élevé de déférence. L'injonction était une réparation souple et draconienne que l'on pouvait utiliser à l'encontre d'un tiers. Un tiers qui contrevenait à une ordonnance judiciaire pouvait être traité comme s'il était lié par l'ordonnance, puisque cette contravention indiquait que le tiers s'était comporté de manière à faire entrave à la justice. Si l'effet d'une injonction sur des tiers était une considération dont la cour pouvait valablement tenir compte lorsqu'elle décidait si elle exerçait sa compétence pour accorder une injonction, cet élément n'avait pas toutefois aucune incidence sur le pouvoir de la cour de rendre une telle ordonnance. Les ordonnances de type Norwich et celles de type Mareva étaient semblables et pouvaient être utilisées pour obliger des tiers à communiquer des renseignements ou des documents qu'ils avaient en leur possession ou pour venir en aide aux parties. L'injonction en l'espèce découlait du fait que le concours de G inc. était nécessaire pour ne pas faciliter la violation d'ordonnances judiciaires par D inc. et causer un préjudice irréparable à E inc. Sans cette injonction, il était clair que G inc. continuerait de faciliter ce préjudice continu. Un tribunal ayant compétence personnelle pouvait accorder une injonction dictant une conduite à adopter n'importe où dans le monde si cela était nécessaire pour assurer l'efficacité de l'injonction. L'Internet n'avait pas de frontières et son habitat naturel était mondial. La seule façon de s'assurer que l'injonction interlocutoire atteignît son objectif était de la faire appliquer là où G inc. exerçait ses activités, c'est-à-dire mondialement. Si l'injonction se limitait au Canada seulement ou à G inc.ca, la réparation ne pourrait pas empêcher le préjudice irréparable. Une injonction interlocutoire n'offrant aucune possibilité réaliste d'empêcher le préjudice irréparable ne constituait pas une réparation en equity. Les effets de l'injonction à l'échelle mondiale ne faisaient pas en sorte que la prépondérance des inconvénients favorisait G inc. L'ordonnance n'exigeait pas que G inc. prît des mesures partout dans le monde, mais seulement à l'endroit où son moteur de recherche était contrôlé, quelque chose que G inc. a reconnu pouvoir faire assez facilement, de sorte que la portée mondiale de l'ordonnance ne causait pas à G inc. un préjudice susceptible de faire partie des « inconvénients ». L'ordonnance ne compromettait pas le caractère neutre sur le plan du contenu de G inc., puisqu'elle n'exigeait pas que G inc. surveillât le contenu disponible sur Internet et elle ne constituait pas non plus une conclusion selon laquelle G inc. était responsable de quelque façon que ce soit d'avoir facilité l'accès aux sites Internet en cause. L'argument de G inc. selon lequel une injonction mondiale contrevenait au principe de la courtoisie internationale était tout au plus théorique. Les questions liées à la liberté d'expression n'étaient pas pertinentes au point de faire pencher la balance la prépondérance des inconvénients en faveur de G inc., puisque l'ordonnance ne visait pas la suppression de propos, mais plutôt le délistage de sites Internet qui contrevenaient à des ordonnances judiciaires. Jusqu'à maintenant, la Cour n'a pas reconnu que la liberté d'expression exigeait que l'on facilitât la vente illégale de biens. Tout bien considéré, puisque l'injonction interlocutoire était la seule façon efficace de réduire le préjudice causé à E inc. et de préserver E inc. elle-même jusqu'à ce que le litige sous-

jacent soit réglé et puisque le préjudice subi par G inc. en contrepoids était minime, voire inexistant, l'injonction interlocutoire devrait donc être confirmée.

Côté, Rowe, JJ. (dissidents) : Même si la CSC-B avait compétence pour prononcer l'injonction interlocutoire, elle aurait dû s'abstenir de le faire. L'ordonnance obligeait un tiers à faire quelque chose alors que ce dernier n'avait ni aidé ni encouragé D inc. à commettre l'acte répréhensible en cause, ne détenait aucun élément d'actif d'E inc. et ne disposait d'aucun renseignement pertinent à l'égard de la procédure sous-jacente. L'ordonnance constituait dans les faits une réparation finale contre G inc., mais la CSC-B n'a pas procédé à un examen approfondi sur le fond de l'action sous-jacente comme le requiert la Cour suprême du Canada depuis 1994 dans le cas où le résultat de la demande d'injonction interlocutoire équivaudrait en fait au règlement final de l'action sous-jacente. E inc. avait réussi à démontrer le caractère inadéquat des dommages-intérêts, mais pas que D inc. avait conçu et vendu des versions contrefaites de son produit ou que cela avait causé une contrefaçon de marque de commerce ou une appropriation illégale de secrets commerciaux.

L'injonction fournissait à E inc. une réparation en equity supérieure à celle sollicitée contre D inc. dans le cadre des procédures sous-jacentes, et E inc. n'avait guère avantage à retourner devant le tribunal pour obtenir une injonction moins sévère, comme en témoignait le choix de E inc. de ne pas demander de jugement par défaut pendant la période d'environ cinq ans qui s'était écoulée depuis qu'elle avait obtenu l'autorisation de ce faire.

La nécessité d'une supervision judiciaire laissait croire qu'il fallait faire preuve de retenue relativement à l'octroi de l'ordonnance. D inc. mettait continuellement en service de nouveaux sites Internet pour remplacer ceux qui étaient délistés, et l'ordonnance avait déjà été modifiée au moins sept fois pour permettre d'englober les nouveaux sites de D inc. L'ordonnance n'arrivait pas à faire respecter l'ordonnance initiale exigeant de D inc. qu'il cesse de faire des affaires sur l'Internet ou à réduire le préjudice subi par E inc., étant donné que les sites Internet de D inc. pouvaient quand même être accessibles par d'autres moyens. Avant de rechercher cette réparation en equity, E inc. aurait dû entreprendre un autre recours juridique en France, là où D inc. avait des actifs, comme la CAC-B le lui a recommandé. E inc. pouvait également demander une injonction contre les FSI afin de faire respecter l'ordonnance initiale et intenter une procédure pour outrage en France ou dans tout autre pays ayant un lien avec les sites Internet illégaux.

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POURVOI formé à l'encontre d'un jugement publié à *Equustek Solutions Inc. v. Jack* (2015), 2015 BCCA 265, 2015 CarswellBC 1590, 386 D.L.R. (4th) 224, 71 C.P.C. (7th) 215, [2015] 11 W.W.R. 45, 39 B.L.R. (5th) 175, 75 B.C.L.R. (5th) 315, 373 B.C.A.C. 240, 641 W.A.C. 240, 135 C.P.R. (4th) 173, [2015] B.C.J. No. 1193 (B.C. C.A.), ayant confirmé l'octroi d'une injonction ayant des effets extraterritoriaux à l'encontre d'un tiers.

***Abella J.* (McLachlin C.J.C., Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. concurring):**

1 The issue in this appeal is whether Google can be ordered, pending a trial, to globally de-index the websites of a company which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company. The answer turns on classic interlocutory injunction jurisprudence: is there a serious issue to be tried; would irreparable harm result if the injunction were not granted; and does the balance of convenience favour granting or refusing the injunction. Ultimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case.

Background

2 Equustek Solutions Inc. is a small technology company in British Columbia. It manufactures networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.

3 The underlying action between Equustek and the Datalink defendants (Morgan Jack, Datalink Technology Gateways Inc., and Datalink Technologies Gateways LLC - "Datalink") was launched by Equustek on April 12, 2011. It claimed that Datalink, while acting as a distributor of Equustek's products, began to re-label one of the products and pass it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product, the GW1000. Any orders for Equustek's product were filled with the GW1000. When Equustek discovered this in 2011, it terminated the distribution agreement it had with Datalink and demanded that Datalink delete all references to Equustek's products and trademarks on its websites.

4 The Datalink defendants filed statements of defence disputing Equustek's claims.

5 On September 23, 2011, Leask J. granted an injunction ordering Datalink to return to Equustek any source codes, board schematics, and any other documentation it may have had in its possession that belonged to Equustek. The court also prohibited Datalink from referring to Equustek or any of Equustek's products on its websites. It ordered Datalink to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek products and directing customers interested in Equustek's products to Equustek's website. In addition, Datalink was ordered to give Equustek a list of customers who had ordered an Equustek product from Datalink.

6 On March 21, 2012, Fenlon J. found that Datalink had not properly complied with this order and directed it to produce a new customer list and make certain changes to the notices on their websites.

7 Datalink abandoned the proceedings and left the jurisdiction without producing any documents or complying with any of the orders. Some of Datalink's statements of defence were subsequently struck.

8 On July 26, 2012, Punnett J. granted a *Mareva* injunction freezing Datalink's worldwide assets, including its entire product inventory. He found that Datalink had incorporated "a myriad of shell corporations in different jurisdictions", continued to sell the impugned product, reduced prices to attract more customers, and was offering additional services that Equustek claimed disclosed more of its trade secrets. He concluded that Equustek would suffer irreparable harm if the injunction were not granted, and that, on the balance of convenience and due to a real risk of the dissipation of assets, it was just and equitable to grant the injunction against Datalink.

9 On August 3, 2012, Fenlon J. granted another interlocutory injunction prohibiting Datalink from dealing with broader classes of intellectual property, including "any use of whole categories of documents and information that lie at the heart of any business of a kind engaged in by both parties". She noted that Equustek's "earnings ha[d] fallen drastically since [Datalink] began [its] impugned activities" and concluded that "the effect of permitting [Datalink] to carry on [its] business [would] also cause irreparable harm to [Equustek]".

10 On September 26, 2012, Equustek brought an application to have Datalink and its principal, Morgan Jack, found in contempt. No one appeared on behalf of Datalink. Groves J. issued a warrant for Morgan Jack's arrest. It remains outstanding.

11 Despite the court orders prohibiting the sale of inventory and the use of Equustek's intellectual property, Datalink continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world.

12 Not knowing where Datalink or its suppliers were, and finding itself unable to have the websites removed by the websites' hosting companies, Equustek approached Google in September 2012 and requested that it de-index the Datalink websites. Google refused. Equustek then brought court proceedings seeking an order requiring Google to do so.

13 When it was served with the application materials, Google asked Equustek to obtain a court order prohibiting Datalink from carrying on business on the Internet. Google told Equustek it would comply with such an order by removing specific webpages. Pursuant to its internal policy, Google only voluntarily de-indexes individual webpages, not entire websites. Equustek agreed to try this approach.

14 On December 13, 2012, Equustek appeared in court with Google. An injunction was issued by Tindale J. ordering Datalink to "cease operating or carrying on business through any website". Between December 2012 and January 2013, Google advised Equustek that it had de-indexed 345 specific webpages associated with Datalink. It did not, however, de-index *all* of the Datalink websites.

15 Equustek soon discovered that de-indexing webpages but not entire websites was ineffective since Datalink simply moved the objectionable content to new pages within its websites, circumventing the court orders.

16 Google had limited the de-indexing to those searches that were conducted on google.ca. Google's search engine operates through dedicated websites all over the world. The Internet search services are free, but Google earns money by selling advertising space on the webpages that display search results. Internet users with Canadian Internet Protocol addresses are directed to "google.ca" when performing online searches. But users can also access different Google websites directed at other countries by using the specific Uniform Resource Locator, or URL, for those sites. That means that someone in Vancouver, for example, can access the Google search engine as though he or she were in another country simply by typing in that country's Google URL. Potential Canadian customers could, as a result, find Datalink's websites even if they were blocked on google.ca. Given that the majority of the sales of Datalink's GW1000 were to purchasers outside of Canada, Google's de-indexing did not have the necessary protective effect.

17 Equustek therefore sought an interlocutory injunction to enjoin Google from displaying any part of the Datalink websites on any of its search results worldwide. Fenlon J. granted the order ((2014), 374 D.L.R. (4th) 537 (B.C. S.C.)). The operative part states:

> Within 14 days of the date of this order, Google Inc. is to cease indexing or referencing in search results on its internet search engines the [Datalink] websites ..., including all of the subpages and subdirectories of the listed websites, *until the conclusion of the trial of this action or further order of this court*.
>
> [Emphasis added]

18 Fenlon J. noted that Google controls between 70-75 percent of the global searches on the Internet and that Datalink's ability to sell its counterfeit product is, in large part, contingent on customers being able to locate its websites through the use of Google's search engine. Only by preventing potential customers from accessing the Datalink websites, could Equustek be protected. Otherwise, Datalink would be able to continue selling its product online and the damages Equustek would suffer would not be recoverable at the end of the lawsuit.

19 Fenlon J. concluded that this irreparable harm was being facilitated through Google's search engine; that Equustek had no alternative but to require Google to de-index the websites; that Google would not be inconvenienced; and that, for the order to be effective, the Datalink websites had to be prevented from being displayed on all of Google's search results, not just google.ca. As she said:

> On the record before me it appears that to be effective, even within Canada, Google must block search results on all of its websites. Furthermore, [Datalink's] sales originate primarily in other countries, so the Court's process cannot be protected unless the injunction ensures that searchers from any jurisdiction do not find [Datalink's] websites. [1]

20 The Court of Appeal of British Columbia dismissed Google's appeal ((2015), 386 D.L.R. (4th) 224 (B.C. C.A.)). Groberman J.A. accepted Fenlon J.'s conclusion that she had *in personam* jurisdiction over Google and could therefore make an order with extraterritorial effect. He also agreed that courts of inherent jurisdiction could grant equitable relief against non-parties. Since ordering an interlocutory injunction against Google was the only practical way to prevent Datalink from flouting the court's several orders, and since there were no identifiable countervailing comity or freedom of expression concerns that would prevent such an order from being granted, he upheld the interlocutory injunction.

21 For the following reasons, I agree with Fenlon J. and Groberman J.A. that the test for granting an interlocutory injunction against Google has been met in this case.

Analysis

22 The decision to grant an interlocutory injunction is a discretionary one and entitled to a high degree of deference (*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 155-56). In this case, I see no reason to interfere.

23 Injunctions are equitable remedies. "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited" (Ian Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333). Robert Sharpe notes that "[t]he injunction is a flexible and drastic remedy. Injunctions are not restricted to any area of substantive law and are readily enforceable through the court's contempt power" (*Injunctions and Specific Performance* (loose-leaf ed.), at para. 2.10).

24 An interlocutory injunction is normally enforceable until trial or some other determination of the action. Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits (Jeffrey Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 24-25). Their character as "interlocutory" is not dependent on their duration pending trial.

25 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

26 Google does not dispute that there is a serious claim. Nor does it dispute that Equustek is suffering irreparable harm as a result of Datalink's ongoing sale of the GW1000 through the Internet. And it acknowledges, as Fenlon J. found, that it inadvertently facilitates the harm through its search engine which leads purchasers directly to the Datalink websites.

27 Google argues, however, that the injunction issued against it is not necessary to prevent that irreparable harm, and that it is not effective in so doing. Moreover, it argues that as a non-party, it should be immune from the injunction. As for the balance of convenience, it challenges the propriety and necessity of the extraterritorial reach of such an order, and raises freedom of expression concerns that it says should have tipped the balance against granting the order. These arguments go both to whether the Supreme Court of British Columbia had jurisdiction to grant the injunction and whether, if it did, it was just and equitable to do so in this case.

28 Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this Court said in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.), injunctions may be issued "'in all cases in which it appears to the court to be just or convenient that the order should be made ... on terms and conditions the court thinks just'" (para. 15, citing *s. 36* of the *Law and Equity Act*, R.S.B.C. 1979, c. 224). *MacMillan Bloedel Ltd.* involved a logging company seeking to restrain protesters from blocking roads. The company obtained an interlocutory injunction prohibiting not only specifically named individuals, but also "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] order" from engaging in conduct which interfered with its operations at specific locations. In upholding the injunction, McLachlin J. noted that

> [i]t may be confidently asserted ... *that both English and Canadian authorities support the view that non-parties are bound by injunctions*: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey.

[Emphasis added; para. 31]

See also Berryman, at pp. 57-60; Sharpe, at paras. 6.260 to 6.265.

29 In other words, where a non-party violates a court order, there is a principled basis for treating the non-party as if it had been bound by the order. The non-party's obligation arises "not because [it] is bound by the injunction by being a party to the cause, but because [it] is conducting [itself] so as to obstruct the course of justice" (*MacMillan Bloedel Ltd.*, at para. 27, quoting *Seaward v. Paterson*, [1897] 1 Ch. 545 (Eng. C.A.), at p. 555).

30 The pragmatism and necessity of such an approach was concisely explained by Fenlon J. in the case before us when she offered the following example:

> ... a non-party corporation that warehouses and ships goods for a defendant manufacturing company might be ordered on an interim injunction to freeze the defendants' goods and refrain from shipping them. That injunction could affect orders received from customers around the world. Could it sensibly be argued that the Court could not grant the injunction because it would have effects worldwide? The impact of an injunction on strangers to the suit or the order itself is a valid consideration in deciding whether to exercise the Court's jurisdiction to grant an injunction. It does not, however, affect the Court's authority to make such an order. [2]

31 *Norwich* orders are analogous and can also be used to compel non-parties to disclose information or documents in their possession required by a claimant (*Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.), at p. 175). *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator (*York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755 (Ont. S.C.J.)). *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich Pharmacal Co.*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.* (2016), [2017] 1 All E.R. 700 (Eng. C.A.), at para. 53). *Norwich Pharmacal Co.* supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier International AG*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF* (2015), 144 B.M.L.R. 194 (Eng. Patents Ct.)).

32 This approach was applied in *Cartier International AG*, where the Court of Appeal of England and Wales held that injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks. (See also Jaani Riordan, *The Liability of Internet Intermediaries* (2016), at pp. 412 and 498-99.)

33 The same logic underlies *Mareva* injunctions, which can also be issued against non-parties. *Mareva* injunctions are used to freeze assets in order to prevent their dissipation pending the conclusion of a trial or action (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (Eng. C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). A *Mareva* injunction that requires a defendant not to dissipate his or her assets sometimes requires the assistance of a non-party, which in turn can result in an injunction against the non-party if it is just and equitable to do so (Stephen Pitel and Andrew Valentine, "The Evolution of the Extra-territorial *Mareva* Injunction in Canada: Three Issues" (2006), 2 J. Priv. Int'l L. 339, at p. 370; Vaughan Black and Edward Babin, "Mareva Injunctions in Canada: Territorial Aspects" (1997), 28 *Can. Bus. L.J.* 430, at pp. 452-53; Berryman, at pp. 128-31). Banks and other financial institutions have, as a result, been bound by *Mareva* injunctions even when they are not a party to an underlying action.

34 To preserve Equustek's rights pending the outcome of the litigation, Tindale J.'s order of December 13, 2012 required Datalink to cease carrying on business through the Internet. Google had requested and participated in Equustek's obtaining this order, and offered to comply with it voluntarily. It is common ground that Datalink was unable to carry on business in a

commercially viable way unless its websites were in Google's search results. In the absence of de-indexing these websites, as Fenlon J. specifically found, Google was facilitating Datalink's breach of Tindale J.'s order by enabling it to continue carrying on business through the Internet. By the time Fenlon J. granted the injunction against Google, Google was aware that in not de-indexing Datalink's websites, it was facilitating Datalink's ongoing breach of Tindale J.'s order, the purpose of which was to prevent irreparable harm to Equustek.

35 Much like a *Norwich* order or a *Mareva* injunction against a non-party, the interlocutory injunction in this case flows from the necessity of Google's assistance in order to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

36 Google's next argument is the impropriety of issuing an interlocutory injunction with extraterritorial effect. But this too contradicts the existing jurisprudence.

37 The British Columbia courts in these proceedings concluded that because Google carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of *in personam* and territorial jurisdiction. Google does not challenge those findings. It challenges instead the global reach of the resulting order. Google suggests that if any injunction is to be granted, it should be limited to Canada (or google.ca) alone.

38 When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world. (See *Transat Tours Canada Inc. v. Tescor, S.A. de C.V.*, [2007] 1 S.C.R. 867 (S.C.C.), at para. 6; Berryman, at p. 20; Pitel and Valentine, at p. 389; Sharpe, at para. 1.1190; Spry, at p. 37.) *Mareva* injunctions have been granted with worldwide effect when it was found to be necessary to ensure their effectiveness. (See *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (B.C. S.C. [In Chambers]); Berryman, at pp. 20 and 136; *Babanaft International Co. SA v. Bassatne* (1989), [1990] Ch. 13 (Eng. C.A.); *Haiti (Republic of) v. Duvalier* (1988), [1990] 1 Q.B. 202 (Eng. C.A.); *Derby & Co. v. Weldon* (1988), [1990] Ch. 48 (Eng. C.A.); and *Derby & Co. v. Weldon (Nos. 3 & 4)* (1988), [1990] Ch. 65 (Eng. C.A.); Sharpe, at paras. 1.1190 to 1.1220.)

