

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

MERIDIAN CREDIT UNION LIMITED

Applicant

and

GARDEN VILLA RETIREMENT RESIDENCE INC.

Respondent

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**COMPENDIUM OF THE RECEIVER  
(Motion Returnable March 5, 2026)**

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February 19, 2026

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**INDEX**

<b>Tab</b>	<b>Description</b>	<b>Page No.</b>
1.	<i>Courts of Justice Act</i> (Ontario), R.S.O. 1990, c. C-43, s. 100, Schedule "B" of Factum	1
2.	<i>Royal Bank of Canada v. Soundair Corporation</i> , 1991 CanLII 2727 (Ont. C.A.)	3
3.	<i>First Source Financial Management v. Chacon Strawberry Fields Inc.</i> , 2024 ONSC 7229 (CanLII) at paras. 30-42, at paras. 43-47, at para. 45 and at paras. 48-53	45
4.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522 (SCC) at para. 53	53
5.	<i>Sherman Estate v. Donovan</i> , 2021 SCC 25 (CanLII), at paras. 37 and 38	90
6.	<i>Royal Bank of Canada v. Walker Hall Winery Ltd.</i> , 2011 ONSC 638 (CanLII), at paras. 13, 21 and 22	151
7.	<i>Bank of Nova Scotia v. Diemer</i> , 2014 ONCA 851 (CanLII) (Ont. C.A.), at paras. 33 and 45	156

8.	<i>Re Windsor Machine &amp; Stamping Ltd.</i> , 2009 CanLII 39772 (ON SC), at para. 8	179
9.	<i>Re Abitibiwater Inc.</i> , 2009 QCCS 6461 (CanLII) (QC SC), at paras 70-75	183
10.	<i>Pinnacle v. Kraus</i> , 2012 ONSC 6376 (CanLII), at para. 47	222

# **TAB 1**

## SCHEDULE “B”

### TEXT OF STATUTES

#### *Courts of Justice Act, R.S.0.1990, c C.43*

##### **Vesting Orders**

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

##### **Sealing Documents**

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

#### *Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3*

##### **Court may appoint receiver**

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt's business; or
- (c) take any other action that the court considers advisable.

##### **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2);
- or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of “receiver”**

- (2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who
  - (a) is appointed under subsection (1); or

- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver- manager.

**Definition of “receiver” — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of “disbursements”**

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89;  
2005, c. 47, s. 115;  
2007, c.36, s. 58.

# **TAB 2**

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

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

4 O.R. (3d) 1  
[1991] O.J. No. 1137  
Action No. 318/91

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

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

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

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

Held, the appeal should be dismissed.

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

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

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

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

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

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

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

Cases referred to

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

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

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137

Environmental Protection Act, R.S.O. 1980, c. 141

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

#### I. DID THE RECEIVER ACT PROPERLY

## IN AGREEING TO SELL TO OEL?

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

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

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

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

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

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

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

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

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

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2. Consideration of the interests of all parties

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

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

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

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

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

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

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

#### 4. Was there unfairness in the process?

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

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

purchaser would require in order to make a serious bid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent that approval of the OEL agreement by Rosenberg

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

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

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

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

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

29, 1990.

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

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

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

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

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

include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I accept that statement as being an accurate statement of the

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

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

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

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

procedure adopted by the receiver.

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

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

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

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

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

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

Appeal dismissed.

# TAB 3

**CITATION:** First Source Financial Management v. Chacon Strawberry Fields Inc., 2024  
ONSC 7229

**COURT FILE NO.:** CV-24-00717742-00CL

**DATE:** 20241223

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

**AND:**

CHACON STRAWBERRY FIELDS INC. and SURINDER KAUR CHAHAL

Respondents

**BEFORE:** Justice Jana Steele

**COUNSEL:** *Steven L. Graff and Adrienne Ho*, for the Receiver, The Fuller Landau Group Inc.

*Wolfgang Kaufmann and Tajinder Kaur Sivia*, for the Respondents

*Ryan Shah*, for the Applicant, First Source Financial Management Inc.

*Jitseh Bhalla*, for the Second Lender, 1794523 Ontario Inc.

*Arnab Bose*, for the third-party, Ramesh Ahluwalia

**HEARD:** December 20, 2024

**ENDORSEMENT**

**Overview**

[1] This is a motion brought by The Fuller Landau Group Inc., the Receiver, for the approval of a sale process and transaction, an approval and vesting order, and an ancillary order approving the Receiver's report, fees and disbursements, and a distribution to the first secured lender, among other things.

[2] The contentious issues before the court relate to whether last ditch attempts to alter the sale process by an unsuccessful bidder, Ramesh Ahluwalia, and by the respondents should be permitted.

[3] The respondents seek access to certain sealed confidential documents and an adjournment of three weeks. The respondents say they want the time to secure financing.

[4] Mr. Ahluwalia asks that his late offer be considered when the court determines whether to approve the agreement of purchase and sale with the Purchaser.

[5] For the reasons set out below the Receiver's motion is granted.

### **Background**

[6] The application to appoint the Receiver was filed by First Source Financial Management Inc. ("First Source") on or about April 3, 2024. However, due to a forbearance agreement that was reached, the Receiver was not appointed until on or about July 19, 2024. At that time, the Receiver was appointed as receiver and manager of the lands and premises municipally known as 12550, 12560 and 12570 Kennedy Road, Caledon Ontario, (the "Real Property") owned by Chacon Strawberry Fields Inc. (the "Debtor").

[7] The Debtor is a company incorporated pursuant to the laws of Ontario.

[8] The Debtor owns and operates a mixed-use retail plaza called "Strawberry Fields Plaza," which is situated on the Real Property, a 2.32-acre piece of land. The plaza is fully leased to 15 tenants.

[9] Upon being appointed and determining the nature of the property and other preliminary steps, the Receiver undertook a process to engage a real estate broker to market and sell the Real Property. The Receiver met with five real estate brokerages, each of which were asked to provide a marketing proposal for the Real Property. All five brokerages submitted marketing proposals. The Receiver selected Lennard Commercial Realty, Brokerage ("Lennard") based on its specific expertise with properties similar to the Real Property and prior successful experience with sales in receiverships.

[10] The Receiver entered into the listing agreement with Lennard on or about September 17, 2024.

[11] Lennard listed the property on September 23, 2024. Lennard took numerous other marketing steps, resulting in 127 parties executing non-disclosure agreements to access the data room.

[12] The initial bid deadline was set at November 6, 2024, at 3 p.m. Eleven offers were submitted by the deadline and three other offers were submitted after the deadline, including Mr. Ahluwalia's bid. The top six bidders (all of which had submitted their bids by the deadline) were invited to submit another bid – Mr. Ahluwalia was not asked to re-submit because he was not among the top six bidders.

[13] The successful bidder (the "Purchaser") submitted its bid by the initial bid deadline and was among the top six asked to re-submit a bid.