39 Groberman J.A. pointed to the international support for this approach:

> I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. Several such cases are cited in the arguments of [International Federation of Film Producers Associations and International Federation of the Phonographic Industry], including *APC v. Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grande Instance de Paris); *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grande Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog https://inforrm.wordpress.com/2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/) and *ECJ Google Spain SL, Google Inc. v. Agencia EspaÑola de Protección de Datos*, Mario Costeja González, C-131/12 [2014], CURIA. [3]

40 Fenlon J. explained why Equustek's request that the order have worldwide effect was necessary as follows:

> The majority of GW1000 sales occur outside Canada. Thus, quite apart from the practical problem of endless website iterations, the option Google proposes is not equivalent to the order now sought which would compel Google to remove the [Datalink] websites from all search results generated by any of Google's websites worldwide. I therefore conclude that [Equustek does] not have an out-of-court remedy available to [it]. [4]
>
> . . . . .
>
> ... to be effective, even within Canada, Google must block search results on all of its websites. [5]

As a result, to ensure that Google did not facilitate Datalink's breach of court orders whose purposes were to prevent irreparable harm to Equustek, she concluded that the injunction had to have worldwide effect.

41 I agree. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.

42 The interlocutory injunction in this case is necessary to prevent the irreparable harm that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation. The order targets Datalink's websites — the list of which has been updated as Datalink has sought to thwart the injunction — and prevents them from being displayed where they do the most harm: on Google's global search results.

43 Nor does the injunction's worldwide effect tip the balance of convenience in Google's favour. The order does not require that Google take any steps around the world, it requires it to take steps only where its search engine is controlled. This is something Google has acknowledged it can do — and does — with relative ease. There is therefore no harm to Google which can be placed on its "inconvenience" scale arising from the global reach of the order.

44 Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted, "Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong". [6]

45 And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A. concluded:

> In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.
>
> ... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem. [7]

46 If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.

47 In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google.

48 This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.

49 And I have trouble seeing how this interferes with what Google refers to as its content neutral character. The injunction does not require Google to monitor content on the Internet, nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily". [8] Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders.

50 Google did not suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing the Datalink websites. It acknowledges, fairly, that it can, and often does, exactly what is being asked of it in this case, that is, alter search results. It does so to avoid generating links to child pornography and websites containing "hate speech". It also complies with notices it receives under the *US Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2680 (1998) to de-index content from its search results that allegedly infringes copyright, and removes websites that are subject to court orders.

51 As for the argument that this will turn into a permanent injunction, the length of an interlocutory injunction does not, by itself, convert its character from a temporary to a permanent one. As previously noted, the order requires that the injunction be in place "until the conclusion of the trial of this action or further order of this court". There is no reason not to take this order at face value. Where an interlocutory injunction has been in place for an inordinate amount of time, it is always open to a party to apply to have it varied or vacated. Google has brought no such application.

52 Datalink and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. Equustek has made efforts to locate Datalink with limited success. Datalink is only able to survive — at the expense of Equustek's survival — on Google's search engine which directs potential customers to its websites. In other words, Google is how Datalink has been able to continue harming Equustek in defiance of several court orders.

53 This does not make Google liable for this harm. It does, however, make Google the determinative player in allowing the harm to occur. On balance, therefore, since the interlocutory injunction is the only effective way to mitigate the harm to Equustek pending the resolution of the underlying litigation, the only way, in fact, to preserve Equustek itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

54 I would dismiss the appeal with costs in this Court and in the Court of Appeal for British Columbia.

***Côté, Rowe JJ.* (dissenting):**

55 Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. ("Equustek") seek a novel form of equitable relief — an effectively permanent injunction, against an innocent third party, that requires court supervision, has not been shown to be effective, and for which alternative remedies are available. Our response calls for judicial restraint. While the court had jurisdiction to issue the June 13, 2014 order against Google Inc. ("Google Order") (2014 BCSC 1063, 374 D.L.R. (4th) 537 (B.C. S.C.), per Fenlon J.), in our view it should have refrained from doing so. The authority to grant equitable remedies has always been constrained by doctrine and practice. In our view, the Google Order slipped too easily from these constraints.

56 As we will explain, the Google Order is effectively final redress against a non-party that has neither acted unlawfully, nor aided and abetted illegal action. The test for interlocutory injunctions established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), does not apply to an order that is effectively final, and the test for a permanent injunction has not been satisfied. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and there are alternative remedies available to Equustek.

I. Judicial Restraint

57 The power of a court to grant injunctive relief is derived from that of the Chancery courts of England (*Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087 (U.K. H.L.), at para. 30), and has been confirmed in British Columbia by the *Law and Equity Act*, R.S.B.C. 1996, c. 253, *s. 39(1):*

> **39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

58 In *Fourie*, Lord Scott explained that "provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it" (para. 30). However, simply because a court has the jurisdiction to grant an injunction does not mean that it should. A court "will not according to its settled practice do so except in a certain way and under certain circumstances" (Lord Scott, at para. 25, quoting from *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 (Eng. K.B.), at p. 563; see also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354, [2015] 1 All E.R. 949 (Eng. Ch. Div.), at paras. 98-100). Professor Spry comes to similar conclusions (I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333):

> The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. [Footnote omitted.]

59 The importance of appropriately modifying judicial restraint to meet the needs of justice was summarized by Lord Nicholls in *Mercedes-Benz AG v. Leiduck* (1995), [1996] A.C. 284 (Hong Kong P.C.), at p. 308: "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice."

60 Changes to "settled practice" must not overshoot the mark of avoiding injustice. In our view, granting the Google Order requires changes to settled practice that are not warranted in this case: neither the test for an interlocutory nor a permanent injunction has been met; court supervision is required; the order has not been shown to be effective; and alternative remedies are available.

II. Factors Suggesting Restraint in This Case

A. The Effects of the Google Order Are Final

61 In *RJR-MacDonald Inc.*, this Court set out the test for interlocutory injunctions — a serious question to be tried, irreparable harm, and the balance of convenience — but also described an exception (at pp. 338-39):

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.
>
> . . . . .
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.
>
> [Emphasis added.]

62 In our view, the Google Order "in effect amount[s] to a final determination of the action" because it "remove[s] any potential benefit from proceeding to trial". In order to understand this conclusion, it is useful to review Equustek's underlying claim. Equustek sought, in its Further Amended Notice of Civil Claim against Datalink, damages, declarations, and:

> A temporary and permanent injunction restraining the Defendants from:
>
> a. using the Plaintiffs' trademarks and free-riding on the goodwill of any Equustek products on any website;
>
> b. making statements disparaging or in any way referring to the Equustek products;
>
> c. distributing the offending manuals and displaying images of the Plaintiff's products on any website; and
>
> d. selling the GW1000 line of products which were created by the theft of the Plaintiff's trade secrets;
>
> and obliging them to:
>
> e. immediately disclose all hidden websites;
>
> f. display a page on all websites correcting [their] misrepresentations about the source and continuing availability of the Equustek products and directing customers to Equustek.

In short, Equustek sought injunctions modifying the way in which Datalink carries out its website business, along with damages and declarations. On June 20, 2012, Datalink's response was struck and Equustek was given leave to apply for default judgment. It has not done so. On December 13, 2012, Justice Tindale ordered that

> [t]he Defendants Morgan Jack, Datalink Technologies Gateways Inc. and Datalink Technologies Gateways LLC (the "Datalink Defendants") cease operating or carrying on business through any website, including those contained in Schedule "A" and all associated pages, subpages and subdirectories, and that these Defendants immediately take down all such websites, until further order of this court. ["December 2012 Order"]

The December 2012 Order gives Equustek *more* than the injunctive relief it sought in its originating claim. Rather than simply ordering the modification of Datalink websites, the December 2012 Order requires the ceasing of website business altogether. In our view, little incentive remains for Equustek to return to court to seek a lesser injunctive remedy. This is evidenced by Equustek's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so.

63 As for the Google Order, it provides Equustek with an additional remedy, beyond the December 2012 Order and beyond what was sought in its original claim. In our view, granting of the Google Order further erodes any remaining incentive for Equustek to proceed with the underlying action. The effects of the Google Order are final in nature. Respectfully, the pending litigation assumed by our colleague Abella J. is a fiction. The Google Order, while interlocutory in form, is final in effect. Thus, it gives Equustek more relief than it sought.

64 Procedurally, Equustek requested an interlocutory order in the course of its litigation with Datalink. While Equustek's action against Datalink could technically endure indefinitely (G.P. Fraser, J.W. Horn and S.A. Griffin, *The Conduct of Civil Litigation in British Columbia* (2nd ed. (loose-leaf)), at § 14.1) — and thus the interlocutory status of the injunction could technically endure indefinitely — it does not follow that the Google Order should be considered interlocutory. Courts of equity look to substance over form, because "a dogged devotion to form has often resulted in injustice" (*John Deere Ltd. v. Firdale Farms Ltd. (Receiver of)* (1987), 45 D.L.R. (4th) 641 (Man. C.A.), at p. 645). In *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698 (Eng. Rolls Ct.), at p. 701, Lord Romilly explained it thus:

> ... Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and, if [they do] find that by insisting on the form, the substance will be defeated, [they hold] it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.

In our view, the substance of the Google Order amounts to a final remedy. As such, it provides Equustek with more equitable relief than it sought against Datalink, and amounts to final resolution via Google. It is, in effect, a permanent injunction.

65 Following *RJR-MacDonald Inc.* (at pp. 338-39), an extensive review of the merits is therefore required at the first stage of the analysis (*Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680 (B.C. C.A.), at paras. 26-27). Yet this was not done. When Justice Fenlon considered Equustek's application for an interim injunction enjoining Google to cease indexing or referencing Datalink's websites, she did not conduct an extensive review of the merits. She did however note that Equustek had raised an arguable case, and that Datalink was presumed to have admitted the allegations when its defenses were struck (para. 151). The rule is not immutable that if a statement of defense is struck, the defendant is deemed to have admitted the allegations contained in the statement of claim. While the facts relating to Datalink's liability are deemed to be admitted, the court can still exercise its discretion in assessing Equustek's claims (*McIsaac v. Healthy Body Services Inc.*, 2009 BCSC 1716 (B.C. S.C.), at paras. 42 and 44 (CanLII); *Plouffe v. Roy* [2007 CarswellOnt 5739 (Ont. S.C.J.)], 2007 CanLII 37693, at para. 53; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140 (Alta. C.A.), at p. 143). Equustek has avoided such an assessment. Thus, an extensive review of the merits was not carried out.

66 The Google Order also does not meet the test for a permanent injunction. To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction (*1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643 (Ont. C.A.), at paras. 74-80; Spry, at pp. 395 and 407-8). Equustek has shown the inadequacy of damages (damages are ascertainable but unlikely to be recovered, and the wrong is continuing). However, in our view, it is unclear whether the first element of the test has been met. Equustek's claims were supported by a good *prima facie* case, but it was not established that Datalink designed and sold counterfeit versions of its product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

67 In any case, the discretionary factors affecting the grant of an injunction strongly favour judicial restraint. As we will outline below, the Google Order enjoins a non-party, yet Google has not aided or abetted Datalink's wrongdoing; it holds no assets of Equustek's, and has no information relevant to the underlying proceedings. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and Equustek has alternative remedies.

B. Google Is a Non-Party

68 A court order does not "technically" bind non-parties, but "anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court" (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 (S.C.C.), at paras. 23 and 27). In *MacMillan Bloedel Ltd.*, the injunction prohibiting named individuals from blocking a logging road also caused non-parties to face contempt proceedings for doing the act prohibited by the injunction.

69 The instant case is not one where a non-party with knowledge of a court order deliberately disobeyed it and thereby deprecated the court's authority. Google did not carry out the act prohibited by the December 2012 Order. The act prohibited by the December 2012 Order is Datalink "carrying on business through any website". That act occurs whenever Datalink launches websites to carry out business — not when other parties, such as Google, make it known that such websites exist.

70 There is no doubt that non-parties also risk contempt proceedings by aiding and abetting the doing of a prohibited act (*Seaward v. Paterson*, [1897] 1 Ch. 545 (Eng. C.A.); D. Bean, A. Burns and I. Parry, *Injunctions* (11th ed. 2012), at para. 9-08). Lord Denning said in *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (Eng. C.A.), at p. 1682:

> It has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who, knowing of an injunction, aids and abets the defendant in breaking it. The reason is that by aiding and abetting the defendant, he is obstructing the course of justice.

71 In our view, Google did not aid or abet the doing of the prohibited act. Equustek alleged that Google's search engine was facilitating Datalink's ongoing breach by leading customers to Datalink websites (Fenlon J.'s reasons, at para. 10). However, the December 2012 Order was to cease carrying on business through any website. That Order was breached as soon as Datalink established a website to conduct its business, regardless of how visible that website might be through Google searches. If

Equustek's argument were accepted, the scope of "aids and abets" would, in our view, become overbroad. It might include the companies supplying Datalink with the material to produce the derivative products, the companies delivering the products, or as Google argued in its factum, it might also include the local power company that delivers power to Datalink's physical address. Critically, Datalink breached the December 2012 Order simply by launching websites to carry out business, regardless of whether Google searches ever reveal the websites.

72 We agree with our colleague Justice Abella that *Mareva* injunctions and *Norwich* orders can operate against non-parties. However, we respectfully disagree that the Google Order is similar in nature to those remedies. *Mareva* injunctions are granted to freeze assets until the completion of a trial — they do not enforce a plaintiff's substantive rights (*Mercedes-Benz AG*, at p. 302). In contrast, the Google Order enforces Equustek's asserted intellectual property rights by seeking to minimize harm to those rights. It does not freeze Datalink's assets (and, in fact, may erode those assets).

73 *Norwich* orders are made to compel information from third parties. In *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.), at p. 175, Lord Reid identified

> a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

Lord Reid found that "without certain action on [Customs'] part the infringements could never have been committed" (at 174). In spite of this finding, the court did not require Customs to take specific action to prevent importers from infringing the patent of Norwich Pharmacal; rather the court issued a limited order compelling Customs to disclose the names of importers. In *Cartier International AG*, the court analogized from *Norwich Pharmacal Co.* to support an injunction requiring Internet service providers ("ISPs") to block access to trademark-infringing websites because "it is via the ISPs' services" that customers view and purchase the infringing material (para. 155). That injunction did not extend to parties merely assisting in finding the websites.

74 In the case at bar, we are of the view that Google does not play a role in Datalink's breach of the December 2012 Order. Whether or not the December 2012 Order is violated does not hinge on the degree of success of the prohibited website business. Rather, the December 2012 Order is violated merely by Datalink conducting business through a website, regardless of the visibility of that website or the number of customers that visit the website. Thus Google does not play a role analogous to Customs in *Norwich Pharmacal Co.* nor the ISPs in *Cartier International AG*. And unlike the order in *Norwich Pharmacal Co.*, the Google Order compels positive action aimed at the illegal activity rather than simply requiring the provision of information to the court.

C. The Google Order Is Mandatory

75 While the distinction between mandatory and prohibitive injunctions has been questioned (see *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20), courts have rightly, in our view, proceeded cautiously where an injunction requires the defendant to incur additional expenses to take positive steps (*Redland Bricks v. Morris* (1969), [1970] A.C. 652 (U.K. H.L.), at pp. 665-66; J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 199-200). Also relevant to the decision of whether to grant a mandatory injunction is whether it might require continued supervision by the courts, especially where the terms of the order cannot be precisely drawn and where it may result in wasteful litigation over compliance (*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* (1997), [1998] A.C. 1 (U.K. H.L.).

76 The Google Order requires ongoing modification and supervision because Datalink is launching new websites to replace de-listed ones. In fact, the Google Order has been amended at least seven times to capture Datalink's new sites (orders dated November 27, 2014; April 22, 2015; June 4, 2015; July 3, 2015; September 15, 2015; January 12, 2016 and March 30, 2016). In our view, courts should avoid granting injunctions that require such cumbersome court-supervised updating.

D. The Google Order Has Not Been Shown To Be Effective

77 A court may decline to grant an injunction on the basis that it would be futile or ineffective in achieving the purpose for which it is sought (Spry, at pp. 419-20; Berryman, at p. 113). For example, in *Attorney General v. Guardian Newspaper Ltd.* (1988), [1990] 1 A.C. 109 (Eng. H.L.), the *Spycatcher* memoirs of an M.I.5 agent were already readily available, thus making a perpetual injunction against publication by the defendant newspapers ineffective.

78 In our view, the Google Order is not effective in enforcing the December 2012 Order. It is recalled that the December 2012 Order requires that Datalink "cease operating or carrying on business through any website" — it says nothing about the visibility or success of the website business. The December 2012 Order is violated as soon as Datalink launches websites to carry on business, regardless of whether those websites appear in a Google search. Moreover, the Google Order does not assist Equustek in modifying the Datalink websites, as Equustek sought in its originating claim for injunctive relief.

79 The most that can be said is that the Google Order might reduce the harm to Equustek which Fenlon J. found "Google is inadvertently facilitating" (para. 152). But it has not been shown that the Google Order is effective in doing so. As Google points out, Datalink's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. Datalink's websites are open for business on the Internet whether Google searches list them or not. In our view, this lack of effectiveness suggests restraint in granting the Google Order.

80 Moreover, the quest for elusive effectiveness led to the Google Order having worldwide effect. This effect should be taken into consideration as a factor in exercising discretion. Spry explains that territorial limitations to equitable jurisdiction are "to some extent determined by reference to questions of effectiveness and of comity" (p. 37). While the worldwide effect of the Google Order does not make it more effective, it could raise concerns regarding comity.

E. Alternatives Are Available

81 Highlighting the lack of effectiveness are the alternatives available to Equustek. An equitable remedy is not required unless there is no other appropriate remedy at law (Spry, at pp. 402-3). In our view, Equustek has an alternative remedy in law. Datalink has assets in France. Equustek sought a world-wide *Mareva* injunction to freeze those assets, but the Court of Appeal for British Columbia urged Equustek to pursue a remedy in French courts: "At present, it appears that the proposed defendants reside in France .... The information before the Court is that French courts will assume jurisdiction and entertain an application to freeze the assets in that country" (2016 BCCA 190, 88 B.C.L.R. (5th) 168 (B.C. C.A.), at para. 24). We see no reason why Equustek cannot do what the Court of Appeal urged it to do. Equustek could also pursue injunctive relief against the ISPs, as was done in *Cartier International AG*, in order to enforce the December 2012 Order. In addition, Equustek could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites.

III. Conclusion

82 For these reasons, we are of the view that the Google Order ought not to have been granted. We would allow the appeal and set aside the June 13, 2014 order of the Supreme Court of British Columbia.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Para. 148.

2 Para. 147.

3 Para. 95.

4 Para. 76.

5 Para. 148.

6 Para. 144.

7 Paras. 93-94.

8 Para. 137.

Tab 27

Most Negative Treatment: Check subsequent history and related treatments.

2018 SCC 5, 2018 CSC 5
Supreme Court of Canada

R. v. Canadian Broadcasting Corp.

2018 CarswellAlta 206, 2018 CarswellAlta 207, 2018 SCC 5, 2018 CSC 5, [2018] 1 S.C.R. 196, [2018] 2 W.W.R. 431, [2018] A.W.L.D. 832, [2018] A.W.L.D. 861, 11 C.P.C. (8th) 221, 144 W.C.B. (2d) 163, 287 A.C.W.S. (3d) 745, 358 C.C.C. (3d) 143, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 63 Alta. L.R. (6th) 1

Canadian Broadcasting Corporation (Appellant) and Her Majesty The Queen (Respondent) and CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 1, 2017
Judgment: February 9, 2018
Docket: 37360

Proceedings: reversing *R. v. Canadian Broadcasting Corp.* (2016), [2017] 3 W.W.R. 413, 2016 ABCA 326, 2016 CarswellAlta 2034, 43 Alta. L.R. (6th) 213, 404 D.L.R. (4th) 318, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085, Frans Slatter J.A., J.D. Bruce McDonald J.A., Sheila Greckol J.A. (Alta. C.A.); reversing *R. v. Canadian Broadcasting Corp.* (2016), [2016] A.J. No. 336, 2016 ABQB 204, 2016 CarswellAlta 620, 37 Alta. L.R. (6th) 299, [2016] 9 W.W.R. 613, 86 C.P.C. (7th) 373, Peter Michalyshyn J. (Alta. Q.B.)

Counsel: Frederick S. Kozak, Q.C., Sean Ward, Tess Layton, Sean Moreman, for Appellant
Iwona Kuklicz, Julie Snowdon, for Respondent
Iain A.C. MacKinnon, for Interveners

Subject: Civil Practice and Procedure; Criminal
Related Abridgment Classifications
Judges and courts
XX Contempt of court
XX.6 Practice and procedure
XX.6.a General principles
Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.i Strength of applicant's case
Headnote
Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — Threshold test — Strength of applicant's case
Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to s. 486.4(2.2) of Criminal Code — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website,

Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Judges and courts --- Contempt of court — Practice and procedure — General principles

Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to s. 486.4(2.2) of Criminal Code — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website, Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Réparations --- Injonctions — Disponibilité des injonctions — Injonctions mandatoires — Critère d'application — Solidité de la preuve du demandeur

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

Juges et tribunaux --- Outrage au tribunal — Procédure — Principes généraux

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant

que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

The accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the Criminal Code. Before the publication ban was issued, the defendant broadcaster posted information revealing the identity of the victim on its website. Because the defendant would not remove the victim's identifying information from its website, the Crown sought an order citing the defendant in criminal contempt of the publication ban and an interlocutory injunction directing removal of the information from the defendant's website. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction and dismissed its application. The majority of the Court of Appeal allowed the Crown's appeal and granted the injunction. The defendant appealed.

Held: The appeal was allowed.

Per Brown J. (McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring): On an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the test was not whether there was a serious issue to be tried but rather whether the applicant had shown a strong prima facie case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. Upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

It was unnecessary to apply the "clearest of cases" threshold as this was not a case of "pure" speech, comprising the expression of the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself. In this appeal the chambers judge correctly identified a "tangible, immediate utility" to the defendant's posting of the identifying information, being the "public's interest" in the defendant's right to express that information, and in freedom of the press.

It was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown's originating notice disclosed only a single basis for seeking the remedy of an injunction, the defendant's alleged criminal contempt of court. The originating notice in this case, and the sequencing therein of the relief sought, belied its putatively hybrid character. Each prayer for relief did not launch an independent proceeding, rather, both related to the alleged criminal contempt. The Crown was bound to show a strong prima facie case of criminal contempt of court. There was nothing in the chambers judge's reasons or in the reasons of the majority of the Court of Appeal which established that the chambers judge, in refusing the interlocutory injunction, committed any errors justifying appellate intervention. The majority of the Court of Appeal conceded that "either position was arguable" which was, in substance, an acknowledgment that the Crown had not shown a strong prima facie case of criminal contempt.

L'accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel. Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur. Le juge siégeant en son cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande.

Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire. Le défendeur a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Brown, J. (McLachlin, J.C.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Rowe, JJ., souscrivant à son opinion) : Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire exigent en outre un examen approfondi sur le fond à l'étape interlocutoire. Lors de l'examen préliminaire de la preuve, le juge des requêtes doit être convaincu qu'il y a une forte chance au regard du droit et de la preuve présentée qu'au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

Il n'était pas nécessaire d'appliquer le seuil du cas parmi « les plus manifestes » puisqu'il ne s'agissait pas, en l'espèce, d'une question de liberté d'expression « seulement », ce qui comprend celle de la personne qui s'exprime en dehors du contexte commercial, lorsque le discours en cause n'a pas d'utilité concrète et directe à part la liberté d'expression elle-même. Dans le présent dossier, le juge siégeant en son cabinet a correctement discerné une « utilité concrète et directe » à ce que le défendeur diffuse l'information permettant d'établir l'identité de la victime, soit « l'intérêt public » à ce que le défendeur ait le droit d'exprimer la teneur de ces renseignements, et la liberté de la presse.

Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée. La demande introductive d'instance du ministère public n'indiquait qu'un motif pour lequel il voulait obtenir cette réparation, soit l'outrage criminel au tribunal reproché au défendeur. L'avis introductif d'instance et l'ordre dans lequel les réparations y étaient demandées ne permettaient pas de conclure qu'il pouvait avoir un caractère théoriquement hybride. Chaque demande de réparation ne donnait pas lieu à une instance distincte; elles étaient plutôt toutes les deux liées à l'outrage criminel reproché. Le ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal.

Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire. Les juges majoritaires de la Cour d'appel ont reconnu que « les deux thèses sont défendables », ce qui constituait essentiellement une reconnaissance que le ministère public n'avait pas établi une forte apparence de droit quant à l'existence d'un outrage criminel.

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Cases considered by *Brown J.*:

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62, 1993 CarswellBC 47, 1993 CarswellBC 1257, [1993] I.L.Pr. 689 (S.C.C.) — referred to

Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd. (2003), 2003 NSSC 112, 2003 CarswellNS 183, 214 N.S.R. (2d) 369, 671 A.P.R. 369, 25 C.P.R. (4th) 435, 35 C.P.C. (5th) 139 (N.S. S.C.) — referred to

Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd. (2003), 2003 NSCA 126, 2003 CarswellNS 412, 38 C.P.C. (5th) 274, 219 N.S.R. (2d) 126, 692 A.P.R. 126, 29 C.P.R. (4th) 423 (N.S. C.A.) — referred to

American Cyanamid Co. v. Ethicon Ltd. (1975), [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, 119 Sol. Jo. 136, [1975] 2 W.L.R. 316, [1975] UKHL 1 (U.K. H.L.) — considered

Bark & Fitz Inc. v. 2139138 Ontario Inc. (2010), 2010 ONSC 1793, 2010 CarswellOnt 2082 (Ont. S.C.J.) — referred to

Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp. (2002), 2002 CarswellOnt 3653, [2002] O.T.C. 799 (Ont. S.C.J.) — referred to

Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc. (1998), 1998 CarswellOnt 3893, 83 C.P.R. (3d) 51, 77 O.T.C. 36 (Ont. Gen. Div.) — referred to

British Columbia (Attorney General) v. Wale (1986), [1987] 2 W.W.R. 331, 120 N.R. 212, [1987] 2 C.N.L.R. 36, 9 B.C.L.R. (2d) 333, 1986 CarswellBC 413 (B.C. C.A.) — referred to

British Columbia (Attorney General) v. Wale (1991), [1991] 2 W.W.R. 568, (sub nom. *Wale v. British Columbia (Attorney General))* [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189, 120 N.R. 208, 1991 CarswellBC 15, 1991 CarswellBC 914 (S.C.C.) — referred to

Canada (Human Rights Commission) v. Canadian Liberty Net (1998), 1998 CarswellNat 387, 1998 CarswellNat 388, 157 D.L.R. (4th) 385, 224 N.R. 241, 50 C.R.R. (2d) 189, [1998] 1 S.C.R. 626, 31 C.H.R.R. D/433, 147 F.T.R. 305 (note), 6 Admin. L.R. (3d) 1, 22 C.P.C. (4th) 1, [1998] 2 F.C. i (S.C.C.) — distinguished

Conway v. Zinkhofer (2006), 2006 ABCA 74, 2006 CarswellAlta 228 (Alta. C.A.) — referred to

Cytrynbaum v. Look Communications Inc. (2013), 2013 ONCA 455, 2013 CarswellOnt 9090, 116 O.R. (3d) 241, 307 O.A.C. 152, 366 D.L.R. (4th) 415 (Ont. C.A.) — referred to

D.E. & Son Fisheries Ltd. v. Goreham (2004), 2004 NSCA 53, 2004 CarswellNS 133, 223 N.S.R. (2d) 1, 705 A.P.R. 1 (N.S. C.A.) — referred to

Fradenburgh v. Ontario Lottery & Gaming Corp. (2010), 2010 ONSC 5387, 2010 CarswellOnt 7316 (Ont. S.C.J.) — referred to

Google Inc. v. Equustek Solutions Inc. (2017), 2017 SCC 34, 2017 CSC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728, 410 D.L.R. (4th) 625, 3 C.P.C. (8th) 219, 98 B.C.L.R. (5th) 1, [2017] 10 W.W.R. 1 (S.C.C.) — considered

H&R Block Canada Inc. v. Inisoft Corp. (Ontario) (2009), 2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List]) — referred to

Hadmor Productions Ltd. v. Hamilton (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — considered

Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC (2015), 2015 FCA 104, 2015 CarswellNat 1437, 2015 CAF 104, 2015 CarswellNat 4700, 130 C.P.R. (4th) 414 (F.C.A.) — referred to

La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals (2011), 2011 SKCA 43, 2011 CarswellSask 251, 371 Sask. R. 123, 518 W.A.C. 123, [2012] 3 W.W.R. 293 (Sask. C.A.) — referred to

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Modry v. Alberta Health Services (2015), 2015 ABCA 265, 2015 CarswellAlta 1530, 388 D.L.R. (4th) 352, [2015] 11 W.W.R. 81, 23 Alta. L.R. (6th) 247, 606 A.R. 373, 652 W.A.C. 373 (Alta. C.A.) — referred to

Musqueam Indian Band v. Canada (2008), 2008 FCA 214, 2008 CarswellNat 1894, 2008 CAF 214, 2008 CarswellNat 2960, (sub nom. *Musqueam Indian Band v. Canada (Public Works and Government Services))* [2008] 3 C.N.L.R. 265, (sub nom. *Musquean Indian Band v. Canada (Minister of Public Works & Government Services))* 378 N.R. 335, 297 D.L.R. (4th) 349 (F.C.A.) — referred to

Musqueam Indian Band v. Canada (2008), 2008 CarswellNat 4404, 2008 CarswellNat 4405, (sub nom. *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services))* 392 N.R. 388 (note), [2008] 3 S.C.R. viii (note) (S.C.C.) — referred to

National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd. (2009), [2009] 1 W.L.R. 1405, [2009] UKPC 16 (Jamaica P.C.) — referred to

Parker v. Canadian Tire Corp. (1998), 1998 CarswellOnt 1633, 67 O.T.C. 196 (Ont. Gen. Div.) — referred to

Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership (2011), 2011 SKCA 120, 2011 CarswellSask 678, [2012] 2 W.W.R. 659, 341 D.L.R. (4th) 407, 377 Sask. R. 78, 528 W.A.C. 78 (Sask. C.A.) — referred to

Quality Pallets & Recycling Inc. v. Canadian Pacific Railway (2007), 2007 CarswellOnt 2477 (Ont. S.C.J.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Sawridge Band v. R. (2004), 2004 FCA 16, 2004 CarswellNat 130, 2004 CAF 16, 2004 CarswellNat 966, *(*sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, [2004] 2 C.N.L.R. 316, *(*sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), *(*sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — referred to

Shepherd Homes Ltd. v. Sandham (1970), [1971] 1 Ch. 340, [1970] 3 All E.R. 402, 21 P. & C.R. 863, [1970] 3 W.L.R. 348 (Eng. Ch. Div.) — referred to

Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment) (2006), 2006 PESCAD 11, 2006 CarswellPEI 25, 256 Nfld. & P.E.I.R. 277, 773 A.P.R. 277, 271 D.L.R. (4th) 530, 48 Admin. L.R. (4th) 1, 41 C.P.C. (6th) 285 (P.E.I. C.A.) — referred to

U.N.A. v. Alberta (Attorney General) (1992), [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137, 1992 CarswellAlta 10, 1992 CarswellAlta 465 (S.C.C.) — considered

West Nipissing Economic Development Corp. v. Weyerhaeuser Co. (2002), 2002 CarswellOnt 4165 (Ont. S.C.J.) — referred to

White Room Ltd. v. Calgary (City) (1998), 1998 CarswellAlta 314, 216 A.R. 44, 175 W.A.C. 44, 62 Alta. L.R. (3d) 177, [1999] 2 W.W.R. 502, 1998 ABCA 120 (Alta. C.A.) — referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 486.4 [en. 2005, c. 32, s. 15] — referred to

s. 486.4(2.1) [en. 2015, c. 13, s. 18(4)] — considered

s. 486.4(2.2) [en. 2015, c. 13, s. 18(4)] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 3.8(1) — considered

APPEAL by defendant from judgment reported at *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), allowing Crown's appeal and granting mandatory interlocutory injunction.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), ayant accueilli l'appel interjeté par le ministère public et accordé une injonction interlocutoire mandatoire.

Brown J. **:**

I. Introduction

1 The background leading to this appeal was summarized in the reasons of the chambers judge: [1]

> On March 5, 2016, [the accused], was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.
>
> As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

> In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.
>
> On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.
>
> One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction [2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part: [3]

> TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.
>
> AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.
>
> RELIEF SOUGHT:
>
> 1. That [CBC] be cited in criminal contempt of court.
>
> 2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
>
> 3. That an appropriate sentence be imposed against [CBC].
>
> 4. Any such further order appropriate that this Honourable Court deems.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application. [4]

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*, [5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim is entitled to an order "directing that any information that could identify the victim *shall not be published* in any document or broadcast *or transmitted* in any way".

III. Judicial History

A. The Chambers Judge's Reasons

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*. [6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban. [7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *U.N.A. v. Alberta (Attorney General)*, [8] he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order. [9]

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. The Court of Appeal

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it" [10] , in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation. [11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website". [12]

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance of such information on a website after it is first posted, the majority conceded that "either position is arguable". [13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory. [14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy

of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?

12 In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*.[15] and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*.[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

13 This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald* the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in*Google Inc. v. Equustek Solutions Inc.*[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory

injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". [29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". [30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; [31] a "strong and clear" or "unusually strong and clear" case; [32] that he or she is "clearly right" or "clearly in the right"; [33] that he or she enjoys a "high probability" or "great likelihood of success"; [34] a "high degree of assurance" of success; [35] a "significant prospect" of success; [36] or "almost certain" success. [37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

B. Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*. [38] This would entail the applicant showing "the rarest and clearest of cases" [39] , such that the conduct complained of would be impossible to defend.

20 In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself". [40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] *other than the expression itself*". [41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages. [42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press. [43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

C. What Strong Prima Facie Case Must the Crown Show?

21 As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the Originating Notice, properly read, was "hybrid" [44] , such that the application for the injunction did not "relate directly" [45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings". [46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website". [47]

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction *in that proceeding*". [48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ... for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case". [49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court* [50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "*a remedy ancillary to a cause of action*". [51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website" [52] , therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation. [53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. Is the Crown Entitled to a Mandatory Interlocutory Injunction?

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*, [54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it". [56] This principle was recently affirmed in *Google*. [57]

28 In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. [58]

30 As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way" [59] by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted. [60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable". [61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order". [62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

V. Conclusion

33 I would allow this appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 2016 ABQB 204, [2016] 9 W.W.R. 613 (Alta. Q.B.), at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R.J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

3 A.R., at pp. 39-40.

4 2016 ABCA 326, 404 D.L.R. (4th) 318 (Alta. C.A.).

5 R.S.C. 1985, c. C-46.

6 [1994] 1 S.C.R. 311 (S.C.C.).

7 Chambers judge's reasons, at para. 26.

8 [1992] 1 S.C.R. 901 (S.C.C.), at p. 933.

9 Chambers judge's reasons, at para. 34.

10 para. 5.

11 para. 6.

12 para. 7.

13 para. 10.

14 para. 11.

15 [1987] 1 S.C.R. 110 (S.C.C.).

16 [1975] A.C. 396 (U.K. H.L.).

17 *RJR — MacDonald*, at pp. 334-35.

18 *RJR — MacDonald*, at pp. 334 and 348.

19 *RJR — MacDonald*, at p. 334.

20 pp. 338-39.

21 2017 SCC 34 (S.C.C.), [2017] 1 S.C.R. 824.

22 *Google*, at paras. 25-27.

23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161 (Alta. C.A.), at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352 (Alta. C.A.), at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74 (Alta. C.A.), at paras. 28-29; *D.E. & Son Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1 (N.S. C.A.), at para. 10; *Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369 (N.S. S.C.), at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126 (N.S. C.A.); and *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152 (Ont. C.A.), at para. 54.

24 *Sawridge Band v. R.*, 2004 FCA 16, [2004] 3 F.C.R. 274 (F.C.A.), at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414 (F.C.A.), at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407 (Sask. C.A.), at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293 (Sask. C.A.), at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277 (P.E.I. C.A.), at para. 65.

25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

26 *Injunctions and Specific Performance*, at para. 2.640.

27 *RJR — MacDonald*, at pp. 338-39.

28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20.

31 *H&R Block Canada Inc. v. Inisoft Corp. (Ontario)* [2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List])], 2009 CanLII 37911, at para. 24.

32 *Fradenburgh v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 5387 (Ont. S.C.J.), at para. 14; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.), at paras. 49 and 52 (citing *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Eng. Ch. Div.), at p. 409).

33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* [2002 CarswellOnt 3653 (Ont. S.C.J.)], 2002 CanLII 34862, at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (Ont. S.C.J.), at para. 12.

34 *Quality Pallets & Recycling Inc. v. Canadian Pacific Railway* [2007 CarswellOnt 2477 (Ont. S.C.J.)], 2007 CanLII 13712, at para. 16.

35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.* [2002 CarswellOnt 4165 (Ont. S.C.J.)], 2002 CanLII 26148, at para. 16.

36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Ont. Gen. Div.), at para. 11.

37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M. A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin eds., *Annual Review of Civil Litigation, 2011* (2011) 367, at pp. 378-79.)

38 [1998] 1 S.C.R. 626 (S.C.C.).

39 *Liberty Net*, at para. 49.

40 paras. 47 and 49.

41 para. 47 (emphasis in original).

42 para. 47.

43 Chambers judge's reasons, at para. 59.

44 para. 5.

45 para. 6.

46 C.A. reasons, at para. 6.

47 C.A. reasons, at para. 7.

48 C.A. reasons, at para. 23 (emphasis added).

49 A.R., at p. 39.

50 Alta. Reg. 124/2010.

51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at p. 930 (emphasis added).

52 C.A. reasons, at para. 7.

53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

54 pp. 154-55.

55 [1982] 1 All E.R. 1042 (U.K. H.L.), at p. 1046.

56 See also *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.); *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177 (Alta. C.A.); *Musqueam Indian Band v. Canada*, 2008 FCA 214, 378 N.R. 335 (F.C.A.), at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii (note) (S.C.C.).

57 para. 22.

58 p. 933 (emphasis added).

59 Chambers judge's reasons, at para. 12.

60 para. 33.

61 C.A. reasons, at para. 10.

62 C.A. reasons, at para. 10; Transcript, at pp. 65 and 70-71.

Tab 28

2015 ABCA 265
Alberta Court of Appeal

Modry v. Alberta Health Services

2015 CarswellAlta 1530, 2015 ABCA 265, [2015] 11 W.W.R. 81, [2015] A.W.L.D. 3913, [2015] A.W.L.D. 3914, 23 Alta. L.R. (6th) 247, 256 A.C.W.S. (3d) 724, 388 D.L.R. (4th) 352, 606 A.R. 373, 652 W.A.C. 373

Dr. Dennis L. Modry and Dennis L. Modry Professional Corporation, Respondents (Plaintiffs/Applicants) and Alberta Health Services, Dr. David Burns Ross, David B. Ross Professional Corporation, Dr. David E. Johnstone, David E. Johnstone Professional Corporation, Dr. Dylan A. Taylor, Dylan A. Taylor Professional Corporation, Dr. D. William C. Johnston, Donald William Cooper Johnston Professional Corporation, Dr. David R. Mador, David R. Mador Holdings Inc., Dr. Randall G. Williams, Randall Gordon Williams Professional Corporation, Dr. Michael Ivan Buss, Michael I. Buss Professional Corporation, Dr. Owen Robert Heisler, Dr. Gerald T. Todd, Gerald T. Todd Professional Corporation, Dr. Gordon H. Wilkes and Gordon H. Wilkes Professional Corporation, Mr. Kenneth Davidson and Ms. Carol Manson-Mcleod, Appellants (Defendants/Respondents)

J.D. Bruce McDonald, Barbara Lea Veldhuis, Thomas W. Wakeling JJ.A.

Heard: April 27, 2015
Judgment: August 21, 2015
Docket: Edmonton Appeal 1403-0324-AC

Proceedings: reversing *Modry v. Alberta Health Services* (2015), [2015] A.J. No. 175, 2015 CarswellAlta 248, 2015 ABQB 106, J.D. Rooke A.C.J.Q.B. (Alta. Q.B.)

Counsel: H.W. Veale, Q.C., G.S. Dunlop, for Respondents, Plaintiffs / Applicants
P.J. Faulds, Q.C., J.M. Raven-Jackson, for Appellants, Defendants / Respondents

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.i Strength of applicant's case
Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.c Miscellaneous
Headnote
Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — Threshold test — Strength of applicant's case
Surgeon who specialized in high-risk procedures abruptly cancelled two surgeries after learning of personal financial loss — Provincial health services authority ("authority") advised surgeon that he was required to submit to Triggered Initial Assessment (TIA) process and that professional review committee would prepare report in respect of TIA — M, who was representative of

authority, would review report and proceed in accordance with relevant bylaws — Surgeon agreed to voluntarily withdraw from practice in exchange for $20,000 per week until TIA decision was reached — TIA report outlined several concerns — Pursuant to November 2013 letter, M referred TIA to "consensual resolution" — M further advised that weekly payments were to cease — Surgeon claimed that process to arrive at decision was unfair — TIA was put on hold while surgeon underwent mandatory age 65 periodic review — Concerns in relation to performance, team work and history on files were addressed and return to work proposal was created — Surgeon rejected return to work proposal, claiming that periodic review process was unfair and biased — Surgeon brought successful action for mandatory injunctive relief — Medical professionals and authority appealed — Appeal allowed — Evidence did not support finding that surgeon adequately demonstrated he was likely to succeed at trial having regard to causes of actions alleged in statement of claim — Chambers judge erred in law in finding that decision to refer TIA to consensual resolution pursuant to bylaws was not final decision — Finding that authority was not entitled to discontinue paying $20,000 weekly to surgeon after M sent him letter was unreasonable — In choosing to refer TIA to consensual resolution process, M made clear decision open to him under bylaws — M's decision to refer TIA to consensual resolution process appropriately discharged his obligation to render decision on TIA pursuant to bylaws — Chambers judge used language of procedural fairness to suggest that authority breached its duty of procedural fairness to surgeon, but surgeon did not plead breach of procedural fairness — Chambers judge erred in finding that process was prima facie fundamentally impaired — Chambers judge had no basis upon which to conclude there was strong prima facie case on allegation of misfeasance in public office.

Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — General principles

A surgeon who specialized in high-risk procedures abruptly cancelled two surgeries after learning of his own personal financial loss. The provincial health services authority ("authority") advised the surgeon that he was required to submit to a Triggered Initial Assessment (TIA) process and that a professional review committee would prepare a report in respect of the TIA. M, who was a representative of the authority, would review the report and proceed in accordance with the relevant bylaws. The surgeon agreed to voluntarily withdraw from practice in exchange for $20,000 per week until the TIA decision was reached.

The TIA report outlined several concerns. Pursuant to his November 2013 letter, M referred TIA to a "consensual resolution". M further advised that the weekly payments were to cease. The surgeon claimed that the process to arrive at the decision was unfair. The TIA was put on hold while surgeon underwent mandatory age 65 periodic review. Concerns in relation to performance, team work and history on files were addressed and a return to work proposal was created. The surgeon rejected the return to work proposal, claiming that the periodic review process was unfair and biased.

The surgeon brought successful action for mandatory injunctive relief. The medical professionals and the authority appealed.

Held: The appeal was allowed.

Per Velduis and Wakeling JJ.A.: The evidence did not support a finding that the surgeon adequately demonstrated that he was likely to succeed at trial having regard to the causes of actions alleged in his statement of claim. The chambers judge erred in law in finding that the decision to refer the TIA to consensual resolution pursuant to the bylaws was not a final decision. The finding that the authority was not entitled to discontinue paying $20,000 weekly to the surgeon after M sent him his letter was unreasonable. In choosing to refer the TIA to the consensual resolution process, M made a clear decision open to him under bylaws.

M's decision to refer the TIA to the consensual resolution process appropriately discharged his obligation to render a decision on the TIA pursuant to applicable bylaws. The chambers judge used language of procedural fairness to suggest that the authority breached its duty of procedural fairness to the surgeon, but the surgeon did not plead any breach of procedural fairness. The chambers judge erred in finding that the process was prima facie fundamentally impaired. The chambers judge had no basis upon which to conclude there was a strong prima facie case on the allegation of misfeasance in public office.

Per McDonald J.A. (dissenting): The chambers judge did not overlook the bylaws. He conducted a thorough review of the applicable bylaws to conclude that M had not made a decision. In his testimony, M admitted that he was aware that a decision had been made pursuant to the bylaws. It was neither an error of law or unreasonable for the chambers judge to accept an admission by a party in preference to wording of November 2013 letter. The inquiry on appeal should be to determine if there was evidence before the chambers judge such that it was reasonable for him to have found that there was no decision made as contemplated by the agreement.

The chambers judge's finding that there was a strong prima facie case that the authority were in breach of the agreement since no decision as contemplated by the agreement had been rendered, and therefore the surgeon was entitled to his agreed upon

compensation until his surgical privileges were restored or a property decision had been rendered pursuant to the TIA was eminently reasonable.

The authority was in plain breach of its clear obligation to continue to pay to the surgeon $20,000 per week until it made its decision, which the chambers judge found had not been rendered. Given the facts of the case, it was entirely appropriate to insist that the agreement be honoured sooner rather than later. The agreed upon weekly payment should continue until the authority reinstated the surgeon's surgical privileges.

The surgeon and the authority were not in an employment-like relationship. The surgeon was never an employee but held a medical staff employment. The authority did not show that it was an error of law to order reinstatement. The authority adduced no evidence of any concerns it had with the surgeon's hospital privileges. The authority's claims about past investigations reaching a common conclusion regarding surgical outcomes were not supported by evidence before the chambers judge. The only uncontroverted evidence on the record was from the surgeon's operating colleagues who stated that the surgeon would be welcomed back. The authority did not show that the chambers judge erred in ordering reinstatement or that he exercised his discretion unreasonably.

The preliminary ruling was not explicitly raised as a ground of appeal and it was not proper to revisit that ruling or to consider the evidence excluded by the chambers judge as a result of it. In ordering the mandatory injunction he did, the findings of fact and inferences drawn by the chambers judge were entitled to deference, absent probably and overriding error. His interpretation of the agreement was entitled to deference absent an extricable error of law. The authority did not show that the chambers judge failed in this regard.

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Assn. des Parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général) (2015), 2015 NWTCA 2, 2015 CATNO 2, 2015 CarswellNWT 1, 2015 CarswellNWT 2, [2015] 3 W.W.R. 490, 80 Admin. L.R. (5th) 75 (N.W.T. C.A.) — considered

B-Filer Inc. v. TD Canada Trust (2008), 2008 ABQB 749, 2008 CarswellAlta 1969, 65 C.P.C. (6th) 274 (Alta. Q.B.) — referred to

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Capital I Industries Inc. v. Weldco-Beales Manufacturing Inc. (2010), 2010 ABQB 404, 2010 CarswellAlta 2395, 500 A.R. 342 (Alta. Q.B.) — considered

Cimolai v. Children's & Women's Health Centre of British Columbia (2003), 2003 BCCA 338, 2003 CarswellBC 1385, 14 B.C.L.R. (4th) 199, 25 C.C.E.L. (3d) 165, [2003] 8 W.W.R. 224, 228 D.L.R. (4th) 420, 183 B.C.A.C. 279, 301 W.A.C. 279 (B.C. C.A.) — considered

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Globex Foreign Exchange Corp. v. Kelcher (2005), 2005 ABCA 419, 2005 CarswellAlta 1790, 10 B.L.R. (4th) 229, 53 Alta. L.R. (4th) 258, 376 A.R. 133, 360 W.A.C. 133, 262 D.L.R. (4th) 752, [2006] 7 W.W.R. 640 (Alta. C.A.) — followed

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(2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — referred to

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Cimolai v. Children's & Women's Health Centre of British Columbia (2003), 2003 BCCA 338, 2003 CarswellBC 1385, 14 B.C.L.R. (4th) 199, 25 C.C.E.L. (3d) 165, [2003] 8 W.W.R. 224, 228 D.L.R. (4th) 420, 183 B.C.A.C. 279, 301 W.A.C. 279 (B.C. C.A.) — considered in a minority or dissenting opinion

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — refered to in a minority or dissenting opinion

Ensign Drilling Inc. v. Lundle (2007), 2007 ABQB 357, 2007 CarswellAlta 687, 75 Alta. L.R. (4th) 138, [2007] 9 W.W.R. 149, 31 B.L.R. (4th) 101, 418 A.R. 267 (Alta. Q.B.) — refered to in a minority or dissenting opinion

Globex Foreign Exchange Corp. v. Kelcher (2005), 2005 ABCA 419, 2005 CarswellAlta 1790, 10 B.L.R. (4th) 229, 53 Alta. L.R. (4th) 258, 376 A.R. 133, 360 W.A.C. 133, 262 D.L.R. (4th) 752, [2006] 7 W.W.R. 640 (Alta. C.A.) — refered to in a minority or dissenting opinion

Hampstead & Suburban Properties Ltd. v. Diomedous (1968), [1969] 1 Ch. 248, [1968] 3 All E.R. 545, [1968] 3 W.L.R. 990 (Eng. Ch. Div.) — considered in a minority or dissenting opinion

Hill v. Hill (2007), 2007 ABCA 293, 2007 CarswellAlta 1287, 35 E.T.R. (3d) 171 (Alta. C.A.) — refered to in a minority or dissenting opinion

Innovative Health Group Inc. v. Calgary Health Region (2006), 2006 ABCA 184, 2006 CarswellAlta 720, 384 A.R. 378, 367 W.A.C. 378, 70 Alta. L.R. (4th) 15 (Alta. C.A.) — refered to in a minority or dissenting opinion

McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd. (1994), 22 Alta. L.R. (3d) 402, [1994] 10 W.W.R. 662, 42 R.P.R. (2d) 215, 159 A.R. 120, 1994 CarswellAlta 205 (Alta. Q.B.) — refered to in a minority or dissenting opinion

Medical Laboratory Consultants Inc. v. Calgary Health Region (2003), 2003 ABQB 995, 2003 CarswellAlta 1731, 347 A.R. 291, 33 Alta. L.R. (4th) 242 (Alta. Q.B.) — considered in a minority or dissenting opinion

Medical Laboratory Consultants Inc. v. Calgary Health Region (2005), 2005 ABCA 97, 2005 CarswellAlta 333, 19 C.C.L.I. (4th) 161, 363 A.R. 283, 343 W.A.C. 283, 43 Alta. L.R. (4th) 5 (Alta. C.A.) — refered to in a minority or dissenting opinion

R. v. Mian (2014), 2014 SCC 54, 2014 CSC 54, 2014 CarswellAlta 1561, 2014 CarswellAlta 1562, 13 C.R. (7th) 1, 2 Alta. L.R. (6th) 217, 462 N.R. 1, 377 D.L.R. (4th) 385, 315 C.C.C. (3d) 453, [2014] 2 S.C.R. 689, 580 A.R. 1, 620 W.A.C. 1, 319 C.R.R. (2d) 4 (S.C.C.) — refered to in a minority or dissenting opinion

Sharma v. London Life Insurance Co. (2005), 2005 CarswellOnt 3368, 45 C.C.E.L. (3d) 302 (Ont. S.C.J.) — considered in a minority or dissenting opinion

Statutes considered by *Veldhuis, Wakeling JJ.A.*:

Hospitals Act, R.S.A. 2000, c. H-12

Generally — referred to

Statutes considered by *J.D. Bruce McDonald J.A.* (dissenting):

Hospitals Act, R.S.A. 2000, c. H-12

Generally — referred to

s. 21 — considered

Judicature Act, R.S.A. 2000, c. J-2

s. 19 — considered

APPEAL from judgment reported at *Modry v. Alberta Health Services* (2015), 2015 ABQB 106, 2015 CarswellAlta 248, [2015] A.J. No. 175 (Alta. Q.B.), allowing surgeon's action for injunctive relief.

***Veldhuis, Wakeling JJ.A.*:**

I. Introduction

1 The appellants (collectively "AHS") appeal the mandatory injunctive relief order of the learned chambers judge requiring the immediate reinstatement of the respondent Dr. Dennis L. Modry's (hereinafter the "respondent surgeon") surgical privileges, a weekly payment of $20,000 for the period of September 17, 2013 to the date of the order, and a payment of $20,000 per week by AHS to the respondent surgeon for any period during which AHS restricted him from his surgical practice or impaired his ability to practice. This Court subsequently stayed the term of the order requiring reinstatement of surgical privileges on January 23, 2015, pending the outcome of AHS's appeal to this Court: 2015 ABCA 31 (Alta. C.A.).

2 AHS asserts that the chambers judge erred in fact and law in granting the mandatory interlocutory injunction. AHS requests that this Court set aside the order of the chambers judge and direct that the respondents repay all monies paid pursuant to the order as well as costs in this Court and in the court below. For the reasons that follow, we allow the appeal.

II. Facts

3 The respondent surgeon is a prominent heart and lung surgeon who has practised in Edmonton for approximately thirty-one years. A significant portion of his surgical practice involves high-risk heart and lung transplant surgeries.

4 On August 30, 2013 the respondent surgeon abruptly cancelled two surgeries which he was scheduled to perform. He had just learned of a personal financial loss requiring him to leave Edmonton to deal with the matter and felt he was not in a position to carry out the surgeries. Several of his colleagues were required to fill in for him on short notice to complete the patients' surgeries in the following days. The respondent surgeon did not respond to phone calls or messages from his colleagues who were attempting to reach him on the day of the cancelled surgeries.

5 Upon his return to Edmonton, AHS (through Dr. Taylor on behalf of Dr. Mador as Zone Medical Director) notified the respondent surgeon in an undated letter (which was confirmed in oral argument by counsel to be September 17, 2013) that he was required to submit to a Triggered Initial Assessment (TIA) process under AHS's 2011 Staff Medical Bylaws (2011 Bylaws) as a "Concern" had been filed regarding the two cancelled surgeries. A "Concern" is defined under the 2011 Bylaws as: "[a] written complaint or concern from any individual or group of individuals about a Practitioner's professional performance and/or conduct, either in general or in relation to a specific event or episode of care provided to a specific Patient". AHS further advised the respondent surgeon that a professional review committee comprised of three individuals would prepare a report in respect of the TIA. Thereafter, the Zone Medical Director, Dr. Mador, on behalf of AHS, would review the report prepared by the TIA committee and take one of the steps listed in s 6.3.4 of the 2011 Bylaws. Attached as Appendix "A" to these reasons is a copy of s 6.3.4 of the 2011 Bylaws.

6 Additionally, in his September 17, 2013 letter, Dr. Taylor requested that the respondent surgeon voluntarily withdraw from his surgical practice. If he did so, AHS offered to remunerate him $20,000 per week until Dr. Mador reached his "decision" on the TIA. The relevant portions of Dr. Taylor's letter follow:

> 3. It is our objective to complete this process within 28 days, subject to ensuring appropriate time for a thorough investigation, a fair process, and best decisions. AHS requests that you withdraw from surgical practice during this process. We will remunerate you $20,000.00 per week during the investigation up until I as Zone Medical Director make a decision pursuant to section 6.3.4 of the [2011 Bylaws]. This remuneration will be reviewed no less often than every 28 days. Once the decision has been made, the remuneration will cease. If you are unwilling to voluntarily withdraw from surgical practice, AHS will undertake immediate action to suspend your surgical privileges.
>
> 4. At the conclusion of this process, as Zone Medical Director I will make a decision from amongst the options available under section 6.3.4 of the [2011 Bylaws].
>
> [Emphasis added.]

7 Through his counsel, the respondent surgeon accepted the offer from AHS.

8 The TIA committee completed its report on November 8, 2013. It outlined several concerns regarding the respondent surgeon including: inappropriate scheduling of elective surgery while on call which yielded an excessive workload (the report noted a lack of the respondent surgeon's insight regarding this issue), unprofessional and inappropriate behaviour with respect to a specific patient including inadequate preoperative review and cancellation of surgery, poor communications, and concerns regarding unknown ongoing "personal issues" of potential future concern. In addition, the report noted a concern regarding the respondent surgeon's surgical performance indicators which included mortality rates.

9 Counsel for the respondent surgeon advised Dr. Mador that consideration of the surgical performance data was inappropriate for the purposes of the TIA investigation. Accordingly, Dr. Mador noted and agreed in his November 20, 2013 letter to the respondent that this was "beyond the scope" of the TIA and excluded the impugned data from his decision.

10 Pursuant to s 6.3.4(g) of the 2011 Bylaws, Dr. Mador advised the respondent in his November 20, 2013 letter that he had decided to refer the TIA to a "Consensual Resolution" with certain recommendations attached. He wrote, in part:

> I am required to make a decision about this TIA based on the review and the options described in 6.3.4 of the Medical Staff Bylaws. Therefore, I request that you engage in Consensual Resolution...

"Consensual Resolution" is defined in the 2011 Bylaws as: "[a] consensual and confidential process to resolve a Concern. Consensual Resolution includes the Affected Practitioner, the relevant AHS medical administrative leader(s), and any other relevant person(s)." The recommendations included that the respondent surgeon would agree to be referred to the College of Physician and Surgeons of Alberta for a psychosocial evaluation, that he voluntarily withdraw from surgical and on-call activities during this evaluation, and that the surgical performance data would be reviewed with him at his upcoming mandatory age sixty-five periodic review. Dr. Mador advised further in his November 20, 2013 letter that as he had rendered his decision pursuant to s 6.3.4 of the 2011 Bylaws, the current $20,000 weekly payments to the respondent surgeon would cease. The payments ceased on or about November 30, 2013.

11 The respondent surgeon acknowledged that Dr. Mador had rendered a decision to refer the TIA to Consensual Resolution (as well as the recommendations) but was of the view that the process he undertook to arrive at his decision was unfair. Therefore whether a decision was, in fact, rendered by Dr. Mador accordingly became a live issue before the chambers judge.

12 In a January 23, 2014 letter, AHS (through Dr. Johnstone as Zone Clinical Department Head) advised the respondent surgeon that he was required at that time to submit to an age sixty-five mandatory periodic review, and that the TIA was effectively put on hold. AHS offered in March 2014 to pay the respondent surgeon $20,000 per month (as opposed to $20,000

per week) while the periodic review process was completed. Dr. Mador referenced this arrangement in his letter of September 11, 2014, which the chambers judge excluded, to counsel for the respondent surgeon advising of his decision on the periodic review.

13 Several meetings concerning the periodic review were held in the ensuing months, which culminated in a return to work proposal AHS communicated to the respondent surgeon on April 4, 2014.

14 In the proposal, Dr. Johnstone advised that the age sixty-five periodic review had highlighted three areas of concern: performance, team work, and history on files. He noted that the areas of concern addressing performance and team work were not new, but that they had not been resolved at the time of the review. AHS proposed a return to work plan for the respondent surgeon. It contained five provisions. First, he would be permitted to do isolated coronary bypass surgery, isolated aortic valve replacement, and non-ischemic mitral valve replacements. He would not be allowed to do heart or lung transplants, lead extractions, left ventricular assist device (LVAD) surgeries, and double valve replacements or reoperations. Second, for the first three months another surgeon would sign off on the operative plan, the procedure and the follow-up with documentation and written confirmation of compliance. Third, the respondent surgeon would be entitled to handle a maximum of 150 cases per year with no more than two cases per day and no more than two days in the operating room per week. Fourth, he would not be permitted to take calls. Fifth, all patients would be peer reviewed.

15 Four days after AHS communicated its April 4, 2014 return to work proposal, the respondents issued their Statement of Claim against AHS. The Statement of Claim advances numerous allegations and causes of action against AHS, including the tort of conspiracy, breach of contract, breach of fiduciary duty, and misfeasance in public office. Nine days after issuing the Statement of Claim (April 17, 2014) the respondent surgeon formally rejected AHS's return to work proposal, advising that the periodic review process was entirely unfair, biased, and that he was prepared to return to work full-time without any restrictions on his practice.

16 On May 15, 2014 counsel for the respondents wrote to counsel for AHS presenting the respondents' back to work proposal. It contained three provisions. First, the respondents would not proceed with their pending application for interlocutory relief. Second, the existing litigation would proceed expeditiously to trial on reasonable timelines agreed to by counsel or as determined by the court. Third, the return to work proposal of AHS set out in Dr. Johnstone's letter of April 4, 2014 would be implemented immediately and remain in place until a final decision of a court of first instance in the litigation following either a trial or summary proceeding. AHS did not respond to this proposal from the respondents.

17 On May 30, 2014 the respondents filed an application for mandatory injunctive relief against AHS seeking the following relief: immediate reinstatement of the respondent surgeon's full surgical privileges, a return to work plan that addressed the damage to his reputation among the referral network, a prohibition on the hiring of a cardio vascular thoracic (CVT) surgeon to replace him, and interim damages consisting of a lump sum and periodic payments until trial to permit the respondents to maintain their office and staff.

18 On July 2, 2014 Dr. Mador wrote to counsel for the respondents proposing to have the TIA committee re-do the assessment and TIA report with instructions not to consider the statistical information previously provided to them. On July 10, 2014, counsel for the respondents wrote to Dr. Mador rejecting the proposal. He advised that he considered Dr. Mador's letter of July 2, 2014 to be an admission that the TIA process was unfair and flawed. Dr. Mador denied the process was flawed in a subsequent letter dated July 22, 2014. He asserted that AHS's position was that the entire TIA process was not unfair or flawed, and that the TIA committee unanimously maintained its view that it would have reached the same conclusions had it not considered the contested data. The issue of procedural fairness and bias therefore became a live issue before the chambers judge.

19 Dr. Mador's letter of July 22, 2014 was not entered into evidence in the court below. That is because the chambers judge, in a preliminary ruling, excluded evidence of facts which occurred after April 8, 2014, which was the date of the respondents' Statement of Claim. As such, the chambers judge further excluded from consideration Dr. Mador's letter of September 11, 2014, his affidavit dated September 22, 2014 attaching the age sixty-five periodic review report dated August 20, 2014, and the report itself. (See further detail in paras 97, 98 herein.) The chambers judge's decision, as explained below, was arbitrary and incorrect in law.

20 On August 30, 2014, the same day as the completed periodic review report, the respondents filed an application for summary judgment against AHS returnable on September 26, 2014 before the Court of Queen's Bench. They sought the following relief: judgment against AHS in the amount of $760,000 and an order requiring AHS to pay the respondents $20,000 per week from September 26, 2014 until further order of the Court. The application further listed, in part, as one of the grounds of the application that Dr. Mador had not made a decision pursuant to s 6.3.4 of the 2011 Bylaws and the TIA process was still underway. To date, the respondents' application for summary judgment has not been heard.

21 The respondents' application for a mandatory interlocutory injunction, originally filed on May 30, 2014, was adjourned and heard before the chambers judge on December 10, 2014 (the subject of this appeal).

22 The respondent surgeon has not returned to work since the end of August 2013 when AHS invoked the TIA process based on the Concern. The $20,000 monthly payments to the respondent surgeon ceased in September 2014 (as communicated by Dr. Mador to counsel for the respondent surgeon in his September 11, 2014 letter).

III. Decision Below

23 The chambers judge initially provided oral reasons on December 10, 2014 followed by supplementary written reasons on February 11, 2015: 2015 ABQB 106 (Alta. Q.B.). He made a number of fact findings which are summarized below.