[14] The second bid deadline was set at November 12, 2024, at 3 pm. Five of the six bidders who were invited to re-submit, including the Purchaser, did so in accordance with the deadline. Two other bidders who were not invited to re-submit, including Mr. Ahluwalia, made another bid.

[15] The Purchaser's bid was accepted by the Receiver on November 13, 2024. The Purchaser's bid was the highest bid delivered by the second bid deadline. The Purchaser paid the required deposit to the Receiver.

[16] On November 14, 2024, two days after the second bid deadline, and after the Receiver had accepted the Purchaser's bid, Mr. Ahluwalia made another bid.

[17] Among other things, the Receiver is asking the court to approve the transaction with the Purchaser (the "Sale Transaction"). The Sale Transaction is targeted to close on January 13, 2025.

[18] The applicant, First Source, is the first ranking secured creditor on the Real Property.

### **Analysis**

*Should the Court adjourn the proceedings to January 9, 2025, as requested by the respondents?*

[19] The respondents ask the court to adjourn the Receiver's motion to January 9, 2025 to give the respondents the opportunity to redeem. Tied in with this request, is the respondents' request that the Receiver be required to provide the respondents with access to certain sealed documents, including the sale price the Purchaser is paying pursuant to the Sale Transaction, the adjustments to the sale price, and a draft payout statement to show what each creditor is expected to receive (the "Transaction Information").

[20] The Court of Appeal in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at para. 9, affirmed that the motions judge had not erred in applying the following principles to guide her consideration of whether the debtor should be granted leave to redeem:

- a. In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- b. Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
- c. In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[21] Unlike *Rose-Isli*, in the instant case the sales process was not pre-approved by the court. The Receiver asks the court on this motion to approve the sales process that it undertook. As set out below, I am satisfied that the *Soundair* principles have been satisfied and the sales process should be approved.

[22] The respondents' evidence is that they have obtained a financing offer from Gurpreet Kainth of K.P. Financial Group for \$23.5 million (the "Financing Offer"). Further, the respondents state that their redemption plan, assuming the financing is approved, is to pay the following:

- a. First Source will be paid in full,
- b. The second mortgagee will receive 90% of the amount owing,
- c. All HST, realty taxes, Receiver's costs and real estate break fees will be satisfied, and
- d. Subsequent mortgagees will be compensated, with specific amounts allocated to obtain necessary postponements.

[23] Essentially the respondents are asking the court for more time to put together a proposal that they say will be better than the Sale Transaction. The respondents are not saying that they have "cash in hand" and can redeem the outstanding mortgages on the property. The respondents seek the confidential Transaction Information so they can ensure that their proposal is better than the deal reached pursuant to the Sale Transaction.

[24] The Receiver objects to any adjournment. As the Receiver points out an adjournment will result in a delay and will not change the outcome. Setting aside whether the Financing Offer may come to fruition, the proposed \$23.5 million in financing is not enough for the Debtor to redeem the outstanding mortgages on the property. The Receiver states that the Debtor would need more than \$32.8 million in financing to pay out the mortgagees in full.

[25] The jurisprudence provides for a balancing act that the court must engage in when faced with a debtor who wants to redeem. After a receiver has gone through an exhaustive bidding process, including the costs associated therewith, to find a purchaser, the court may still permit a last-minute redemption where the debtor comes with a cheque in hand: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000 at para. 7-9. Further, in the exceptional circumstances where the court may permit a last-minute redemption, the cheque in hand must be sufficient to cover all the outstanding obligations: *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635, at para. 97.

[26] There is no cheque in hand in the instant case.

[27] Further, a short adjournment would not alter the situation such that the debtors would have sufficient funds to redeem the mortgages. As noted above, the Financing Offer, even if it comes to fruition, would not provide sufficient funds for the debtor to redeem all the outstanding mortgages on the Real Property. Instead, the debtors want to obtain information and financing so that they can make an offer above the sale price in the Sale Transaction. As noted by the Receiver, this is one of the reasons the purchase price is kept confidential in a situation like this until the transaction closes. Otherwise, the debtor may use the information to try to obtain financing just to beat the purchase price and attempt to negotiate with subsequent mortgagees. This would thwart the entire process.

[28] As noted by the court in *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930, 55 C.B.R. (5<sup>th</sup>) 271, at para. 22:

[...] Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[29] The request for an adjournment is denied.

*Should the Court approve the Sale Agreement and the Sale Transaction with the Purchaser?*

[30] The Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727, 4 O.R. (3d) 1 set out the factors for the court to consider when determining whether a proposed sale should be approved:

- 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 process by which offers were obtained;
- c. Whether there has been unfairness in the working out of the process; and,
- d. The interest of all parties.

[31] I am satisfied that the *Soundair* factors have been met.

[32] The Receiver first sought proposals for the brokerage firm to market the property. After receiving and considering five marketing proposals, the Receiver selected Lennard, based on its expertise and experience. The activities taken to market the Real Property included listing the property on MLS, sending weekly eblasts with relevant details to prospective purchasers and agents, featuring the Real Property on the Lennard Commercial website and LinkedIn, and advertising the Real Property on three occasions in the *Globe & Mail's* Report on Business section. As evidenced by the fact that 127 parties executed NDAs and were granted access to the data room, the Real Property received wide market exposure. As noted above, 14 bidders submitted offers on the first round and seven bidders submitted offers on the second round. The Purchaser's offer was the highest and best offer received in the bidding process and the agreement of purchase and sale does not contain any material conditions. The Real Property is being bought by the Purchaser on an "as is where is" basis. I further note that the Sale Transaction has the support of the Debtor's first ranking secured creditor.

[33] Mr. Ahluwalia asks the court to consider his November 14, 2024 offer when determining whether to approve the sale process and the proposed Sale Transaction. As noted above, Mr. Ahluwalia missed the first bid deadline and submitted a bid significantly below the top six bidders who were asked to re-submit. Mr. Ahluwalia submitted a bid in the second round of bidding in any event, which the Receiver did consider. However, there were at least three parties who had higher bids than Mr. Ahluwalia in the second round. Accordingly, the Receiver accepted the

Purchaser's offer. Mr. Ahluwalia submitted his November 14, 2024 offer after the Receiver had accepted the Purchaser's offer.

[34] A disappointed bidder does not generally have standing to challenge a motion to approve a sale to another bidder: *Re Consumer Packaging Inc.*, 2001 CanLII 6708, at para. 7.

[35] In any event, considering Mr. Ahluwalia's bid after the bid deadline passed and the Purchaser's offer was accepted would thwart the integrity of the sales process. If a party could swoop in at the last minute and submit a bully bid, after a fair and thorough sales process has been run and the highest and best offer accepted, complete uncertainty would be created.