24 The chambers judge found that AHS and the respondent surgeon agreed he would voluntarily withdraw his surgical practice in exchange for weekly payments of $20,000 until AHS made a decision (specifically, Dr. Mador as Zone Medical Director) pursuant to s 6.3.4 of the 2011 Bylaws. He found also that the TIA only dealt in substance with the two cancelled surgeries in August of 2013.

25 The chambers judge also stated that the "only real decisions" that are possible following the TIA report include dismissal, abandonment, or sending the matter to a hearing. He found that AHS took no steps to resolve the matter by a decision on the merits but instead mediation (i.e. Consensual Resolution) was suggested. He further noted that the TIA process was effectively on hold because Dr. Mador made no decision on the substance of the Concern, and that the respondent surgeon was still prevented from his surgical privileges and entitled to the $20,000 per week payments.

26 The chambers judge ultimately concluded at para 19 that because the Concern was neither dismissed nor abandoned at the TIA stage, and a hearing was never initiated, "...no final disposition or decision was made as contemplated in the Concern process or the letter of September 17, 2013." He further held that as a decision was a prerequisite to stop the contractually agreed weekly payments, and no decision was made, there was therefore a strong *prima facie* case that the respondent had a contractual right to continue receiving weekly payments.

27 The chambers judge also found that the respondent surgeon had no notice prior to November 14, 2013 when he received the TIA review committee report that the TIA committee was addressing anything other than the matters described in AHS's initial letter of September 5, 2013. The chambers judge found the respondent surgeon was therefore unable to address the substance of the matters prior to the TIA committee report and concluded the process was "*prima facie* fundamentally impaired". He further held that mortality rates were not included within the definition nor were they relevant to the Concern or the proceedings before the TIA committee. Even if mortality rates were relevant, the chambers judge reasoned there would have been a duty on the TIA committee to advise the respondent surgeon accordingly and provide the data relied upon, which it did not. Therefore, the respondent surgeon did not have the opportunity to address these issues before the TIA committee prepared its report.

28 The chambers judge ultimately concluded that there was a "strong *prima facie* case" for a mandatory injunction requiring both the surgical privileges to be reinstated and the remuneration to continue until that was done. This was for several reasons which included:

• The respondent surgeon was not afforded procedural fairness in the TIA process, and the TIA committee report was flawed because it addressed issues outside the Concern and based its conclusions on issues the committee was not asked to address

• Dr. Mador's recommendations were directions (not decisions) based on the TIA committee's flawed report

• Dr. Mador raised the issue of the respondent surgeon's retirement which was outside the scope of the TIA and suggested the matter had been pre-judged

• The $20,000 per week payments were improperly cancelled because there was no basis for the respondent surgeon to be prevented from operating.

29 On the issue of irreparable harm, the chambers judge found the respondents had met this prong of the test in that the respondent surgeon satisfied the Court that he would suffer a loss in referrals, deterioration in his skills if he was not able to practice and maintain them, and a lack of income to his professional corporation. The chambers judge remarked that the loss of reputation of the respondent's surgical privileges spoke "loudly" to irreparable harm that could not be adequately compensated with damages.

30 On the issue of balance of convenience, the chambers judge concluded that the balance favoured the respondents. Here, the chambers judge noted that several cardiac surgeons and medical professionals had "debunked the concern of patient risk and physician relationships" and provided "unchallenged evidence" which praised the respondent surgeon's skills and supported his immediate return to the operating room. He further noted specifically that given the respondent surgeon's "attested competent skills, and his willingness to do high risk surgery", some patients may lose or have reduced surgical options for their heart and lung problems. These factors therefore supported the balance of convenience in favour of the respondents.

31 The chambers judge additionally found there was a "strong *prima facie* case" against AHS for the tort of misfeasance in public office due to the deliberate (or negligent) unlawful conduct in exercising its public function with an awareness of the conduct being unlawful and likely to injure the respondent.

32 The chambers judge further stated there was a "possibility [of] finding of the tort of conspiracy" but that no "strong *prima facie* case" had been made out.

IV. Issues

33 The following issues are raised by this appeal:

1. Did the chambers judge err in finding that:

   (a) there was a strong *prima facie* case of breach of contract against AHS;

   (b) there was a strong *prima facie* case that the TIA process was procedurally unfair; and

   (c) there was a strong *prima facie* case of the tort of misfeasance in public office?

2. Did the chambers judge err in ordering AHS to pay $20,000 per week to the respondent surgeon as a form of mandatory injunctive relief?

3. Did the chambers judge wrongly exclude evidence of facts occurring after April 8, 2014 which directly addressed the third branch (balance of convenience) of the tripartite test?

4. If the chambers did wrongly exclude such evidence, did he further err in ordering the immediate reinstatement of the respondent surgeon as a form of mandatory injunctive relief?

V. Standard of Review

34 An interlocutory injunction involves the exercise of judicial discretion and is entitled to deference, unless the judge proceeded arbitrarily or on wrong legal principles: *Victoria Oil & Gas Plc v. Alhambra Resources Ltd.*, 2009 ABCA 64 (Alta. C.A.) at para 8, (2009), 448 A.R. 374 (Alta. C.A.).

35 In *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419 (Alta. C.A.) ("*Globex*") at para 18, this Court succinctly observed that: "[t]his Court will not interfere unless the chambers judge committed an error in principle or in law, or unless the order is unreasonable in the circumstances. The chambers judge must apply correct legal principles to a reasonable view of the facts reaching a result that is not manifestly unjust: *Medical Laboratory Consultants Inc. v. Calgary Health Region* (2005), 363 A.R. 283, 2005 ABCA 97". See also *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 (Alta. C.A.) at para 11: "[t]he standard of appellate review of a refusal to grant discretionary interlocutory relief requires deference, unless it can be shown that the exercise of discretion was based on a misunderstanding of law or facts, or was so aberrant that no reasonable judge would have done so: *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.)."

VI. Test for Granting a Mandatory Interlocutory Injunction

36 The tripartite test for granting of a *prohibitory* interlocutory injunction is well-known. The applicant must demonstrate that: 1) there is a serious issue to be tried; 2) that irreparable harm would result to the application if the injunction was not granted; and 3) the balance of convenience between the parties favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) ("*RJR-MacDonald Inc.*"); see also generally *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.).

37 However, as noted in *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2003 ABQB 995 (Alta. Q.B.) at para 14, aff'd 2005 ABCA 97 (Alta. C.A.), the first step of the tripartite test is modified when the applicant seeks a *mandatory* interlocutory injunction requiring the respondent to carry out a positive act. The applicant must demonstrate a strong and clear *prima facie* case. For a definition of "strong *prima facie* case", see *IBM Canada Ltd. v. Almond*, 2015 ABQB 336 (Alta. Q.B.) at para 29 (a strong *prima facie* case is one that will "probably prevail at trial" or is "likely to succeed at trial"), citing with approval *BrettYoung Seeds Limited Partnership v. Dyck*, 2013 ABQB 319 (Alta. Q.B.) at para 13; see also *B-Filer Inc. v. TD Canada Trust*, 2008 ABQB 749 (Alta. Q.B.) at para 17.

38 In his text, *The Law of Equitable Remedies*, 2nd ed (Toronto: Irwin Law, 2013), Professor Berryman observes that a court may have regard to the following factors before ordering a *mandatory* interlocutory injunction requiring the defendant to take positive steps in compliance (at p 67):

> 1) Will the order cause the defendant a greater waste of resources, either time or money, than merely being delayed in commencing something he would otherwise be entitled to do?
>
> 2) *Will the granting of the relief make it unlikely that the plaintiff will return to bring the matter on for trial? In other words, is the plaintiff getting complete relief at the interlocutory stage, making the proceeding determinative of the dispute*?
>
> 3) Can the order be expressed with sufficient clarity so that the defendant, and any subsequent court, knows what was expected of the defendant to be in compliance?
>
> 4) *Are there any other "due process" concerns about the use of coercive and intrusive power to achieve the particular end without the protection of a full trial?*
>
> 5) Has the defendant increased the impugned activities after being informed of the plaintiff's request for judicial assistance? [Emphasis added.]

39 The parties agree on the standard of review, and that the chambers judge identified the correct test for a mandatory interlocutory injunction. They disagree, however, as to the chambers judge's findings of fact and application of the legal test under each of the three elements of the test. The parties further disagree whether the chambers judge was entitled to grant the respondents the relief he ordered in the form of reinstatement of the respondent surgeon's surgical privileges, and the payment of $20,000 per week until his surgical privileges are reinstated.

VII. Analysis

1. Did the chambers judge err in finding the respondents had demonstrated a strong prima facie case against AHS?

40 The first stage of the tripartite test for the grant of a mandatory interlocutory injunction therefore requires a preliminary assessment of the merits of the respondents' case to determine whether a strong *prima facie* case has been made out by the respondents. This, as has been established in the Alberta case authorities relating to mandatory injunctions, is a much more onerous burden than simply determining whether there is a serious issue to be tried (a serious issue exists if the claim is not frivolous or vexatious).

41 For the reasons that follow, we would give effect to this first ground of appeal. The evidence on this record, limited as it is at this stage, cannot support a finding that the respondents adequately demonstrated they were likely to succeed at trial having regard to the causes of action alleged in the Statement of Claim.

1(a). Did the chambers judge err in finding there was a strong prima facie case of breach of contract against AHS?

(i) The appellants' position (AHS)

42 AHS attacks the chambers judge's finding that there was a strong *prima facie* case for breach of contract by AHS. Here, AHS submits the chambers judge labored under an unreasonable assumption that AHS offered the respondent surgeon open-ended compensation at the time the TIA process was triggered, which it says it did not. AHS points specifically to Dr. Mador's letter of November 20, 2013 wherein he refers to a clear decision rendered by him as Zone Medical Director pursuant to s 6.3.4 of the 2011 Bylaws. Accordingly, AHS contends Dr. Mador proceeded correctly in further advising the respondent surgeon in his November 20, 2013 letter that the $20,000 weekly payments would thereby cease.

(ii) The respondents' position

43 The thrust of the respondents' submission is that the chambers judge's finding that there was a strong *prima facie* case against AHS for breach of contract was reasonable and therefore entitled to deference. They submit the chambers judge conducted a thorough review of the 2011 Bylaws before concluding that AHS, through Dr. Mador, had ultimately not made a "decision" on the TIA. The respondents point in particular to Dr. Mador's admission on cross-examination that he was aware that a "decision" had *not* been made pursuant to 6.3.4 of the 2011 Bylaws. Based on this admission, the respondents submit it is not unreasonable for the chambers judge to have accepted it in preference to a contradictory statement that he gave elsewhere in the record.

(iii) Analysis

44 The chambers judge's reasoning is set out below, in part, as follows:

> [13] On November 20, 2013 ([The respondents'] Brief, para 59), AHS, through Dr. Mador, directed a consensual resolution (in effect, a mediation) of the TIA, and terminated the $20,000 per week payment. In doing so, I find, and Dr. Mador agreed, ([The respondents'] Brief, para 60), he made no decision on the TIA but only deferred it to another process. As no decision had been made, there was no basis to cancel [the respondent surgeon's] remuneration which was, by contract, to remain "until" a decision was made ([The respondents']Reply Brief, para 16).
>
> . . . . .

> [20] Accordingly, as no decision was made, and a decision is a prerequisite to stop the contractually agreed weekly payment, there is a strong *prima facie* case in contract that such payment cannot be suspended.
>
> [Emphasis added.]

45 Attached as Appendix A to the chambers judge's written supplementary reasons are his initial oral reasons given on December 10, 2014, in which he stated, in part, that the respondent surgeon was entitled to a *final decision*:

> I find it is proper to interpret this not in a broad context but in the context of the Concern as delineated. It was the Concern and the TIA process that led to the prospect of a suspension. Dr. Modry agreed, as a matter of contract as requested to withdraw from surgical practice during the TIA process in consideration of several things. Number 1 was for it to be speedy. We know that the Alberta Health Services Medical Staff Bylaws have a process which contemplates a 28 day investigation period and report. A decision within 28 days thereafter. In this case there is a purposed [sic] decision under Section 6.3.4 [on] November 20, 2013. Second, consideration of a fair process. He is entitled to a fair process as a matter of law on any such investigation and he is specifically entitled to a fair process under Section 6.2 of the Bylaw. He was entitled to a final decision. Not a decision that had this linger forever but a decision under s. 6.3.4 to dismiss the Concern or to send it off to a form of settlement process within a reasonable time, i.e. to delay the 28 days, referred to in s. 6.3.4(g) as a "consensual resolution". And, among other things, to a hearing under s. 6.3.4(i). Thus dismissal under s. 6.3.4(a), referral to a hearing under (i), or a consensual process under (g).
>
> [Emphasis added.]

46 In our view, the chambers judge erred in law in his finding that the decision of Dr. Mador to refer the TIA to a "Consensual Resolution" pursuant to s 6.3.4 of the 2011 Bylaws was not a *final* decision for the purposes of s 6.3.4 but one that was deferred to another process, namely the Consensual Resolution process.

47 The chambers judge's finding that AHS was not entitled to discontinue paying $20,000 per week to the respondent surgeon after Dr. Mador forwarded to him his November 20, 2013 letter is, with respect, unreasonable. It is unreasonable because a detailed review of the 2011 Bylaws reveals that the decision Dr. Mador announced in his November 20, 2013 letter to the respondent is one of ten options expressly allowed by s 6.3.4.

48 One of those ten options expressly states that the Concern may be referred to a "Consensual Resolution" process under 6.3.4 (g), which section provides that the Zone Medical Director *may "request that the Affected Practitioner engage in Consensual Resolution pursuant to section 6.4 of these Bylaws"* (emphasis added).

49 It is evident to us that Dr. Mador did exactly what was required of him under s 6.3.4: he chose to refer the TIA to a Consensual Resolution process. In so doing, Dr. Mador made a clear decision on the TIA. Accordingly, the chambers judge's finding that the TIA was simply suspended by his decision to refer the matter to Consensual Resolution was unreasonable, thus warranting appellate intervention.

50 We do not accept that Dr. Mador's testimony under cross-examination (specifically that he was aware a decision had not been made on the TIA) yielded an admission which contradicts our conclusion. We have reviewed Dr. Mador's cross-examination in detail. When one contextualizes Dr. Mador's statement that no "decision" had been made on the TIA, it is apparent that he was referring to the fact that the TIA process was put on hold and therefore a *final decision* under the Consensual Resolution process had not been made. However, the question posed by counsel for the respondents referenced Dr. Mador's understanding of s 6.3.4 of the 2011 Bylaws, which, as we have indicated above, permits the Zone Medical Director to do one of ten things ranging from dismissal of the Concern, to further investigation of the Concern, or to refer the matter to Consensual Resolution. In each of these cases, a decision is duly rendered by the Zone Medical Director.

51 Accordingly, we are satisfied that Dr. Mador's letter of November 20, 2013 to refer the TIA to the Consensual Resolution process appropriately discharged his obligation as Zone Medical Director to render a decision on the TIA pursuant to s 6.3.4 of the 2011 Bylaws.

1(b). Did the chambers judge err in concluding that there was a strong prima facie case that the TIA process was procedurally unfair?

52 AHS contends that the chambers judge did not consider relevant evidence before him, including that Dr. Mador had provided a higher level of procedural fairness to the respondent surgeon by having the investigation completed by a separate panel of three, and his decision to recommend Consensual Resolution was based only on the components of the TIA committee report that were within the committee's scope of review. AHS therefore asserts that the chambers judge's failure to consider this critical evidence rendered his finding of procedural unfairness unsustainable.

53 The chambers judge concluded that the TIA process initiated under the 2011 Bylaws was "*prima facie* fundamentally impaired". He stated in his reasons at para 31:

> In the result, I agree and find (Dr. Modry's Brief, para 55) that Dr. Modry had no notice prior to November 14, 2013 [6 days after the date of the TIA Committee Report] that the TIA Committee was addressing anything other than the matters described in Dr. Johnstone's September 5, 2013 letter. In particular, [the respondent surgeon] had no notice that his surgical outcomes or mortality rates were being considered...." (Dr. Modry's Reply Brief, para 18). Indeed, later requests for data relied upon were also not provided even as late as May 2014 (Dr. Modry's Brief, para 58). Thus, he was not able to address the substance of these matters prior to the TIA Committee Report. Accordingly, I find that the process was *prima facie* fundamentally impaired, such that I further find, in the context of mandatory injunction law, that there is a strong *prima facie* case.

54 The chambers judge used the language of procedural fairness and his reasons suggest that AHS breached its administrative or statutory duty of procedural fairness to the respondent surgeon. However, the respondent surgeon did not plead breach of procedural fairness and did not commence a judicial review by way of an originating notice of motion. Properly understood, the complaint about notice is that AHS breached its contract with the respondent surgeon.

55 This claim assumes that the TIA provisions of the 2011 Bylaws, or perhaps parts of the administrative law duty of fairness, were incorporated as terms into the contract between AHS and the respondent surgeon under which he provided services and was granted privileges. Neither we, nor the chambers judge, received any argument on this, but for the purposes of this appeal, we assume that the relevant provisions of the 2011 Bylaws were also incorporated into the language of the contract.

56 With respect, we are of the view that the chambers judge erred in his finding that the process was "*prima facie* fundamentally impaired". It is clear on this record that Dr. Mador's letter of November 20, 2013 *directly* addressed the issue of the surgical performance indicators (including mortality rates) objected to by respondents' counsel, in that he noted that this was "beyond the scope of this TIA". He further stated that "[t]herefore I must consider in my recommendations the other major components of their report mainly recurrent behavioral issues with evidence of recent exacerbation and uncertainty as to causation in addition to the finding of unprofessional behavior". There is no ambiguity here; Dr. Mador states unequivocally that he disregarded the impugned surgical data in arriving at his overall decision under s 6.3.4.

57 Further, while it is true that in July 2014 Dr. Mador offered to have the TIA committee "re-do" its report excluding the impugned surgical data raised by respondents' counsel, we are mindful that in Dr. Mador's July 22, 2014 letter (which was excluded from admission into the record by the chambers judge) he disagreed with the assertion that the TIA process was flawed. Dr. Mador advised that the TIA review committee unanimously maintained its view that the exclusion of the statistical data (surgical performance indicators) raised by counsel would *not* have changed their findings or recommendations. Had the chambers judge allowed this letter into the record, it would have made it clear that Dr. Mador did not think the TIA process was unfair.

1(c). Did the chambers judge err in concluding there was a strong prima facie case of the tort of misfeasance in public office?

58 AHS further argues that the chambers judge's finding that there was a strong *prima facie* case for the tort of misfeasance in public office was unreasonable and unfair. Here, AHS submits its counsel in the court below did not speak to the issue of public misfeasance as the chambers judge indicated this would be a matter for trial.

59 The respondents assert that even if this Court accepts AHS's argument on this issue, this would not change the outcome on the instant appeal given the chambers judge had found a separate strong *prima facie* case of breach of contract.

60 The chambers judge set out his reasoning at para 35 that he further concluded there was a "strongly supported" case made out on the tort of misfeasance in public office:

> In the result, the tort of misfeasance in public office is strongly supported because the conduct of the AHS, I find, was deliberate (or negligent) unlawful conduct in exercising its public function, with an awareness of the conduct being unlawful and likely to injure Dr. Modry. There is a strong *prima facie* case that it did so in bad faith. Support is found in fact and law for this conclusion: Dr. Modry's Brief, paras 91-92, 104-112; *Odhavji Estate v Woodhouse* 2003 SCC 69, at para 32, [2003] 3 SCR 263; *Rosenhek v Windsor Regional Hospital*, 2010 ONCA 13, at paras 21, 25, 29-31,36, 257 OAC 283.

61 With respect, this finding is unreasonable. As rightly pointed out by counsel for AHS before us, this issue simply was never canvassed or raised by counsel for AHS in the court below as the chambers judge indicated the issue would be a matter to be decided at trial. It follows that he had no basis upon which to conclude there was a strong *prima facie* case on the allegation of misfeasance in public office. This finding is therefore unreasonable and amounts to reviewable error.

2. Did the chambers judge err in ordering the payment of $20,000 per week to the respondent surgeon as a form of mandatory injunctive relief?

62 As we have concluded that the chambers judge erred in finding there was a strong *prima facie* case of breach of contract and misfeasance in public office, it follows that he erred in ordering the $20,000 weekly payments to the respondents as a form of mandatory injunctive relief.

63 We are of the opinion that our conclusion on the first issue (i.e. no strong *prima facie* case) is dispositive of this appeal. However, we continue our analysis on the remaining issues having regard to the second (irreparable harm) and third prong (balance of convenience) of the tripartite test which we note AHS has expressly raised as grounds of appeal in its notice of appeal. See generally Robert J Sharpe JA, *Injunctions and Specific Performance*, loose-leaf ed. (Toronto: Canada Law Book, 2013) at 2.280. Even if the respondents had demonstrated a strong *prima facie* case under the first branch of the test, in our view they would nevertheless have failed to meet the second and third branch of the test.

(i) The appellants' position (AHS)

64 AHS argues that the term of the chambers judge's order requiring payment of $20,000 per week to the respondent surgeon was not a suitable subject matter for an injunction. The thrust of its submission here is that, in essence, the payment order amounted to summary judgment under the guise of an injunction. It contends that the purpose of an interim injunction is to provide the applicant with a remedy without which he or she will suffer irreparable harm, and which harm cannot be adequately compensated in monetary damages. Therefore, AHS says the requirement to pay the respondent surgeon $20,000.00 per week was inconsistent with that purpose. It suggests that the impugned payment order in substance constitutes summary judgment in that damages have been awarded to the respondent surgeon without a trial having been being conducted on the merits. AHS further contends that the summary judgment application brought by the respondent surgeon against AHS in August 2014 (which has not been heard to date) sought, in part, the monetary relief he was ultimately granted by the chambers judge.

(ii) The respondents' position

65 The respondents assert that AHS confuses the test for an interim injunction with the terms of an injunction. They submit that the chambers judge made five findings concerning the issue of irreparable harm, none of which have been appealed to this Court by AHS. Those five observations include: a deterioration of the respondent surgeon's referral network; the hiring of a

new surgeon to replace him; a deterioration of the respondent's surgical skills; the loss of a valued employee of the respondent's professional corporation; and, the loss of the respondent surgeon's reputation as a result of a flawed TIA process. The respondents further submit that the courts have previously awarded monetary payments as requirements of interim injunctions.

(iii) Analysis

A. No Irreparable Harm Shown by Respondents Relating to the Weekly Payments

66 In *RJR-MacDonald Inc.*, Justices Sopinka and Cory, writing for the Court, provided a useful definition of "irreparable" harm at 341: "'irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

67 The chambers judge reasoned as follows on the issue of irreparable harm at para 38:

> The evidence of Dr. Modry (Dr. Modry's Brief, paras 78-79, 81-82, 114) is that: the longer his privileges are suspended the greater will be the deterioration of his referral network; the hiring of a new CVT surgeon to replace him would impede referrals to him; his surgical skills may deteriorate if he is not able to practice and maintain them and have experience with new equipment and techniques; and lack of income to Dr. Modry's PC will cause him to lose a valued employee of 25 years' experience. These, plus the loss of reputation of his surgical privileges (Dr. Modry's Brief, para 115), by a flawed process, all speak loudly to irreparable harm that cannot be adequately compensated by damages: *Medical Laboratory* at para 42 (ABQB); *Shephard v Colchester Regional Hospital Commission*, (1991), 103 NSR (2d) 361, at para 28, 26 ACWS (3d) 880 (NSSC(TD)), aff'd. (1992), 106 NSR (2d) 239, 29 ACWS (3d) 273 (NSSC(AD)) [*Shephard*]. Moreover, Dr. Modry being a physician, this is a different situation than a medical researcher: *Cimolai v Children's & Women's Health Centre of British Columbia*, 2001 BCSC 1537 (*Cimolai 1*), at para 32, 109 ACWS (3d) 326.

68 It is apparent to us that the respondent surgeon could clearly be compensated by AHS in monetary terms as to the $20,000 weekly payments if he is successful at trial. Therefore, the respondent surgeon would clearly *not* suffer any irreparable harm relative to the payment order. A reference to the respondent surgeon's income stream and his post-September 17, 2013 income stream will greatly assist any trial court required to measure the respondents' claim. A monetary award would undoubtedly make him whole.

69 Further, there is no suggestion that AHS is impecunious and would not be in a position to pay any sum a trial court may ultimately order AHS to pay the respondents.

70 Finally, we agree with AHS's position that on a reasonable view of the evidence, the agreement the chambers judge found in fact could simply *not* have been that AHS had agreed to remunerate the respondents the sum of $20,000 on a weekly basis for an indefinite period until such time that the respondent surgeon was reinstated to his surgical practice. As noted above, the express agreement was that the payments would cease once a decision was rendered on the TIA by Dr. Mador, which he did as communicated to the respondent surgeon in his letter of November 20, 2013. Accordingly, it follows that the chambers judge's finding of an indefinite agreement to pay the respondent surgeon was unreasonable.

B. Summary Judgment under the Guise of Injunction

71 Further, it is not lost on us that in the backdrop to this entire litigation the respondents filed a summary judgment application in August 2014 in which they sought the very relief the chambers judge granted in the mandatory interlocutory injunction application.

72 In our view, the payment order was premature and inappropriate. We agree with the submission of AHS that the payment order amounted in substance to summary judgment in the guise of an injunction. The chambers judge unreasonably exercised his discretion in ordering the $20,000 weekly payments to the respondents. This should have properly been dealt with in the summary judgment application or alternatively resolved at the conclusion of a trial on the merits: see *Assn. des Parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)*, 2015 NWTCA 2 (N.W.T. C.A.) at para 7 wherein the

Northwest Territory Court of Appeal observed that "... a chambers judge applied an interlocutory injunction analysis (not a summary judgment analysis), and granted some of the requested relief, including the provision of two portable classrooms joined to the main school building by a passageway".

73 Next, we address the third and fourth issues collectively. We do so as the issue of reinstatement is directly connected to the issue arising from the chambers judge's preliminary ruling excluding evidence of relevant facts which occurred after April 8, 2014 - the date of the respondents' filed Statement of Claim.

3. Did the chambers judge wrongly exclude evidence after April 8, 2014 which directly addressed the third branch (balance of convenience) of the tripartite test?

4. If the chambers did wrongly exclude such evidence, did he further err in ordering the immediate reinstatement of the respondent surgeon as a form of mandatory injunctive relief?

(i) The appellants' position (AHS)

74 First, AHS argues that the return to work order was not a suitable subject for an injunction and did not properly consider the public interest. Here, AHS raises its concerns about the respondent's surgical skills as he had been out of the operating room at that time for eighteen months, and his potential reintegration into the workplace amidst ongoing litigation proceedings he initiated against colleagues with whom he works at AHS.

75 Second, AHS contends that in assessing the balance of convenience portion of the test for injunctive relief, the chambers judge failed to consider all the relevant evidence or properly weigh the public interest. AHS asserts here that there is a "common conclusion" as to six years' worth of reviews of the respondent surgeon's professional conduct and record of patient safety; and that his surgical outcomes are concerning. It submits further that the respondent surgeon's judgment and conduct in professional matters have repeatedly fallen below acceptable standards. AHS says that such concerns implicate the public interest and tip the balance of convenience against the respondents. AHS further contends that the chambers judge's finding that all concerns about the respondent surgeon having been "debunked" by the uncontested evidence led in the court below is unsustainable on the record. It points in particular to the critique of thirteen of the respondent surgeon's colleagues who provided an assessment of him which are included in the August 20, 2014 Periodic Review report (which was excluded from the record by the chambers judge in his preliminary ruling).

76 Third, AHS says the chambers judge erred in excluding Dr. Mador's September 22, 2014 affidavit as the Court held its decision would be based on the record at the time the litigation proceedings commenced i.e. April 8, 2014 which therefore barred the August 20, 2014 Periodic Review report (which was attached to Dr. Mador's affidavit).

(ii) The respondents' position

77 The respondents submit that AHS's reference on appeal to an employment-like arrangement between the respondent surgeon and AHS was never raised in the court below. The respondent surgeon says he was never an employee but, instead, he held a medical staff appointment. He emphasizes that there was never a contract of personal service between him and AHS. Therefore, he submits that AHS's authority flows from the *Hospitals Act*, RSA 2000, c H-12. The respondents further contend that AHS should have adduced evidence in the court below regarding any concerns it had with his hospital privileges, which it did not, and the only uncontroverted evidence on the record is from his operating colleagues who have stated that they would welcome him back, and this in their view, would not cause a disruption. Specifically, the respondents rely upon the filed affidavit evidence of several of the respondent surgeon's surgical colleagues including Dr. Aboelnazar, Dr. Barrios, Dr. Ghorpade, Ms. Glavin (registered nurse), Dr. Wang, Dr. Mullen and Ms. Parayko (registered nurse).

78 The respondents further submit that AHS's position that past investigations have reached a "common conclusion" regarding surgical outcomes is "utterly without foundation". They say AHS has refused to produce the underlying data to him to permit an independent analysis and therefore no weight should be given to the statistical data upon which AHS relies. The respondent

surgeon asserts that AHS did not raise these arguments or argue the third prong of the tripartite test (i.e. balance of convenience) in the court below and should be barred from raising such arguments on appeal to this Court.

(iii) Analysis

79 Given our conclusion that the chambers judge erred in determining that the respondents had demonstrated a strong *prima facie* case against AHS in contract (including the alleged breach of procedural fairness during the TIA process), it follows in our view that the chambers judge additionally erred in ordering the immediate reinstatement of his surgical privileges.

80 As we have stated above in paragraph 63, we provide our analysis on the issue of reinstatement addressing both the second (irreparable) and third (balance of convenience) prong of the tripartite test as there is significant overlap between these branches of the test. We find that there is no irreparable harm and even if the respondent surgeon was successful in demonstrating that there was such harm by not immediately reinstating his surgical privileges, it is our view that the balance of convenience favours AHS. This Court cannot ignore the need to protect the public interest from the potential harm that may occur if the respondent surgeon is prematurely ordered back to the operating room to perform high-risk surgeries. This potential harm is far more serious than the reputational harm that the respondent surgeon may suffer in his referral networks or his continuing professional development as a heart and lung surgeon.

A. Evidence of Irreparable Harm As to Reinstatement of Surgical Privileges

81 First, we note the respondent surgeon deposed in his affidavit on the issue of reinstatement of surgical privileges (in support of his injunction application) that he will, *inter alia*, suffer a deterioration of his referral network (including future referrals if AHS hires a new CVT surgeon to replace him), and deterioration of his surgical skills if he is not able to keep current with new equipment and techniques. The respondent invokes the use of the word "will" here to suggest that his concerns extend beyond that of mere speculation at this juncture. However, we are not satisfied there is any evidentiary foundation to support these hypothetical claims he asserts in his affidavit. Without more, these claims do not rise above mere speculation or conjecture at the second stage of the tripartite analysis to sustain the respondent surgeon's claim of irreparable harm.

82 It must be remembered that evidence of irreparable harm must be shown by the applicant to be clear and not speculative: see for example *Capital I Industries Inc. v. Weldco-Beales Manufacturing Inc.*, 2010 ABQB 404 (Alta. Q.B.) at para 35: "Evidence of irreparable harm must be clear and not speculative: *Sun Drilling Products Corp. v. Garrett* (1999), 245 A.R. 370 (Alta. Q.B.) at para. 46. As such, evidence of loss of reputation and market share must go beyond speculation: *Core Laboratories Canada Ltd. v. Lonkar Services Ltd.*, 2008 ABCA 76, 64 C.P.R. (4th) 241 (Alta. C.A.) at para. 11; *Gold In the Net Hockey School Inc. v. Netpower Inc.*, 2007 ABQB 520, 430 A.R. 38 (Alta. Q.B.) at para. 49".

83 Even if the respondents had successfully cleared the irreparable harm hurdle on this issue based on the subjective and speculative belief of the respondent surgeon, we are nevertheless of the view that he would have failed to show that the balance of convenience favoured the grant of a mandatory interlocutory injunction against AHS.

B. Balance of Convenience

84 In addressing the final prong of the tripartite test (balance of convenience), it is important that the Court catalogue not only the harm that an applicant claims he will suffer if he is not granted an interlocutory injunction; but, the Court must also consider any countervailing harm that the respondent will suffer if the applicant is granted the injunctive relief they seek. The Court must then assess which detriment is the greatest: see *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at 129.

85 In his reasons, the chambers judge referred specifically at para 39 to the "unchallenged evidence" of several cardiac surgeons and medical professional who have "debunked" the concern of patient risk and physician relationships:

> Turning to the balance of convenience and the not too veiled argument that patients will be at risk if he returns to practice and he will not be able to work with other physicians. Dr. Modry has responded, on the issue of mortality, even without

the data continually withheld from him by AHS (Dr. Modry's Brief, para 119). This was sufficient to create an arguable issue of fact even if it were relevant to the Concern, which I have found it was not. Several cardiac surgeons and medical professionals have debunked the concern of patient risk and physician relationships, and have provided unchallenged evidence praising Dr. Modry's skills and supporting his immediate return to the practice of CVT surgery. Further, these professionals addressed his ability to work with other physicians and, indeed, AHS has made proposals as to his return to work (Dr. Modry's Brief, paras 83-84; Dr. Modry's Reply Brief, paras 21-22). This distinguishes this case, on the facts, from *Hutton v Grey Sisters of the Immaculate Conception of Sault Ste. Marie General Hospital* 1997 CarswellOnt 3607, 40 OTC 121. Moreover, with his attested competent skills, and his willingness to do high risk surgery, some patients may lose - or have reduced - surgical options for their CVT problems. These support the balance of convenience in favour of Dr. Modry: Dr. Modry's Brief, paras 116-17; *Medical Laboratory*, at para 10 (ABCA); *Fraser Health Authority v British Columbia Anesthesiologists' Society* 2012 BCSC 498, at paras 16-17, [2012] BCJ No 660; and *Shephard*.

86 First, it is apparent to us that the chambers judge misapprehended a key underlying fact, namely that the respondent's surgical privileges were suspended by AHS. This is factually incorrect. Dr. Taylor informed the respondent surgeon in his September 17, 2013 letter that AHS would suspend his surgical privileges if he did not agree to voluntarily withdraw from his surgical practice. We understood in oral argument from counsel for both AHS and the respondents that the respondent surgeon's surgical privileges have to date *never* been subject to a *formal* suspension as provided under the 2011 Bylaws. Ultimately, the parties came to a mutually suitable arrangement that avoided the necessity of a formal suspension.

87 However, it is beyond dispute that several live issues have and continue to prevent the respondent surgeon's return to the operating room, namely the TIA process that was put on hold pending the outcome of the age sixty-five periodic review undertaken in January of 2014, and the ongoing litigation proceedings commenced by the respondents against AHS in April of 2014.

88 In theory, there is nothing preventing the respondent surgeon from returning to the operating room tomorrow. However, the likelihood of his return to work is extremely low given Dr. Mador's testimony that while the respondent surgeon has not been subject to a formal suspension, AHS nevertheless would have significant concerns with his immediate return to the operating room.

89 Second, it is noteworthy that in his analysis the chambers judge did *not* consider any countervailing harm to AHS or the public interest following potential reinstatement of the respondent surgeon to the operating room, or from the $20,000 being paid both retrospectively and prospectively. That is because the chambers judge refused at the outset of the hearing of the injunction application that he would consider any evidence of facts occurring after April 8, 2014 - the date of the respondents' Statement of Claim. A live issue therefore arises as to the propriety of the chambers judge's preliminary decision to reject this evidence. We address this issue next and its resulting impact on the balance of convenience arm of the tripartite test. We conclude that but for the chambers judge's decision to exclude evidence of facts occurring after April 8, 2014, the balance of convenience must favour AHS to protect the public interest from the risk of the respondent surgeons' pre-mature return to the operating room.

C. Exclusion of Evidence After April 8, 2014

90 AHS expressly raises a separate ground of appeal concerning the chambers judge's preliminary ruling to exclude consideration of evidence of facts which occurred after April 8, 2014 being the date of the respondents' Statement of Claim.

91 AHS asserts that the chambers judge's decision to exclude evidence of facts which occurred after April 8, 2014 has a direct bearing on his determination on the third prong of the tripartite test: whether the balance of convenience favoured the respondents or AHS. We agree.

92 In our view, this preliminary ruling to exclude consideration of evidence filed after April 8, 2014 constitutes reviewable error. There is no principled basis for it. We are not aware of any case in which a motions court has ruled inadmissible relevant evidence just because it related to facts which occurred after the commencement of the applicant's lawsuit or application for

interlocutory injunctive relief. See for example: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95 (Alta. C.A.) at para 11 rev'g 2003 ABQB 110 (Alta. Q.B.) at paras 9, 25, 63.

93 We agree with the position taken by AHS that Dr. Mador's affidavit is admissible as it is relevant to the consequences of a mandatory injunction being granted: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.). Further, in this type of a mandatory injunction application, the Court may consider evidence filed by the parties up to the date of the application. It follows that the chambers judge's decision to pick April 8, 2014 as the "cut-off" date for any additional evidence was arbitrary, unprincipled, and incorrect in law. This constitutes reviewable error.

94 That evidence includes Dr. Mador's July 22, 2014 letter and September 11, 2014 letter, as well as his affidavit sworn September 22, 2014 attaching a copy of the August 20, 2014 periodic review report, and the report itself.

95 This was a live issue that was raised at the outset of the injunction application before the chambers judge by counsel for AHS. The chambers judge gave his ruling following a previous exchange with counsel for AHS:

> THE COURT: Yeah. Well I'm going to make a ruling. Unless there's some other arguments I haven't heard, I'm not going to be considering evidence of things that took place after April 8th, period. If there is evidence that's filed after that date relating to documents and things that happened before April 8th, that's fair game. We go into this sidetrack discussion about settlement proposals and you've heard my ruling on that, and that's not dealing with the facts in dispute. It feels [sic] with the facts about the dispute. Okay?

So that's my ruling. So the letters that are contained in Mr. — or Dr. Mador's affidavit of October, filed October 1 of the August, 2014, and September 11, 2014 letters, are not evidence to the extent that they refer to things that happened after April the 8th.

96 Because the chambers judge imposed the April 8, 2014 evidentiary cut-off date, he failed to consider relevant evidence. Had he factored in this vital evidence, he could not have reasonably concluded that the balance of convenience favoured the respondents given there was relevant evidence which directly challenged the issue of the respondent's surgical performance, competence and professional conduct relative to his patients and surgical colleagues. The balance of convenience compels recognition of AHS's desire to protect the public from the risk of the respondent surgeon's premature return to the operating room given it has legitimate and significant ongoing and unresolved complaints involving both patient safety and his professional conduct.

97 The August 20, 2014 periodic review report is included in the AHS's Extracts of Key Evidence at Tab 14. It is attached to a letter dated September 11, 2014 from Dr. Mador to respondents' counsel, which is marked as Exhibit "A" to the affidavit of Dr. Mador sworn on September 22, 2014. The report is authored by Dr. Johnstone and contains several relevant and ongoing concerns regarding the respondent surgeon's clinical performance, communication and collaboration with his clinical team, namely that:

> 1. A significant negative variance in the quality of the respondent's patient care was detected including post-operative mortality (these analyses were summarized in a report dated January 15, 2014 which the respondent surgeon challenged; a second analysis arrived at the same conclusions in a report dated April 3, 2014, which report the respondent surgeon additionally challenges);
>
> 2. On the issue of team work, the report highlighted significant concerns regarding communication and collaboration; Dr. Johnstone concluded that "...it is imperative that [the respondent surgeon] improve communication with patients and health care practitioners, as well as improving collaboration with health care practitioners. This feedback was shared with [the respondent surgeon] during the February 25 meeting.";
>
> 3. The relevant information from peer feedback which consisted of 13 requests for input in 22 areas:
>
> (a) 17% indicated [the respondent surgeon] was performing at or above expected standards;

(b) 23% indicated he had significant areas requiring improvement but that these did not pose a safety risk;

(c) 62% indicated he was not meeting acceptable standards and required an immediate remediation plan;

4. Dr. Johnstone noted that these areas of concern are not new and have not been resolved;

5. Dr. Johnstone indicated further that there have been three serious practice reviews since 2010. "The lack of insight by [the respondent surgeon] into the seriousness of these reviews has been consistent. [The respondent surgeon] has demonstrated behavior of non-acceptance, dispute and rebuttal of findings, rather than insight, acknowledgment, and a commitment to address legitimate concerns. One specific example is the issue around VAD, where [the respondent surgeon] agreed not to get involved with VADs but shortly afterwards proposed to the Zone Medical Director's office that he be part of the VAD program.";

6. Dr. Johnstone further pointed to documented examples of the respondent surgeon cancelling patient appointments, and inability to reach him after hours.

98 In his letter of September 11, 2014 to respondents' counsel, Dr. Mador summarized the conclusions of the August 20, 2014 periodic review report prepared by Dr. Johnstone and advised that he was obliged to render a decision on the periodic review report pursuant to s 6.3.4 of the 2011 Bylaws. He further advised, *inter alia*, that:

1. In respect of the TIA, AHS's persistent concern is that [the respondent surgeon] has failed to disclose information to the review committee and did not fully participate in the process; and further, that [the respondent surgeon] was not completely forthcoming with the TIA review committee about the details of the events which occurred the week of August 26, 2013;

2. The TIA would not re-convene to reconsider its findings and recommendations given [the respondent surgeon] had rejected the offer of AHS to have the TIA committee undertake a further review excluding the 2012 surgical data or alternatively taking into account the data presented by [the respondent surgeon];

3. Pursuant to s 5.0.7 of the 2011 Bylaws, his decision was to initiate a Triggered Review based on the concerns outlined in the Periodic Review report. He wished to meet with [the respondent surgeon] to discuss the option of Consensual Resolution or the alternatives available to him under the 2011 Bylaws;

4. The $20,000 monthly payments to [the respondent surgeon] would cease given he had reached a decision on the Periodic Review to initiate a Triggered Review.