[36] As noted by the Receiver, courts will generally defer to a court-appointed receiver's expertise in reviewing a sale and will not second-guess their recommendation absent exceptional circumstances: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15.

[37] I am satisfied that the sale agreement and Sale Transaction with the Purchaser should be approved.

*Should the Approval and Vesting Order be granted?*

[38] The Receiver seeks an approval and vesting order in respect of the Real Property sale to the Purchaser.

[39] Under section 100 of the *Courts of Justice Act* the court has the power to grant approval and vesting orders:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[40] The proposed vesting order will extinguish the registered charges on the Real Property listed out in paragraphs 30 and 31 of the Receiver's factum.

[41] Vesting orders are routinely granted by this court: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 106.

[42] I agree with the Receiver's submission that it is appropriate for the court to grant the requested AVO, granting the Real Property to the Purchaser free and clear of the claims and encumbrances set out at paras. 30 and 31 of the Receiver's factum (other than Permitted Encumbrances). The applicant, First Source, is supportive of the transaction being put forward. Further, as set out above, the sale was conducted in a manner that meets the *Soundair* principles.

*Should the Interim Distribution be approved?*

[43] The Receiver seeks court approval to distribute \$16 million to First Source following the completion of the Transaction. The Receiver seeks authorization to make further payments to First Source from available funds up to the amount of First Source's debt, once the Receiver has determined the amounts due in respect of certain priority claims.

[44] The court routinely grants orders authorizing interim distributions in insolvency proceedings: *e.g.*, *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472, at paras. 8 and 12.

[45] In determining whether it is appropriate to authorize an interim distribution the court may consider: (a) whether the proposed recipient's security is valid and enforceable; (b) whether the amounts that are owed to the proposed recipient exceed the proposed interim distribution amount; and (c) whether the proposed interim distribution would result in interest savings: *Re Abitibowater Inc.*, 2009 QCCS 6461 at para. 75.

[46] In the instant case, First Source has a valid and enforceable security interest in respect of the collateral covered by its security. Counsel to the Receiver provided the Receiver with a security opinion, subject to the usual qualifications, assumptions and disclaimers, which opinion confirms the validity of the charge granted in favour of First Source on the Real Property. The amount of First Source's indebtedness as at October 1, 2024 was \$17,752,258.56. The proposed distribution of \$16 million is less than the amount outstanding on the loan. By repaying a portion of the loan, there will be interest savings.

[47] I am satisfied that the proposed interim distribution should be approved.

*Should the Court grant the Sealing Order?*

[48] The Receiver seeks a sealing order with respect to the Confidential Appendices of the Third Report. The Confidential Appendices contain information regarding the purchase price for the transaction and information regarding the sales process, including other offers submitted.

[49] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[50] For the court to grant a sealing order, the party requesting the order must establish that:

- a. Court openness poses a serious risk to an important public interest;
- b. The order sought is necessary to prevent this serious risk to the interest because reasonably alternative measures will not prevent this risk; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects:

*Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

[51] The requested sealing order is limited in scope. The proposed sealing order balances the open court principle and legitimate commercial requirements for confidentiality in the circumstances. In my view, the benefits of the requested sealing order outweigh the negative impact on the "open court" principle. The Confidential Appendices contain commercially sensitive information that could have a detrimental impact on a future sales process, should one be required if the transaction does not close. No stakeholder will be materially prejudiced by the

sealing order, which applies to only a limited amount of information. As noted by the Receiver, there is not a reasonable alternative to a sealing order.

[52] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53, requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

[53] I am satisfied that the Confidential Appendices should be sealed pending further order of this court.

*Should the Court grant the other relief sought by the Receiver?*

[54] There was no opposition to the other relief sought by the Receiver, specifically, the approval of the Second Report, Third Report, and Supplemental Third Report, and the approval of the fees and disbursements of the Receiver and its counsel.

[55] As noted in *Re Target Canada Co.*, 2015 ONSC 7574, at para. 2, court appointed officers routinely seek court approval of their reports and activities, which relief is routinely granted where there is no opposition. The court in *Target* also recognized, at para. 22, that there are “good policy and practical reasons” for the court to provide such approval. While *Target* was a case involving court approval of Monitor’s reports and activities under a *Companies’ Creditors Arrangement Act* proceeding, subsequent cases have confirmed that the considerations apply equally to the reports and activities of a receiver: *Re Hangfeng Evergreen Inc.*, 2017 ONSC 7161 at para. 15.

[56] I am satisfied that the activities of the Receiver set out in the Second Report, Third Report, and Supplemental Third Report were necessary and undertaken in good faith in accordance with the order appointing the Receiver and should be approved.

[57] Having reviewed the fee affidavits and considered the non-exhaustive factors in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 33, I am satisfied that the fees and disbursements of the Receiver and its counsel for the applicable billing period are fair and reasonable and should be approved.

[58] Orders attached.

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J. Steele J.

# TAB 4

**Atomic Energy of Canada  
Limited** *Appellant*

v.

**Sierra Club of Canada** *Respondent*

and

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

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

**Neutral citation: 2002 SCC 41.**

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF  
APPEAL

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

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

**Énergie atomique du Canada  
Limitée** *Appelante*

c.

**Sierra Club du Canada** *Intimé*

et

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

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

**Référence neutre : 2002 CSC 41.**

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D’APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Cases Cited

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

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

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

### Jurisprudence

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

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

### Statutes and Regulations Cited

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

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

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

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

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

The judgment of the Court was delivered by

IACOBUCCI J. —

### I. Introduction

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

*Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360, conf. [1998] A.C.F. n° 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

### Lois et règlements cités

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

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. n° 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. n° 1633 (QL). Pourvoi accueilli.

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

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

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

### I. Introduction

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

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

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

## II. Facts

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

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

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

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

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

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

## II. Les faits

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

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

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

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

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

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.

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

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

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

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

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

### III. Relevant Statutory Provisions

*Federal Court Rules, 1998, SOR/98-106*

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

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

### IV. Judgments Below

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

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

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

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

### III. Dispositions législatives

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

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

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

### IV. Les décisions antérieures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

(2) Le juge Robertson (dissident)

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

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

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

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

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

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

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

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

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

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

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

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

#### V. Issues

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

#### VI. Analysis

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

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

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

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

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

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

#### V. Questions en litige

- A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?
- B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

#### VI. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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

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

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

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

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

a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

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

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

(2) Les droits et les intérêts des parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### B. *Application of the Test to this Appeal*

##### (1) Necessity

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

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

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

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

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

#### B. *Application de l’analyse en l’espèce*

##### (1) Nécessité

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

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

Le juge Pelletier souligne que l’ordonnance sollicitée en l’espèce s’apparente à une ordonnance conservatoire en matière de brevets. Pour l’obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. n<sup>o</sup> 1850 (QL) (C.F. 1<sup>re</sup> inst.), par. 29-30. J’ajouterais à cela

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### (2) The Proportionality Stage

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

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

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

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

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

#### (2) L'étape de la proportionnalité

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

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

(a) *Salutary Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

(b) *Deleterious Effects of the Confidentiality Order*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2002 SCC 41 (CanLII)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VII. Conclusion

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

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

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

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

## VII. Conclusion

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

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

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*Appeal allowed with costs.*

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

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

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

*Pourvoi accueilli avec dépens.*

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

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

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

# TAB 5

**Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate** *Appellants*

v.