D. The Balance of Convenience Must Favour AHS to Protect the Public Interest

99 It concerns us that the chambers judge failed to consider any facts after April 8, 2014 as they are clearly of probative value and speak directly to the issue of balance of convenience, specifically AHS's ongoing concerns with the professional conduct and competence of the respondent surgeon. This material evidence from thirteen of the respondent surgeon's colleagues appears to contradict the chambers judge's conclusion that the respondents' evidence proffered before the Court on the issue of balance of convenience was "unchallenged" by AHS. But for the chambers judge's error in excluding this evidence from the record, the balance of convenience would have, in our view, favoured AHS to protect the public interest.

100 Further, the current situation which has unfolded between AHS and the respondents is not unlike the hospital-doctor situation which was addressed by the British Columbia Court of Appeal in *Cimolai v. Children's & Women's Health Centre of British Columbia*, 2003 BCCA 338 (B.C. C.A.). There, Newbury JA, writing for the majority, concluded at para 47 that the Court would not exercise its discretion to order Dr. Cimolai's reinstatement or that he be entitled to full remuneration and benefits given there were outstanding complaints which had not been resolved:

As for the other relief sought by Dr. Cimolai in his application to amend his prayer of relief, I will assume for purposes of this appeal that the Court has a discretion to declare that Dr. Cimolai is entitled to full remuneration and benefits from the

> date of his purported suspension of privileges at the Hospital, and to order that he is entitled to resume working again at the Hospital. However, I would not exercise this discretion to make such an order in this case. It seems to me Dr. Cimolai should have an incentive to co-operate in the prompt investigation and resolution of the complaints against him. Further, if reinstatement were ordered and it was ultimately found that the termination of his permit was justified, the Hospital would be obliged to seek the return of the pay and benefits paid to him in respect of the period from January 1, 2002. It would also be unsatisfactory to require the Hospital to reintroduce Dr. Cimolai into its staff until the complaints have been properly dealt with and decided. On the other hand, if the Hospital wished to have Dr. Cimolai's services in the interim, it should be entitled to do so.
>
> [Emphasis added.]

101 In the case before us, we note the respondents have not been silent participants in that which has kept the respondent surgeon out of the operating room since August 2013. Put another way, notwithstanding the pending TIA and conclusions of the periodic review report, AHS has actively attempted to facilitate the respondent surgeon's return to work through various written proposals, with the respondents rejecting all of them. The respondent surgeon, through his counsel, presented his own return to work proposal on May 15, 2014 on express conditions. Understandably, AHS did not respond to this proposal given that just four days after its April 4, 2014 proposal, the respondents took the aggressive step of issuing their Statement of Claim against AHS, accusing it and all of the individual defendant physicians, many of whom are the respondent surgeon's own colleagues, of very serious allegations including the tort of conspiracy, public misfeasance in public office, breach of contract, and breach of fiduciary duty.

102 Here, it is apparent to us, as in *Cimolai*, that the chambers judge's order providing for the respondent surgeon's immediate reinstatement and the payment order continuing the $20,000 weekly payments would offer no incentive for him to participate in the expeditious resolution of either the TIA process or the findings contained in the August 20, 2014 periodic review report.

103 There is no suggestion that any of the thirteen individuals (eight in particular who have raised significant concerns that the respondent surgeon was not meeting acceptable standards and required an immediate remediation plan) provided their critique of him under any sort of influence or were in any way biased in giving their particular comments.

104 The general principle at common law against granting specific performance of a contract for personal service in an injunction setting was addressed by the Supreme Court years ago in *Winnipeg Builders' Exchange v. I.B.E.W., Local 2085*, [1967] S.C.R. 628 (S.C.C.), at 639: "[t]here is no doubt that it has been repeatedly held in cases of high authority that the courts will not issue an injunction if it will result in the enforcement in specie of contract not otherwise specifically enforceable and that contract for personal services such as an agreement for hiring and service constituting the common relation of master and servant will not be specifically enforced".

105 AHS referred us in particular to the Ontario Superior Court of Justice case of *Sharma v. London Life Insurance Co.*, 2005 CanLII 27324, (2005), 45 C.C.E.L. (3d) 302 (Ont. S.C.J.) ("*Sharma*"), at para 22 wherein the Court observed that: "[i]t is a general principle of the law of equity that specific performance will not be granted of an employment or personal service contract, unless there are special circumstances." There, the Court found that the relationship between the employer and the employees was essentially contractual and therefore governed by common law and equitable principles. The Court noted there was "no labour relations statute or collective agreement" that would avail the employees of a "right of reinstatement or the benefit of the issuance of an exonerating notice": *Sharma*, *supra* at para 20.

106 We note the Court's statement in *Sharma* favouring the general principle against specific performance of a contract for personal service as the Court found there was "...a breakdown in trust and confidence between the parties such that reuniting the parties in a relationship seems futile, untenable, and beyond the ability of the court to supervise by a mandatory order": *Sharma*, supra at para 24.

107 A similar breakdown in trust and confidence between AHS and the respondent surgeon has occurred in the case at bar. The breakdown in the trust relationship is not a recent issue; indeed, it is one which we note has existed well before AHS

invoked the TIA process in September of 2013. This, in our view, constitutes an additional factor which tips the balance of convenience in favour of AHS to protect the public interest.

108 We are not persuaded by the respondents' submission that the respondent surgeon is entitled to reinstatement as a form of mandatory injunctive relief because he is not an employee of AHS (whereby specific performance of his contract for services is not available as a remedy absent special circumstances); but, rather a medical staff appointment made pursuant to the *Hospitals Act*, RSA 2000, c H-12.

109 Whether or not the respondent surgeon is, in fact, entitled to reinstatement on account of his status as a medical staff appointment with AHS under the *Hospitals Act* does not end the analysis under the balance of convenience arm of the tripartite test. The evidence of harm to the respondent surgeon (in the event of non-reinstatement) must be assessed against the countervailing harm to AHS and the public interest on reinstatement. It is clear to us that the countervailing harm to AHS and the public interest - specifically in respect of the current breakdown in trust and confidence between AHS and the respondent surgeon - outweighs the harm which the respondent surgeon subjectively claims he will suffer if his surgical privileges are not immediately reinstated. The balance of convenience must favour AHS to protect the public interest from the risk of the respondent surgeon's premature return to the operating room. It would be untenable to reunite the respondent surgeon with AHS and his surgical colleagues at this juncture.

110 It is regrettable the chambers judge failed to perform this critical analysis in the court below. This amounts to reviewable error.

111 In addition the Court is not in a position to "supervise, scrutinize, and evaluate" the performance of the respondent surgeon if he were to be reinstated to the operating room: see *Sharma*, *supra* at para 25. The Court cannot assess or monitor on an ongoing basis whether AHS should have a business relationship with the respondent surgeon.

112 Finally, we note the respondents' request for reinstatement in their injunction application is identical to the relief sought in their summary judgment application. In our view, the proper venue to address the issue of reinstatement was the summary judgment application or a trial on the merits, not a mandatory interlocutory injunction application.

VIII. Remedy

113 For the reasons herein the appeal is allowed.

114 The order of the chambers judge and the mandatory injunctive relief in respect of the immediate reinstatement of the respondent's surgical privileges and the payment order providing for $20,000 weekly payments to him are hereby set aside.

J.D. Bruce McDonald J.A. **(dissenting):**

Introduction

115 I have read the Memorandum of Judgment of my colleagues and am unable to agree with it. Rather, for the reasons set out below, I would have dismissed the appeal.

116 The appellants, Alberta Health Services and others (AHS), appeal the chambers judge's order granting the respondents, Dr. Dennis L. Modry and Dennis L. Modry Professional Corporation, among other things, interim injunctive relief of a $20,000 weekly payment to be paid to Dr. Modry for the period of September 17, 2013 to the date of the order; $20,000 per week until his reinstatement; and $20,000 per week for any period during which AHS restricted Dr. Modry from surgical practice or impaired his ability to practice to the extent it constituted an intentional restriction of his surgical practice from the date of the order until the trial decision in the underlying litigation.

Background Facts

117 Dr. Modry is a cardiovascular and thoracic surgeon who has been practicing in Edmonton for 30 years. His practice included high-risk heart and lung transplants.

118 Complaints regarding Dr. Modry's skill and conduct commenced in 2009 and resulted in four reviews. In 2010, an external review by a committee covered a variety of complaints. The committee found that Dr. Modry's mortality rate was unquestionably high and recommended further review for the next one or two years until the rate was in line with other surgeons. It also found situations where Dr. Modry's behaviour would be considered harassment and recommended Dr. Modry be advised of legislative requirements of a harassment free work place.

119 In 2011, an internal review by a committee resulted following a complaint made by Dr. Ken Stewart with respect to diagnosis and plan for a patient. The 2011 internal review concluded at a meeting on May 10, 2011 with Dr. Modry agreeing to the recommendations of the 2010 external review. No final report of the external review was produced.

120 The third review in 2013 resulted after Dr. Modry cancelled two surgeries that he had been scheduled to perform that very day because he was upset following receipt of communications regarding a financial loss he had suffered. Dr. Modry then left on vacation without speaking to the patients or providing an explanation to his superiors. Discussions among senior medical officers occurred, and one, Dr. Johnstone (Edmonton Zone Clinical Department Head, Cardiac Sciences) on September 5, 2013 wrote to Dr. Taylor (Facility Medical Director of the Mazankowski Alberta Health Institute) to complain.

121 Senior medical officers, Dr. Ross, head of the Cardiac Surgery Division in Edmonton, and Dr. Greenwood, recommended to Dr. Taylor that Dr. Modry not operate until issues raised had been resolved. Dr. Modry was advised in writing that a decision had been made that he submit to a clinical practice review, called a triggered initial assessment (TIA) pursuant to Part 6 of the AHS Medical Staff Bylaws as of February 28, 2011 (2011 Bylaws).

122 The relevant provisions of the 2011 Bylaws are Part 6 and section 6 providing for a TIA and "Triggered Review" of a "Concern" or complaint, and general provisions for the process.

123 Section 6.2 addresses procedural fairness. Section 6.2.1 provides the requirements for procedural fairness to the practitioner: 1) being provided with a copy of the Concern; 2) the right to respond; 3) full disclosure of all information considered by the TIA; and 4) a timely disposition.

124 Section 6.3.2.1 provides that a Concern "shall be completed within twenty-eight days of receipt of the Concern". Section 6.3.4 provides that "within twenty-eight days of completing the [TIA] initiated upon receipt of a Concern, the Zone Medical Director may take one of 10 options", the relevant ones include to:

> a) dismiss the Concern;
>
> b) effectively, abandon the Concern;
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> . . .
>
> d) request further investigation;
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> . . .
>
> g) request that the Affected Practitioner engage in Consensual Resolution pursuant to section 6.4...;
>
> h) refer the Concern for a Hearing if the Affected Practitioner declines to participate in Consensual Resolution; or
>
> i) refer for a Hearing pursuant to section 6.5 (directly).

125 Section 6.5 deals with the hearing. Under section 6.5.4.1, the Hearing Committee is to prepare a report and make recommendations. The powers of the Hearing Committee under section 6.5.5 include to dismiss; take no further action (abandon

the hearing); place a reprimand in the Affected Practitioner's file; require counselling, or treatment, or further education, or a period of clinical supervision, or remedial measures; temporarily suspend or permanently change Clinical Privileges; change the category of appointment; or terminate the "Affected Practitioner's Appointment"; or "any other recommendation considered appropriate to ensure public or Patient safety".

126 On September 17, 2013, Dr. Modry received an undated letter from Dr. Taylor, on behalf of Dr. Mador, Dr. Modry's superior, which stipulated the following:

- Dr. Modry was to be the subject of a TIA under the 2011 Bylaws, based on a concern identified in Dr. Johnstone's September 5, 2013 letter.
- A three person committed led by Dr. Wilkes would review the concern.
- Dr. Modry was to be given a copy of any information the committee considered, and afforded an opportunity to respond in writing.
- Dr. Taylor's objective was to complete the review within 28 days (by October 17, 2013).
- AHS requested that Dr. Modry withdraw from surgical practice during this process.
- AHS would remunerate Dr. Modry $20,000 per week during the investigation until Dr. Mador, as Zone Medical Director, made a decision pursuant to section 6.3.4 of the 2011 Bylaws. Once the decision had been made, the remuneration would cease.
- The remuneration would be reviewed no less than every 28 days.
- If Dr. Modry did not voluntarily withdraw from surgical practice, AHS would undertake immediate action to suspend his surgical privileges.
- Dr. Mador would make a decision from amongst the options available under section 6.3.4 at the conclusion of this process.

(the Agreement)

127 Dr. Modry accepted the offer and withdrew voluntarily from surgical practice on the understanding he would receive $20,000 per week thereafter. His then counsel confirmed this understanding in a letter, dated September 20, 2013, to Dr. Mador.

128 On November 20, 2013, AHS, through Dr. Mador, directed a "Consensual Resolution" (a meditation) of the TIA and terminated the $20,000 per week payment.

129 The fourth review occurred in 2014. Dr. Johnstone wrote to Dr. Modry by letter dated January 23, 2004 advising of a mandatory "Periodic Review" of Dr. Modry's practice as he had turned 65. This letter stated in part: "I understand that the [TIA] is currently on hold." The letter enclosed a report addressing mortality statistics relating to Dr. Modry's practice. Dr. Modry's counsel requested a copy of the data underlying the report and Dr. Modry provided a list to AHS of his concerns regarding the statistical reports.

130 The Periodic Review involved self-assessment, peer assessment, review of performance indicators and a series of meetings with Dr. Modry and his counsel. Eight of the 13 colleagues involved in the peer assessment concluded Dr. Modry was not meeting acceptable standards. As was the case with previous reviews, concerns included Dr. Modry's surgical performance and his behaviour that he lacked communication and collaboration, as well as the ongoing nature of these issues. The final written report from this Periodic Review, dated August 20, 2014, was excluded by the chambers judge as outside the time relevant to the application.

131 On July 2, 2014, Dr. Mador wrote to Dr. Modry's counsel proposing to have the 2013 TIA committee re-do the TIA and TIA report with instructions not to consider the statistical information previously provided to them. In his letter, Dr. Mador again acknowledged that the TIA had been put on hold by mutual agreement pending Dr. Modry's Periodic Review.

132 On July 10, 2014, Dr. Modry's counsel wrote to Dr. Mador rejecting the proposal. He advised that he considered the July 2, 2014 letter to be an admission that the TIA process was unfair and flawed. Dr. Mador denied the process was flawed in his letter to Dr. Modry's counsel dated July 22, 2014.

133 By this time, Dr. Modry had issued a statement of claim (April 8, 2014) alleging that since 2009, AHS had engaged in a conspiracy and campaign against him to reduce or eliminate his surgical privileges based on coerced or solicited complaints, false allegations, improper investigation and doctored statistics. He claimed breach of contract, misfeasance in public office, and conspiracy by AHS and a number of individual including the ten individual appellants.

134 On December 10, 2014, Dr. Modry applied for a mandatory injunction against AHS and requiring it to immediately reinstate his surgical privileges and remuneration of $20,000 per week pursuant to the Agreement.

Decision of the Chambers Judge

135 At the outset of the hearing before him, the chambers judge made a preliminary ruling that "I am not going to be considering evidence of things that took place after April 8th, period. If there is evidence that's filed after that date relating to documents and things that happened before April 8th, that's fair game ... so that's my ruling." AHS never appealed that preliminary ruling.

136 In oral reasons and supplementary written reasons, the chambers judge held that a mandatory injunction requires the tripartite test of a strong prima facie case, irreparable harm and a balance of convenience in favour of the injunction.

137 In determining whether there was a strong prima facie case, the chambers judge found that Dr. Mador understood and agreed to the Agreement, namely, that Dr. Modry would withdraw voluntarily from surgical practice and AHS would compensate him at the rate of $20,000 per week until a decision was made by the Zone Medical Director pursuant to section 6.3.4 of the 2011 Bylaws. Furthermore, neither the September 5, 2013 letter nor Dr. Taylor's letter received September 17, 2013 [referred to as the September 17, 2013 letter] raised Dr. Modry's mortality rates as issues in the TIA; rather the TIA only dealt with the two cancelled surgeries.

138 The chambers judge further found that the 2010 external review, and the 2011 internal review had been resolved by agreement between AHS and Dr. Modry, and therefore were not part of the TIA.

139 The chambers judge concluded that Dr. Mador made no decision on the TIA but only deferred it to another process. As no decision had been made, there was no basis to cancel Dr. Modry's remuneration which was, under the terms of the Agreement, to remain until a decision was made. The chambers judge held that until a decision was made, there was nothing to appeal under the appeal procedures of the *Hospitals Act*, RSA 2000, c. H-12, as section 21 refers to "appeal the decision". He also found that even if there was an appeal remedy available in theory, it would not be a fair and adequate remedy having regard to Dr. Modry's circumstances.

140 The chambers judge stated that the only decisions following the TIA report were dismissal, abandonment, or sending the matter to a hearing. He found no steps were taken to resolve the matter by a decision on the merits but rather mediation (Consensual Resolution) was suggested. He found the TIA process was on hold as no decision had been made on the substance, and Dr. Modry was still prevented from his surgical privileges and denied the agreed upon payment of $20,000 per week.

141 The chambers judge, referring to the 2011 Bylaws section 6.5.4.1 dealing with the hearing, concluded the Concern against Dr. Modry was not dismissed or abandoned at the TIA stage and the hearing stage was never initiated. He held only the hearing can affect or terminate Dr. Modry's privileges. As no final disposition or decision was made as contemplated in the

concern process or the Agreement, and as a decision was a prerequisite to stop the contractually agreed weekly payment, the chambers judge found there was a strong prima facie case in contract that such a payment could not be suspended.

142 The chambers judge further concluded that Dr. Modry had been denied procedural fairness. Dr. Modry had no notice prior to November 14, 2013 (six days after the date of the TIA report) that the TIA committee was addressing anything other than the matters described in Dr. Johnstone's September 5, 2013 letter. Dr. Modry was therefore unable to address the substance of the matters prior to the TIA committee report.

143 In addition, the chambers judge found that mortality rates were neither included within the definition of, nor relevant to the concern of the proceedings before the TIA committee. Even if mortality rates were relevant, the chambers judge held there would have been a duty on the TIA committee to advise Dr. Modry and provide the data relied upon. Dr. Modry was not given notice and not afforded the opportunity to address these issues before the TIA report was written.

144 The chambers judge further found that as the process was in stalemate or limbo, there was no timely disposition as required under section 6.2.1(g) of the 2011 Bylaws. He noted that the AHS expressly stated the hope that a decision on the Concern could be reached within 28 days. While the TIA committee released its report on or about November 8, 2013, addressing mortality rates, and Dr. Mador purported to make a decision in his letter of November 20, 2013, the chambers judge found there never has been a decision flowing from the TIA as contemplated by the Bylaws, not even to the date of the application before him.

145 The chambers judge concluded there was a strong prima facie case for a mandatory injunction requiring both the surgical privileges to be reinstated and the remuneration to continue until that was done. He held Dr. Modry was not afforded procedural fairness in the TIA process. The information about mortality rates was not relevant and even if relevant, the committee failed to advise and provide the data being relied upon, Dr. Modry was not put on notice, and was not given the data or opportunity to address them before the report was made. The TIA committee report was flawed because it addressed issues outside the Concern and based its conclusions on issues the committee was not asked to address; Dr. Mador's recommendations were directions, not decisions, based on the TIA committee's flawed report; the issue of Dr. Modry's retirement was outside the scope of the TIA, which suggested the matter had been pre-judged, and the $20,000 per week remuneration was improperly cancelled.

146 The chambers judge further found a strong prima facie case for the tort of misfeasance in public office due to the deliberate or negligent unlawful conduct of AHS in exercising its public function with an awareness the conduct was unlawful and likely to injure Dr. Modry. The chambers judge also found a possibility of finding the tort of conspiracy but no strong prima facie case had been made out.

147 On the second part of the test for a mandatory interim injunction, the chambers judge found that irreparable harm would not be adequately compensated by damages based on the evidence of Dr. Modry that he would suffer a loss in referrals and deterioration of his skills if he was not able to practice and maintain them, lack of income to his professional corporation, and the loss of reputation.

148 Regarding the third part of the test for a mandatory injunction, the chambers judge found that the balance of convenience favoured Dr. Modry given his attested competent skills, and his willingness to do high risk surgery. He also found some patients might lose or have reduced surgical options. Whether patients will be at risk, if relevant to the Concern, he found was an arguable issue of fact. He held that the conduct of AHS's senior medical officers was negative to AHS in the context of the balance of convenience.

149 The chambers judge granted an interim mandatory injunction to Dr. Modry requiring AHS to reinstate Dr. Modry's surgical privileges and remuneration back to November 30, 2013 and continuing that remuneration until his surgical practice privileges were reinstated.

Grounds of Appeal

150 In their factum, AHS submit that the chambers judge erred in that:

(a) the finding of a strong *prima facie* case was not based on a reasonable view of the facts;

(b) the payment order is not a suitable subject for an injunction and amounted to summary judgment in the guise of an injunction without the test for summary judgment being applied or met; and

(c) the return to work order is not a suitable subject for an injunction and was granted without consideration of all the relevant evidence or proper weighing of the public interest.