**Kevin Donovan and Toronto Star Newspapers Ltd.** *Respondents*

and

**Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee** *Interveners*

INDEXED AS: SHERMAN ESTATE v. DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public*

**Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession** *Appelants*

c.

**Kevin Donovan et Toronto Star Newspapers Ltd.** *Intimés*

et

**Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee** *Intervenants*

RÉPERTORIÉ : SHERMAN (SUCCESSION) c. DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites*

*interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.*

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

*Held:* The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at

*discrétionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpliqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?*

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexplicables ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

*Arrêt :* Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

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

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

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

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

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

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

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

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

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

### Jurisprudence

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

(3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dymont*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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*Chantelle Cseh and Timothy Youdan*, for the appellants.

*Iris Fischer and Skye A. Sepp*, for the respondents.

*Peter Scrutton*, for the intervener the Attorney General of Ontario.

*Jaqueline Hughes*, for the intervener the Attorney General of British Columbia.

*Ryder Gilliland*, for the intervener the Canadian Civil Liberties Association.

*Ewa Krajewska*, for the intervener the Income Security Advocacy Centre.

*Robert S. Anderson, Q.C.*, for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

*Adam Goldenberg*, for the intervener the British Columbia Civil Liberties Association.

*Khalid Janmohamed*, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

Rochette, Sébastien, et Jean-François Côté. « Article 12 », dans Luc Chamberland, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, 5<sup>e</sup> éd., Montréal, Yvon Blais, 2020.

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*Chantelle Cseh et Timothy Youdan*, pour les appelants.

*Iris Fischer et Skye A. Sepp*, pour les intimés.

*Peter Scrutton*, pour l’intervenant le procureur général de l’Ontario.

*Jaqueline Hughes*, pour l’intervenant le procureur général de la Colombie-Britannique.

*Ryder Gilliland*, pour l’intervenante l’Association canadienne des libertés civiles.

*Ewa Krajewska*, pour l’intervenant le Centre d’action pour la sécurité du revenu.

*Robert S. Anderson, c.r.*, pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

*Adam Goldenberg*, pour l’intervenante British Columbia Civil Liberties Association.

*Khalid Janmohamed*, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

### I. Overview

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

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

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

Version française du jugement de la Cour rendu par

LE JUGE KASIRER —

### I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

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

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

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

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

plaidoyer en faveur du prononcé d'ordonnances de mise sous scellés des dossiers d'homologation. Les intimés s'opposent à ce que de telles ordonnances soient rendues, rappelant que la protection de la vie privée est généralement considérée comme une faible justification à une exception à la publicité des débats. Ils affirment qu'après tout, presque chaque procédure judiciaire entraîne un certain dérangement dans la vie des personnes concernées et que ces atteintes à la vie privée doivent être tolérées parce que la publicité des débats judiciaires est essentielle à une saine démocratie.

[6] Le présent pourvoi offre donc l'occasion de trancher la question de savoir si la vie privée peut constituer un intérêt public suivant la jurisprudence relative à la publicité des débats judiciaires et, dans l'affirmative, si la publicité des débats menace sérieusement la vie privée en l'espèce au point de justifier le type d'ordonnances demandé par les appelants.

[7] Pour les motifs qui suivent, je propose de reconnaître qu'un aspect de la vie privée constitue un intérêt public important pour l'application du test pertinent énoncé dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522. La tenue de procédures judiciaires publiques peut mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui me semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, est sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée.

[8] Dans la présente affaire, et en gardant cet intérêt à l'esprit, on ne peut pas dire que le risque pour la vie privée est suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en est de même du risque pour la sécurité physique en l'espèce. Dans les circonstances, la Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés et je suis donc d'avis de rejeter le pourvoi.

## II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")<sup>1</sup> sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

<sup>1</sup> As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate". In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

## II. Contexte

[9] Bernard Sherman et Honey Sherman, figures importantes du monde des affaires et de la philanthropie, ont été retrouvés morts dans leur résidence de Toronto en décembre 2017. Leur décès apparemment inexpliqué a suscité un vif intérêt chez le public et une attention médiatique intense. En janvier de l'année suivante, le service de police de Toronto a annoncé que les décès faisaient l'objet d'une enquête pour homicides. Au moment où l'affaire a été portée devant les tribunaux, l'identité et le mobile des personnes responsables demeuraient inconnus.

[10] Les successions du couple et les fiduciaires des successions (collectivement les « fiduciaires »)<sup>1</sup> ont cherché à réfréner l'attention médiatique intense provoquée par les événements. Les fiduciaires souhaitaient veiller au transfert harmonieux des biens du couple, à distance de ce qu'ils percevaient comme un intérêt morbide du public pour les décès inexplicés et la curiosité suscitée par les importantes sommes d'argent apparemment en jeu.

[11] Quand le temps est venu d'obtenir auprès de la Cour supérieure de justice leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires (« personnes touchées ») de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les fiduciaires ont soutenu que, si les renseignements contenus dans les dossiers judiciaires étaient révélés au public, la sécurité des personnes touchées serait menacée et leur vie privée compromise tant et aussi longtemps que les décès demeureraient inexplicés et que les personnes responsables de la tragédie seraient en liberté. À l'appui de leur demande, ils ont fait valoir qu'il existait un risque réel et important que les personnes touchées subissent un préjudice sérieux en raison de la diffusion publique des documents dans les circonstances.

<sup>1</sup> Comme l'indique l'intitulé de la cause, les appelants en l'espèce ont, tout au long des procédures, été désignés comme suit : « succession de Bernard Sherman et fiduciaires de la succession et succession de Honey Sherman et fiduciaires de la succession ». Dans les présents motifs, les appelants sont appelés les « fiduciaires » par souci de commodité.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").<sup>2</sup> The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

### III. Proceedings Below

#### A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension

<sup>2</sup> The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

[12] Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par Kevin Donovan, un journaliste qui avait rédigé une série d'articles sur le décès du couple, ainsi que par Toronto Star Newspapers Ltd., le journal pour lequel il écrivait (collectivement le « Toronto Star »)<sup>2</sup>. Le Toronto Star a affirmé que les ordonnances portaient atteinte à ses droits constitutionnels à la liberté d'expression et à la liberté de la presse, ainsi qu'au principe corollaire selon lequel les activités des tribunaux devraient être accessibles au public comme moyen de garantir l'équité et la transparence de l'administration de la justice.

### III. Historique judiciaire

#### A. *Cour supérieure de justice de l'Ontario, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (le juge Dunphy)*

[13] Examinant la question de savoir si les circonstances justifiaient une atteinte au principe de la publicité des débats judiciaires, le juge de première instance s'est appuyé sur l'arrêt *Sierra Club* de notre Cour. Il a souligné qu'une ordonnance de confidentialité ne devrait être accordée que si [TRADUCTION] : « (1) elle est nécessaire [. . .] pour écarter un risque sérieux pour un intérêt important en l'absence d'autres options raisonnables pour écarter ce risque, et (2) ses effets bénéfiques l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression et l'intérêt du public à la publicité des débats judiciaires » (par. 13(d)).

[14] Le juge de première instance a examiné la question de savoir si les intérêts des fiduciaires seraient servis par l'octroi des ordonnances de mise sous scellés. À son avis, les fiduciaires avaient correctement mis en évidence deux intérêts légitimes à l'appui d'une exception au principe de la publicité des débats judiciaires, à savoir [TRADUCTION] « la

<sup>2</sup> L'utilisation du terme « Toronto Star » pour désigner collectivement les deux intimés ne devrait pas être interprétée comme indiquant que seule la société Toronto Star Newspapers Ltd. participe au présent pourvoi. Monsieur Donovan est le seul intimé à avoir été une partie devant toutes les cours. Toronto Star Newspapers Ltd. a participé à la première instance, mais, sur consentement, elle a été retirée comme partie à la Cour d'appel. Par une ordonnance de la juge Karakatsanis datée du 25 mars 2020, Toronto Star Newspapers Ltd. a été ajoutée en tant qu'intimée devant notre Cour.

of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased” (paras. 22-25). With respect to the first interest, the application judge found that “[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating” (para. 23). For the second interest, although he noted that “it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation”, he concluded that “the lack of such evidence is not fatal” (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the “willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed” (*ibid.*). He concluded that the “current uncertainty” was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was “grave” (*ibid.*).

[15] The application judge ultimately accepted the Trustees’ submission that these interests “very strongly outweigh” what he called the proportionately narrow public interest in the “essentially administrative files” at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

protection de la vie privée et de la dignité des victimes d’actes criminels ainsi que de leurs êtres chers », et « une crainte raisonnable d’un risque de préjudice chez les personnes connues comme ayant un intérêt à recevoir ou à administrer les biens des défunts » (par. 22-25). S’agissant du premier intérêt, le juge de première instance a conclu que [TRADUCTION] « le degré d’atteinte à cette vie privée et à cette dignité est déjà extrême et [. . .] insoutenable » (par. 23). En ce qui a trait au deuxième intérêt, bien qu’il ait souligné qu’« il aurait été préférable d’inclure des éléments de preuve objectifs de la gravité de ce risque, obtenus, par exemple, auprès des policiers responsables de l’enquête », il a conclu que « l’absence de tels éléments de preuve n’est pas fatale » (par. 24). Les inférences nécessaires pouvaient plutôt être tirées des circonstances, notamment [TRADUCTION] « la volonté de la personne ou des personnes ayant perpétré les crimes de recourir à une violence extrême pour obéir à un mobile quelconque » (*ibid.*). Il a conclu que [TRADUCTION] « l’incertitude actuelle » était source d’une crainte raisonnable du risque de préjudice, et qu’en outre, le préjudice prévisible était « grave » (*ibid.*).

[15] Le juge de première instance a finalement accepté l’argument des fiduciaires selon lequel ces intérêts [TRADUCTION] « l’emportent très fortement » sur ce qu’il a qualifié d’intérêt public proportionnellement restreint à l’égard des « dossiers essentiellement administratifs » en cause (par. 31 et 33). Il a donc conclu que les effets bénéfiques des ordonnances de mise sous scellés sur les droits et les intérêts des personnes touchées l’emportaient sensiblement sur leurs effets préjudiciables.

[16] Enfin, le juge de première instance a examiné la question de savoir quelle ordonnance protégerait les personnes touchées tout en portant le moins possible atteinte au principe de la publicité des débats judiciaires. Il a décidé que, si l’on devait apporter aux deux dossiers le caviardage nécessaire à la protection des intérêts qu’il avait constatés, il n’en resterait plus aucun passage digne d’intérêt susceptible d’être divulgué. Des ordonnances de mise sous scellés d’une durée indéterminée ne lui semblaient toutefois pas une bonne solution. Le juge de première instance a donc fait placer sous scellés les dossiers pour une période initiale de deux ans, avec possibilité de renouvellement.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan J.J.A.)*

[17] The Toronto Star’s appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that “[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle” (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone’s physical safety. The application judge had erred on this point: “the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order” (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

B. *Cour d’appel de l’Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (les juges Doherty, Rouleau et Hourigan)*

[17] L’appel interjeté par le Toronto Star a été accueilli à l’unanimité et les ordonnances de mise sous scellés ont été levées.

[18] La Cour d’appel a examiné les deux intérêts qui avaient été soulevés devant le juge de première instance au soutien des ordonnances visant à mettre sous scellés les dossiers d’homologation. En ce qui concerne la nécessité de protéger la vie privée et la dignité des victimes de crimes violents et de leurs êtres chers, elle a rappelé que le type d’intérêt qui est à juste titre protégé par une ordonnance de mise sous scellés doit comporter un élément d’intérêt public. Citant l’arrêt *Sierra Club*, la Cour d’appel a écrit que [TRADUCTION] « [d]es préoccupations personnelles ne peuvent à elles seules justifier une ordonnance de mise sous scellés de documents qui seraient normalement accessibles au public en vertu du principe de la publicité des débats judiciaires » (par. 10). Elle a conclu que l’intérêt en matière de vie privée à l’égard duquel les fiduciaires sollicitaient une protection ne comportait pas cette qualité d’intérêt public.

[19] Bien qu’elle ait reconnu que la sécurité personnelle des gens constituait, de manière générale, un intérêt public important, la Cour d’appel a écrit qu’il n’y avait aucun élément de preuve en l’espèce permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Le juge de première instance avait commis une erreur sur ce point : [TRADUCTION] « l’idée selon laquelle les bénéficiaires et les fiduciaires sont en quelque sorte en danger parce que les Sherman ont été assassinés n’est pas une inférence, mais une conjecture. Elle ne justifie aucunement l’octroi d’une ordonnance de mise sous scellés » (par. 16).

[20] La Cour d’appel a conclu que les fiduciaires n’avaient pas franchi la première étape du test relatif à l’obtention d’ordonnances de mise sous scellés des dossiers d’homologation. Elle a donc accueilli l’appel et annulé les ordonnances.