Standard of Review

151 An injunction, as a discretionary order, attracts a high standard of review. This court will not interfere unless the chambers judge committed an error in principle or law, or unless the order is unreasonable in the circumstances. The chambers judge must apply correct legal principles to a reasonable view of the facts reaching a result that is not manifestly unjust: *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419 (Alta. C.A.) at para 18, (2005), 376 A.R. 133 (Alta. C.A.).

152 On appeal, a chambers court judge's interpretation of a contract is to be reviewed on the standard of reasonableness: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.).

153 Furthermore, a judge's interpretation of evidence or inferences made from the evidence are both questions of fact, and appellate intervention will only be warranted if the judge made a palpable and overriding error: *Innovative Health Group Inc. v. Calgary Health Region*, 2006 ABCA 184 (Alta. C.A.) at para 13, (2006), 384 A.R. 378 (Alta. C.A.).

Analysis and Decision

Ground a: A strong prima facie case

154 The chambers judge found a strong prima facie case for breach of the terms of the Agreement by which Dr. Modry voluntarily withdrew from surgery and receive a payment of $20,000 per week while the preliminary investigation of the 2013 complaint was conducted. AHS submit that this conclusion was based on an unreasonable view of the facts. In particular, they submit that the chambers judge's unreasonable findings were that the 2013 review was procedurally unfair, there was misfeasance in public office, and Dr. Mador had not made a decision regarding the TIA.

155 AHS concede there was one instance of unfairness when the 2013 committee was performing the preliminary investigation received surgical performance data on Dr. Modry from one person interviewed. This was outside the committee's mandate and Dr. Modry had no opportunity to respond. AHS submit, however, that the chambers judge made no mention of the fact that the committee's recommendation was rejected, and Dr. Mador as Zone Medical Director remedied this default by recommending consensual resolution which was based only on the components of the report that were within the committee's purview. AHS submit that this negated any unfairness and the chambers judge's failure to consider this rendered his finding of procedural unfairness unsustainable.

156 The Bylaws and the Agreement promised fairness. As the chambers judge held, any unfairness supports a prima facie case of breach of contract.

157 In my view, AHS have shown no error in the other instances of unfairness found by the chambers judge, namely, failure to provide a timely disposition; consideration by the TIA committee of the 2010 external review and 2011 internal review; failure to provide Dr. Modry a meaningful right to respond; failure to disclose to Dr. Modry the mortality statistics presented to the TIA committee; failure of the TIA committee to receive and consider Dr. Modry's written response to the allegations against him; and Dr. Mador's reference to Dr. Modry's retirement that demonstrated bias. AHS, therefore, have not shown that the chambers judge erred in concluding that a strong prima facie case of breach of the Agreement has been shown because of the multiple failures to afford fairness in the process.

158 AHS further submits that the chambers judge incorrectly found that payments to Dr. Modry could only terminate upon a final disposition or decision of the 2013 process. They submit the Bylaws provide a two-stage process: a TIA resulting in a decision by the Zone Medical Director under section 6.3.4 that can then be followed by a next stage. AHS further submit the chambers judge made an unreasonable assumption that the AHS was offering Dr. Modry open-ended compensation, which was not the case. The offer to Dr. Modry, which he accepted without qualification, was unequivocal. It offered payment of $20,000 per week during the investigation until Dr. Mador as Zone Medical Director made a decision pursuant to section 6.3.4 of the Bylaw. Once that decision was made, the remuneration would cease. AHS point to Dr. Mador's letter of November 20, 2013 in which he stated, "I have rendered my decision pursuant to s. 6.3.4 of the Medical Staff Bylaws" as further evidence of a decision which AHS submit was not referred to by the chambers judge and contradicts the chambers judge's finding that no such decision was ever rendered by Dr. Mador.

159 In my view, the chambers judge did not overlook the Bylaws. He conducted a thorough review of the 2011 Bylaws to conclude that Dr. Mador had not made a decision. He also had the testimony from the cross-examination of Dr. Mador who, when asked if he was familiar with section 6.3.4 and whether he was aware that no decision had been made, agreed he was aware that a decision had not been made pursuant to section 6.3.4 of the 2011 Bylaws. It is neither an error of law nor unreasonable for the chambers judge to accept an admission by a party in his testimony in preference to the wording in a document written by that same party, namely, in this case, the November 20, 2013 letter.

160 My colleagues posit that the chambers judge's finding that there was not a decision is unreasonable. I strongly disagree and suggest what my colleagues are in effect doing is to reweigh the evidence that was before the chambers judge and this is not appropriate on an appeal. Rather, the inquiry on appeal should be to determine if there was evidence before the chambers judge such that it was "reasonable" for him to have concluded that there was no decision made as contemplated by the terms of the Agreement. This evidence includes the following:

- Dr. Mador's admission on cross-examination that no decision had been made under section 6.3.4 of the 2011 By-Law, contrary to what had been stated in his November 20, 2013 correspondence;

- Dr. Johnstone's letter to Dr. Modry dated January 23, 2014 wherein he stated, *inter alia*, "I understand that the triggered initial assessment of 2013 September 12 is currently on hold.";

- Dr. Mador's letter dated July 2, 2014 wherein he again acknowledged that the TIA had been put on hold by mutual agreement pending Dr. Modry's periodic review; and

- Key provisions of the Agreement, specifically both the final and ante-penultimate bullets referenced in paragraph 126 above.

161 My colleagues also assert that the chambers judge erred because he relied upon a misapprehension of the evidence, namely, that Dr. Modry was not the subject of a formal suspension. However, to me this is a distinction without significance. AHS presented Dr. Modry with essentially a "Hobson's choice" (namely either agree to withdraw from surgical practice or face immediate proceedings to have his surgical privileges suspended) and under the circumstances he agreed with the AHS that he would withdraw from surgical procedures pending the outcome of the TIA process. This process, as found by the chambers judge, was never completed. The Agreement cannot be unilaterally revoked by Dr. Modry. Accordingly, his privileges remain in effect suspended unless reinstated by agreement of AHS or by court order.

162 In effect, the chambers judge found that there was a strong prima facie case that AHS were in breach of the Agreement since no decision as contemplated by the Agreement had been rendered, and therefore Dr. Modry was entitled to the agreed upon compensation until such time as his surgical privileges were restored or a proper decision had been rendered pursuant to the TIA. The chambers judge's decision on this point in my view is eminently reasonable.

163 Furthermore, AHS submit that the finding of a strong prima facie case for misfeasance in public office cannot stand as the chambers judge stated that there was no need for AHS' counsel to address that issue as it was a matter for trial. Relying upon this, counsel made no submission.

164 Both AHS and Dr. Modry in written submissions argued the issue of the tort of public misfeasance in office. Even if AHS were denied the opportunity to orally address the issue because of the statements of the chambers judge, the outcome on this appeal would not change the chambers judge's finding of a strong prima facie case of breach of contract.

165 To succeed on this ground, AHS must demonstrate that the chambers judge's conclusion that a strong prima facie case of breach of the Agreement had been established because of the lack of fairness and the failure to make a decision was unreasonable due to an overriding and palpable error in his fact findings or an error in law. As they have failed to show either, this ground cannot succeed.

166 This ground of appeal is accordingly dismissed.

Ground b: Ordering payment

167 On the second ground of appeal, AHS submit that the payment order was not a suitable subject for an injunction and amounted to summary judgment in the guise of an injunction. The purpose of an interim injunction is to provide the applicant with a remedy without which he will suffer irreparable harm, and which harm cannot be adequately compensated in monetary damages. Therefore, they submit the requirement to pay Dr. Modry $20,000 per week was inconsistent with that purpose.

168 It is asserted that this payment was in reality a summary judgment as there has been an award of damages before or without trial, and *Assn. des Parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)*, 2015 NWTCA 2 (N.W.T. C.A.) at para 7 is cited for the proposition that it is a misuse of the injunctive remedy where there is an award of summary judgment without the test for a summary judgment having been met. Further, AHS argue that there is no justification in law for an injunction that purports to immunize the recipient from the proper consequences of his future conduct.

169 As the respondents point out, AHS confuse the test for an interim injunction with the terms of the injunction. The test for an interim injunction requires irreparable harm, but the test does not require irreparable harm result from the failure to pay the respondent. The chambers judge found that Dr. Modry would suffer irreparable harm as a result of loss in referrals and deterioration in his surgical skills if he was not able to practice, loss of income to his professional corporation, and the loss of reputation. AHS have not shown he erred in this conclusion.

170 Courts may award monetary payments as requirements of interim injunctions. Section 19 of the *Judicature Act*, RSA 2000 c J-2, provides that in entertaining an injunction application, a court may award damages in addition to or in substitution for the injunction.

171 An example of an injunction, including payment in accordance with contractual terms, is *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2003 ABQB 995, 347 A.R. 291 (Alta. Q.B.), where the terms of a mandatory interlocutory injunction included restraint from terminating payments for medically necessary services. That order was upheld by this court: *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 363 A.R. 283 (Alta. C.A.).

172 As the chambers judge did not err in law in awarding monetary payments, nor in his exercise of discretion, this ground of appeal cannot succeed.

173 If my colleagues' contention is correct, then Dr. Modry is essentially left in limbo. That is to say, pursuant to the Agreement, his surgical privileges are "withdrawn" on their view of the evidence, yet he is entitled to no remuneration since there was a "decision" made on November 20, 2013, even though Dr. Mador subsequently acknowledged that there had been no such decision ever made. My colleagues' position also overlooks the fact that the parties had agreed to suspend the TIA proceedings as acknowledged in the correspondence referenced in paragraphs 129 and 131 above.

174 Furthermore, while Dr. Modry had brought an application for summary judgment, it was not advanced and therefore in my view, it is an error to conflate that with what was being sought in the application before the chambers judge, namely, a mandatory interim injunction. Indeed, the chambers judge's formal order included the following:

> The amounts paid by AHS pursuant to paragraph 3 are provisional and subject to repayment in whole or in part as may be ordered by the learned Trial Judge or as otherwise agreed by the parties.

A summary judgment would not contain such a provision.

175 Finally, as regards this portion of the injunction directing that the AHS continue to pay Dr. Modry in accordance with the terms of the Agreement, I find the comments of Megarry J in *Hampstead & Suburban Properties Ltd. v. Diomedous* (1968), [1969] 1 Ch. 248, [1968] 3 All E.R. 545 (Eng. Ch. Div.) (although spoken in the context of enforcing a negative covenant by way of interim injunction) are entirely apropos:

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairns' statement come into its own. Indeed, Lord Cairns' express reference to "the balance of convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is.
>
> [Emphasis added]

176 As found by the chambers judge, the AHS stands in plain breach of its clear obligation to continue to pay Dr. Modry $20,000 per week until it made its decision, a decision that the chambers judge also found has not been rendered. Given the facts of this case (including Dr. Modry's age) it was entirely appropriate to insist that the Agreement be honoured sooner rather than later. Therefore the agreed upon weekly payment should continue to be made until AHS reinstates Dr. Modry's surgical privileges.

177 Clearly in the event that this matter were to proceed to trial on the merits, the trial judge could as a matter of law come to a different conclusion regarding the Agreement and its enforceability: *Ensign Drilling Inc. v. Lundle*, 2007 ABQB 357, 418 A.R. 267 (Alta. Q.B.); *McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd.* (1994), 159 A.R. 120 (Alta. Q.B.).

178 However, this ground of appeal must be dismissed.

Ground c: Ordering return to work

179 On the third ground of appeal, AHS submit that the return to work order was not a suitable subject for an injunction and did not properly consider the public interest. They submit that courts generally refuse specific performance of employment-type relationships as it is doubtful the essential elements of trust and confidence would exist. They submit these concerns are exacerbated by the fact that Dr. Modry commenced litigation proceedings against his colleagues alleging, among other things, a conspiracy against him. They cite *Cimolai v. Children's & Women's Health Centre of British Columbia*, 2003 BCCA 338, 183 B.C.A.C. 279 (B.C. C.A.), where the British Columbia Court of Appeal declined to order a doctor's return to work because it would be unsatisfactory to reintroduce the doctor into the staff community until the complaints had been properly dealt with and decided. The court in *Cimolai* also declined to order reinstatement of pay as it reasoned this would be a disincentive to the doctor's co-operation in addressing the complaints.

180 AHS went on to argue that there are no special circumstances before the chambers judge to justify his decision to grant specific performance of the employment contract, citing *Sharma v. London Life Insurance Co.* (2005), 45 C.C.E.L. (3d) 302

(Ont. S.C.J.), 2005 CanLII 27234 at paras 21-23. They also note Dr. Modry has been out of the operating room for 18 months, in addition to the ongoing concerns about his conduct and the litigation proceedings he initiated against his colleagues.

181 In assessing the balance of convenience for the injunctive relief test, AHS submit the chambers judge failed to consider all the relevant evidence or properly weigh the public interest. There are six years of reviews regarding Dr. Modry's conduct and record of patient safety. AHS submit Dr. Modry's surgical outcomes are a cause for concern, and his judgment and conduct in professional matters have repeatedly fallen below acceptable standards. Such concerns implicating the public interest tips the balance of convenience against Dr. Modry. They emphasize Dr. Modry's barrage of procedural objections, and point to the 2010 external review observation that Dr. Modry responded in depth with self-justification of practices which are outside the accepted norm. Most of the 13 colleagues who gave a peer assessment of Dr. Modry in the 2014 Periodic Review report were negative. They submit the chambers judge's finding that all concerns about Dr. Modry had been debunked is unsustainable on the record. However the chambers judge had excluded that evidence.

182 The general principles argued by AHS do not apply to Dr. Modry. As the respondents point out, the statements quoted by AHS are from *Injunctions and Specific Performance* by R. D. Sharpe in the section on personal service contracts or employment-like relationship. Dr. Modry and the AHS are not in an employment-like relationship and the issue was never raised in the court below. Dr. Modry was never an employee but held a medical staff appointment; there was never a contract of personal service between the AHS and Dr. Modry.

183 Furthermore, the general principles do not wholly prohibit reinstatement as an injunction remedy. In his text, Sharpe states at para 7.600 that even in a contract of employment, reinstatement may be ordered where the employee holds a position under statutory authority. In this case, the respondent's hospital privileges flow from the *Hospitals Act*.

184 AHS are not assisted by the decisions cited. In *Cimolai* the British Columbia Court of Appeal by way of obiter assumed it would have the discretion to order reinstatement and back pay although it refused to order it on the facts of that case. In *Cimolai* the physician was an employee of the hospital.

185 In *Sharma*, the applicants were employees and the court stated the general principle that specific performance will not be granted for employment or personal services contracts absent special circumstances. That action arose from breach of sales contracts and the court found damages were not an inadequate remedy. In contrast, in this appeal, the chambers judge found irreparable harm and damages would not be an adequate remedy.

186 AHS therefore have not shown it was an error of law to order reinstatement.

187 As for concerns about personal cooperation and the public interest, the respondents agree with AHS that Dr. Modry, his patients and other health care professionals require close personal cooperation in the operating room. However the respondents submit this is not the case in the hospital where there are thousands of employees and doctors. AHS adduced no evidence of any concerns it had with Dr. Modry's hospital privileges. AHS' claims about past investigations reaching a common conclusion regarding surgical outcomes were unsupported by the evidence before the chambers judge. Criticisms by Dr. Modry's colleagues were not raised in argument about the balance of convenience in the court below and therefore, not referred to by the chambers judge. The only uncontroverted evidence on the record is from Dr. Modry's operating colleagues who have stated they would welcome him back and this would not cause a disruption.

188 This portion of the chambers judge's decision follows logically from his ruling that AHS stood in breach of the Agreement because it never rendered a decision as contemplated therein.

189 As a result, AHS have not shown that the chambers judge erred in law in ordering reinstatement or that he exercised his discretion unreasonably. Therefore, this ground of appeal is dismissed.

Did the chambers judge wrongly exclude evidence respecting events that occurred subsequent to April 8, 2014?

190 The grounds of appeal raised by AHS in their written submissions are those as referenced (pretty much verbatim) in paragraph 150 above. Contrary to the statement contained in paragraph 90 of my colleagues' memorandum, AHS did not expressly raise as a ground of appeal the chambers judge's preliminary ruling to exclude consideration of evidence of events that occurred subsequent to April 8, 2014. The effects of that ruling were simply complained about *en passant* in the final paragraph of AHS's factum.

191 Neither did AHS appeal the chambers judge's finding of irreparable harm. That being so, it does not lie with AHS to now complain that the chambers judge erred in refusing to consider that evidence and it would equally be an error on the part of this court to consider and deal with this evidence. In my view, the validity of the chambers judge's preliminary ruling is a new ground of appeal raised by my colleagues on this appeal and is a basis (in their view) for finding error in the decision under appeal: *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 (S.C.C.) at para 61.

192 Accordingly, given that the preliminary ruling was not explicitly raised as a ground of appeal, in my view it is not proper to either revisit that ruling or to consider the evidence excluded by the chambers judge as a result of it.

Conclusion

193 In ordering the mandatory injunction that he did, the chambers judge must apply correct legal principles to a reasonable view of the facts, reaching a result that is not manifestly unjust: *Globex* at para 18. His findings of fact and the inferences drawn therefrom are entitled to deference, absent probable and overriding error: *Hill v. Hill*, 2007 ABCA 293 (Alta. C.A.) at para 8, (2007), 35 E.T.R. (3d) 171 (Alta. C.A.). Furthermore, his interpretation of the Agreement is likewise entitled to deference absent an extricable error of law. AHS have not shown that the chambers judge failed in this regard. As a result, I would have dismissed the appeal.

Appeal allowed.

Appendix "A"

The Alberta Health Services Medical Staff Bylaws

Definitions

Concern: A written complaint or concern from any individual or group of individuals about a Practitioner's professional performance and/or conduct, either in general or in relation to a specific event or episode of care provided to a specific Patient.

Consensual Resolution: A consensual and confidential process to resolve a Concern. Consensual Resolution includes the Affected Practitioner, the relevant AHS medical administrative leader(s), and any other relevant person(s).

Section 6.3 - Triggered Initial Assessment

Section 6.3.4 states:

Within twenty-eight days of completing the [TIA] initiated upon receipt of a Concern, the Zone Medical Director may:

> a) dismiss the Concern as being unfounded;
>
> b) determine that further action is not required or will not contribute further to investigation and resolution of the Concern;
>
> c) refer the Complainant to an appropriate body or agency internal or external to AHS if the Concern does not pertain to the responsibilities and expectations of the AHS Medical Staff Appointment of the Affected Practitioner;
>
> d) request further investigation and/or appoint another investigator if he/she determines the Initial Assessment to be incomplete;

e) refer the matter to an Associate Chief Medical Officer, pursuant to section 6.3.5 of these Bylaws, if the Affected Practitioner is an AHS medical administrative leader and the Concern is determined to pertain primarily to his/her role as a medical administrative leader;

f) refer the Concern, or a portion thereof, for internal or external expert opinion;

g) *request that the Affected Practitioner engage in Consensual Resolution pursuant to section 6.4 of these Bylaws*;

h) refer the Concern for a Hearing if the Affected Practitioner declines to participate in Consensual Resolution;

i) refer for a Hearing pursuant to section 6.5 of these Bylaws if he/she determines that the Concern is not amenable to Consensual Resolution pursuant to section 6.4 of these Bylaws;

j) refer the Concern to the relevant College if the Practitioner agrees, in writing; or if the Zone Medical Director, after consultation with the Associate Chief Medical Officer, determines that:

i) the referral is required by law; or

ii) the referral is necessary to ensure public or Patient safety; or

iii) the Concern will not be amenable to resolution pursuant to this part of these Bylaws but only if the Concern is within the scope of authority of the College to receive and act upon, and only after considering all reasonable alternatives and meeting with the Affected Practitioner to review the determination to refer and the reasons for it. If referral to the relevant College is planned under these circumstances, it shall not be made earlier than seven days following the meeting between the Affected Practitioner and the Zone Medical Director, and the Practitioner shall be provided with a copy of all materials intended to be sent to the relevant College.

[Emphasis added.]

End of Document

Tab 29

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege

XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.
Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.
Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.
Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.
Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.
Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses

effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when 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 includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer 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. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires

de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, *(*sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness,

both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

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

II. Facts

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

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

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

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant 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 Dr. 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 R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

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

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

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 Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

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

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

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

12 Pelletier J. first considered whether leave should be granted pursuant to R. 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 respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

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

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

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

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

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

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

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

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

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

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

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

22 With respect to R. 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 R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 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 the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

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

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a

confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

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

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

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

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). 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.

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

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

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of 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.

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

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

V. Issues

35

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

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], 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 freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

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

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

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

39 *Dagenais*, *supra*, 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 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 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

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

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* 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*, *supra*, at para. 33; 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 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). 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 accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

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

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

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

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

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary 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*, *supra*, 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 *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), 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 branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed 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" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the

importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

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

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

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

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

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

(2) The Proportionality Stage

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

to free 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 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. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *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*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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

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

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

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would 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 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. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

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

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

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> 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.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with

the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

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

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

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

VII. Conclusion

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

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

Appeal allowed.

Pourvoi accueilli.

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