### C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

### IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical

### C. *Procédures subséquentes*

[21] L'ordonnance de la Cour d'appel annulant les ordonnances de mise sous scellés a été suspendue en attendant l'issue du présent pourvoi. Le Toronto Star a présenté une requête pour être autorisé à déposer de nouveaux éléments de preuve dans le cadre du pourvoi, éléments de preuve qui comprennent des documents d'enregistrement des droits immobiliers, des transcriptions du contre-interrogatoire d'un détective sur l'enquête relative aux meurtres ainsi que divers articles de presse. Ces éléments de preuve, affirme-t-il, étayaient la conclusion selon laquelle les ordonnances de mise sous scellés devraient être levées. La requête a été renvoyée à notre formation.

### IV. Moyens

[22] Les fiduciaires ont interjeté appel devant notre Cour pour demander le rétablissement des ordonnances de mise sous scellés rendues par le juge de première instance. En plus de contester la requête en production de nouveaux éléments de preuve, ils soutiennent que les ordonnances sont nécessaires pour écarter un risque sérieux pour la vie privée et la sécurité physique des personnes touchées, et que les effets bénéfiques de la mise sous scellés des dossiers d'homologation judiciaire l'emportent sur les effets préjudiciables du fait de limiter la publicité des débats judiciaires. Les fiduciaires soutiennent que deux erreurs de droit ont amené la Cour d'appel à conclure autrement.

[23] Premièrement, ils soutiennent que la Cour d'appel a conclu à tort que la vie privée est une préoccupation personnelle qui ne peut, à elle seule, constituer un intérêt important suivant l'arrêt *Sierra Club*. Les fiduciaires affirment que le juge de première instance a qualifié à bon droit la vie privée et la dignité comme un intérêt public important qui, étant exposé à un risque sérieux, justifiait les ordonnances. Ils demandent à notre Cour de reconnaître que la vie privée constitue en elle-même un intérêt public important pour les besoins de l'analyse.

[24] Deuxièmement, les fiduciaires avancent que la Cour d'appel a commis une erreur en infirmant la conclusion du juge de première instance selon

harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an “administrative” character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star’s view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees’ position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files

laquelle il y avait un risque sérieux de préjudice physique. Ils font valoir que la Cour d’appel n’a pas reconnu que les tribunaux sont habilités à tirer des inférences raisonnables sur le fondement de la raison et de la logique, même en l’absence d’éléments de preuve précis du risque allégué.

[25] Les fiduciaires affirment que ces erreurs ont amené la Cour d’appel à annuler à tort les ordonnances de mise sous scellés. En réponse aux questions qui leur ont été posées à l’audience, les fiduciaires ont reconnu qu’une ordonnance de caviardage de certains documents dans le dossier ou encore une interdiction de publication pourrait contribuer à apaiser certaines de leurs préoccupations, mais ils ont maintenu qu’aucune de ces mesures ne constituait une solution de rechange raisonnable aux ordonnances de mise sous scellés dans les circonstances.

[26] Les fiduciaires font également valoir que la protection de ces intérêts l’emporte sur les effets préjudiciables des ordonnances. Ils soutiennent que la nature des procédures d’homologation successorale dans la présente affaire atténue l’importance du principe de la publicité des débats judiciaires. Étant donné qu’elle n’est ni contentieuse ni, à proprement parler, nécessaire au transfert des biens au décès, l’homologation est une procédure judiciaire de nature [TRADUCTION] « administrative », ce qui réduit la nécessité d’appliquer le principe de la publicité des débats judiciaires à l’espèce (par. 113-114).

[27] Le Toronto Star soutient pour sa part que la Cour d’appel n’a commis aucune erreur en annulant les ordonnances de mise sous scellés et que l’appel devrait être rejeté. Selon le Toronto Star, bien que la vie privée puisse constituer un intérêt important quand elle révèle la présence d’un élément public, les fiduciaires ont seulement fait état d’un désir subjectif de la part des personnes touchées en l’espèce d’éviter toute publicité supplémentaire, laquelle n’est pas préjudiciable en soi. De l’avis du Toronto Star et de certains des intervenants, la position des fiduciaires reviendrait à permettre à cette part d’inconvénients et d’embarras propre à toute instance judiciaire à avoir préséance sur l’intérêt dans la publicité des débats judiciaires, un principe qui est garanti par la *Charte canadienne des droits et libertés* et dans

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

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

#### V. Analysis

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

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

lequel toute la société a un intérêt. Le Toronto Star soutient également que les renseignements contenus dans les dossiers judiciaires ne sont pas de nature très sensible. En ce qui a trait à la question de savoir si les ordonnances de mise sous scellés étaient nécessaires pour protéger les personnes touchées d'un préjudice physique, le Toronto Star fait valoir que la Cour d'appel a eu raison de conclure que les fiduciaires n'avaient pas établi l'existence d'un risque sérieux pour cet intérêt.

[28] Subsidièrement, le Toronto Star affirme que, même s'il existe un risque sérieux pour un intérêt important quelconque, les ordonnances de mise sous scellés ne sont pas nécessaires, car le risque pourrait être écarté par une autre ordonnance moins sévère. De plus, il soutient que les ordonnances ne sont pas proportionnées. En cherchant à minimiser l'importance de la publicité des débats judiciaires dans les procédures d'homologation, les fiduciaires invitent à adopter, à l'égard de la pondération des effets de l'ordonnance, une approche inflexible, incompatible avec le principe de la publicité qui s'applique à toutes les procédures judiciaires. Quoiqu'il en soit, il existe précisément un intérêt public à l'égard de la publicité des débats dans la présente affaire, étant donné que les certificats demandés peuvent avoir une incidence sur les droits de tiers et que la publicité des débats garantit l'équité des procédures, qu'elles soient contestées ou non.

#### V. Analyse

[29] L'issue du pourvoi dépend de la question de savoir si le juge de première instance aurait dû rendre les ordonnances de mise sous scellés conformément au test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires, test établi par notre Cour dans l'arrêt *Sierra Club*.

[30] La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de notre démocratie (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23-26). On dit souvent de la liberté de la presse de rendre compte

principle of open justice. “In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so” (*Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court’s jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra*

des procédures judiciaires qu’elle est indissociable du principe de publicité. [TRADUCTION] « En rendant compte de ce qui a été dit et fait dans un procès public, les médias sont les yeux et les oreilles d’un public plus large qui aurait parfaitement le droit d’y assister, mais qui, pour des raisons purement pratiques, ne peut le faire » (*Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, par. 16, citant *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339-1340, le juge Cory). Le pouvoir d’imposer des limites à la publicité des débats judiciaires afin de servir d’autres intérêts publics est reconnu, mais il doit être exercé avec modération et en veillant toujours à maintenir la forte présomption selon laquelle la justice doit être rendue au vu et au su du public (*Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, par. 32-39; *Sierra Club*, par. 56). Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir cette présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger ces autres intérêts publics lorsqu’ils entrent en jeu (*Mentuck*, par. 33). Les parties conviennent qu’il s’agit du cadre d’analyse approprié à appliquer pour trancher le présent pourvoi.

[31] Les parties et les tribunaux d’instance inférieure ne s’entendent pas, cependant, sur la façon dont ce test s’applique aux faits de la présente affaire et cela nécessite des éclaircissements sur certains points de l’analyse établie dans l’arrêt *Sierra Club*. Plus fondamentalement, il y a désaccord sur la façon dont un intérêt important à la protection de la vie privée pourrait être reconnu de telle sorte qu’il justifierait des limites à la publicité des débats, et en particulier lorsque la vie privée peut constituer une question d’intérêt public. Les parties font valoir deux principes établis dans la jurisprudence de la Cour à l’appui de leur position respective. Tout d’abord, notre Cour a souvent fait observer que la vie privée est une valeur fondamentale nécessaire au maintien d’une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest (dissident, mais non sur ce point); *Nouveau-Brunswick*, par. 40).

*Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this

Dans certains cas, les tribunaux ont invoqué la vie privée pour justifier l'application d'une exception à la publicité des débats judiciaires conformément au test établi dans *Sierra Club* (voir, p. ex., *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, par. 11 et 17). En même temps, la jurisprudence reconnaît qu'un certain degré d'atteinte à la vie privée — qui entraîne des inconvénients, voire de la contrariété ou de l'embarras — est inhérent à toute instance judiciaire accessible au public (*Nouveau-Brunswick*, par. 40). Par conséquent, le maintien de la présomption de la publicité des débats judiciaires signifie reconnaître que ni la susceptibilité individuelle ni le simple désagrément personnel découlant de la participation à des procédures judiciaires ne sont susceptibles de justifier l'exclusion du public des tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 185; *Nouveau-Brunswick*, par. 41). Déterminer le rôle de la vie privée dans le cadre de l'analyse prévue dans l'arrêt *Sierra Club* exige de concilier ces deux idées, et c'est là le nœud du désaccord entre les parties. Le droit à vie privée n'est pas absolu et le principe de la publicité des débats judiciaires n'est pas sans exception.

[32] Pour les motifs qui suivent, je ne suis pas d'accord avec les fiduciaires pour dire que l'intérêt en matière de vie privée apparemment illimité qu'ils invoquent constitue un intérêt public important au sens de *Sierra Club*. Leur revendication large n'est pas axée sur les éléments de la vie privée qui méritent une protection publique dans le contexte de la publicité des débats judiciaires. Cela ne veut pas dire, cependant, que la protection de la vie privée ne peut jamais justifier une mesure exceptionnelle comme les ordonnances de mise sous scellés sollicitées en l'espèce. Bien que le simple embarras causé par la diffusion de renseignements personnels dans le cadre d'une procédure judiciaire publique ne suffise pas à justifier une limite à la publicité des débats judiciaires, il existe des circonstances où un aspect de la vie privée d'une personne revêt une dimension d'intérêt public manifeste.

[33] La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne.

affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

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

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

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

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

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

qu’il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l’application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l’on puisse dire qu’ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu’il existe un risque sérieux d’atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n’est pas rendue.

[36] En l’espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu’on pourrait dire qu’ils touchent à l’identité fondamentale des personnes concernées; les fiduciaires n’ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l’atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l’exige *Sierra Club*. De plus, comme je tenterai de l’expliquer, il n’y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n’est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l’accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l’admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d’avis de rejeter le pourvoi.

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

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l’étape de la nécessité et celle de la proportionnalité de l’ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

- (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;
- (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et
- (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte (Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

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

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

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

public à l’égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l’arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] “l’une des caractéristiques d’une société démocratique” » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l’administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d’analyse par analogie avec le test de l’arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d’une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s’est élargie au fil du temps. Dans l’arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d’un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s’exprimant encore une fois au nom de la Cour à l’unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d’un litige » (par. 53). Il a en

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

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

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

même temps précisé que l’intérêt important doit être exprimé en tant qu’intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n’aurait pas été suffisant, mais « l’intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l’égard de la jurisprudence relative à l’arrêt *Oakes*, laquelle met l’accent sur l’objectif « urgen[t] et rée[l] » d’un texte de loi d’application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L’expression « intérêt important » vise donc un large éventail d’objectifs d’intérêt public.

[42] Bien qu’il n’y ait aucune liste exhaustive des intérêts publics importants pour l’application de ce test, je partage l’opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l’importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu’ils constatent les intérêts publics importants (par. 56). Déterminer ce qu’est un intérêt public important peut se faire dans l’abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d’une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d’une part, un intérêt important et celui de constater, d’autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu’un intérêt public important valide n’est pas sérieusement menacé au vu des faits de l’affaire ou, à l’inverse, parce que les intérêts constatés, qu’ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] Le test énoncé dans *Sierra Club* continue d’être un guide approprié en ce qui a trait à l’exercice du pouvoir discrétionnaire des tribunaux dans des

“important interest” transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court’s authority. The court’s decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of

affaires comme en l’espèce. L’étendue de la catégorie d’« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l’atteinte aux valeurs fondamentales de notre société qu’une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4<sup>e</sup> éd. 2020), par. 3.185; J. Bailey et J. Burkell, « Revisiting the Open Court Principle in an Era of Online Publication : Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information » (2016), 48 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l’obligation de démontrer l’existence d’un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S’ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l’imposition d’une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d’analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s’applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l’homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n’a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l’imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l’écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

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

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

#### B. *The Public Importance of Privacy*

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

à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d’homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L’obtention d’un certificat de nomination à titre de fiduciaire d’une succession en Ontario est une procédure judiciaire, et la raison d’être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l’administration de la justice par la transparence — s’applique aux procédures d’homologation et donc au transfert de biens sous l’autorité d’un tribunal ainsi qu’à d’autres questions touchées par ce recours judiciaire.

[45] Il est vrai que d’autres mécanismes de planification successorale non assujettis à une procédure d’homologation peuvent permettre que le transfert du patrimoine soit effectué en dehors des voies ordinaires de la succession testamentaire ou *ab intestat* — c’est le cas, par exemple, de certaines assurances et prestations de retraite, et de certains biens détenus en copropriété. Cependant, cela ne change rien au caractère nécessairement public des procédures d’homologation. Le fait que les transferts non assujettis à une procédure d’homologation soustraient aux regards du public certains renseignements se rapportant à l’administration d’une succession ne signifie pas que les fiduciaires en l’espèce, en demandant au tribunal de leur délivrer des certificats, ne font pas d’une façon ou d’une autre intervenir ce principe. Les fiduciaires sollicitent les avantages qui découlent de la procédure judiciaire publique d’homologation : la transparence garantit que le tribunal successoral exerce son pouvoir de manière équitable et efficace (*Vancouver Sun*, par. 25; *Nouveau-Brunswick*, par. 22). La forte présomption en faveur de la publicité des débats judiciaires s’applique manifestement aux procédures d’homologation et les fiduciaires doivent satisfaire au test des limites discrétionnaires à cette publicité.

#### B. *L’importance pour le public de la protection de la vie privée*

[46] Comme il a été mentionné précédemment, je ne suis pas d’accord avec les fiduciaires pour dire qu’un intérêt illimité en matière de vie privée constitue un intérêt public important au sens du test des

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

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

limites discrétionnaires à la publicité des débats judiciaires. Pourtant, dans certaines de ses manifestations, la vie privée revêt une importance sociale allant au-delà de la personne la plus immédiatement touchée. Sur ce fondement, elle ne peut être exclue en tant qu’intérêt qui pourrait justifier, dans les circonstances appropriées, une limite à la publicité des débats judiciaires. En fait, la Cour a dans divers contextes reconnu l’importance pour le public de la vie privée, ce qui permet de mieux comprendre pourquoi l’aspect plus restreint de la vie privée lié à la protection de la dignité constitue un intérêt public important.

[47] Soit dit en tout respect, je ne puis souscrire à la manière dont la Cour d’appel a statué sur l’alégation des fiduciaires selon laquelle il existe un risque sérieux pour l’intérêt à la protection de la vie privée personnelle dans la présente affaire. Pour les juges d’appel, les préoccupations en matière de vie privée soulevées par les fiduciaires équivalent à des [TRADUCTION] « [p]réoccupations personnelles » qui ne peuvent, « à elles seules », satisfaire à l’exigence énoncée dans *Sierra Club* voulant qu’un intérêt important soit exprimé en tant qu’intérêt public (par. 10). Au paragraphe 10 de ses motifs dans l’affaire qui nous occupe, la Cour d’appel s’est appuyée sur l’arrêt *H. (M.E.) c. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, où il a été conclu que [TRADUCTION] « [d]es intérêts purement personnels ne peuvent justifier des ordonnances de non-publication ou de mise sous scellés » (par. 25). Citant les arrêts *MacIntyre* et *Sierra Club* de notre Cour comme des décisions faisant autorité à cet égard, la cour a poursuivi en soulignant que « les préoccupations personnelles d’une partie, y compris les préoccupations relatives à la détresse émotionnelle et à l’embarras bien réels que peuvent subir les parties quand la justice est rendue en public, ne satisferont pas à elle seules au volet nécessité du test » (par. 25). En toute déférence, j’estime que la Cour d’appel a eu tort de mettre l’accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l’exigence de la nécessité dans la présente affaire et dans *Williams*. Les préoccupations personnelles qui s’attachent à des aspects de la vie privée de la personne qui comparaît devant les tribunaux peuvent coïncider avec un intérêt public à la confidentialité.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the “sensibilities of the individuals involved” (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions “personal concerns”. Certain personal concerns — even “without more” — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a “public interest in confidentiality” that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face “a substantial risk of serious debilitating emotional . . . harm”, an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a “public interest in confidentiality” is therefore not whether the interest reflects or is rooted in “personal concerns” for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual’s privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on

[48] À l’instar de la Cour d’appel, je souscris à l’opinion exprimée en particulier dans *MacIntyre*, une affaire antérieure à la *Charte*, selon laquelle lorsque la publicité des débats judiciaires entraîne une atteinte à la vie privée qui perturbe « la susceptibilité des personnes en cause » (p. 185), cette préoccupation est généralement insuffisante pour justifier une ordonnance de mise sous scellés ou une ordonnance semblable et ne constitue pas un intérêt public important suivant l’arrêt *Sierra Club*. Cependant, je ne suis pas d’accord avec la Cour d’appel dans la présente affaire et dans *Williams* pour dire que c’est parce que l’atteinte n’occasionne que des [TRADUCTION] « préoccupations personnelles ». Certaines préoccupations personnelles — même « à elles seules » — peuvent coïncider avec des intérêts publics importants au sens de *Sierra Club*. Pour reprendre l’expression du juge Binnie dans *F.N. (Re)*, 2000 CSC 35, [2000] 1 R.C.S. 880, par. 10, il y a un « droit du public à la confidentialité » qui touche, d’abord et avant tout, la personne concernée et qui est très certainement une préoccupation personnelle. Même dans *Williams*, la Cour d’appel a pris soin de souligner que lorsque, sans protection de la vie privée, une personne serait exposée à [TRADUCTION] « un risque important de préjudice émotionnel [. . .] débilisant », une exception à la publicité des débats devrait être permise (par. 29-30). Pour savoir si un intérêt en matière de vie privée reflète un « droit du public à la confidentialité », il ne s’agit donc pas de se demander si l’intérêt est le reflet ou tire sa source de « préoccupations personnelles » relatives à la vie privée des personnes concernées. Il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public en matière de confidentialité. Ces intérêts relatifs à la vie privée peuvent, à mon avis, être des intérêts publics importants au sens de *Sierra Club*. Il est vrai que la vie privée d’une personne est d’une importance primordiale pour celle-ci. Cependant, notre Cour reconnaît depuis longtemps que la protection de la vie privée est, dans divers contextes, dans l’intérêt de la société dans son ensemble.

[49] La proposition selon laquelle la vie privée est importante, non seulement pour la personne touchée, mais également pour notre société, est profondément enracinée dans la jurisprudence de la Cour en dehors

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

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

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 (“*UFCW*”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as “intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values” (para. 24). The importance of privacy, its “quasi-constitutional status” and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59).

du contexte du test des limites discrétionnaires à la publicité des débats judiciaires. Cela aide à expliquer pourquoi la vie privée ne saurait être rejetée en tant que simple préoccupation personnelle. Cependant, les différences clés dans ces contextes sont telles que l’importance pour le public de la vie privée ne saurait être transposée sans adaptation dans le contexte de la publicité des débats judiciaires. Seuls certains aspects particuliers des intérêts en matière de vie privée peuvent constituer des intérêts publics importants suivant l’arrêt *Sierra Club*.

[50] Dans le contexte de l’art. 8 de la *Charte* et des mesures législatives sur la protection de la vie privée dans le secteur public, le juge La Forest a cité un universitaire américain spécialiste de la vie privée, Alan F. Westin, à l’appui de la thèse selon laquelle la vie privée est une valeur fondamentale de l’État moderne; il l’a fait d’abord dans *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428 (motifs concordants), puis dans *Dagg*, par. 65 (dissident, mais non sur ce point). Dans ce dernier arrêt, le juge La Forest a écrit : « La protection de la vie privée est une valeur fondamentale des États démocratiques modernes. Étant l’expression de la personnalité ou de l’identité unique d’une personne, la notion de vie privée repose sur l’autonomie physique et morale — la liberté de chacun de penser, d’agir et de décider pour lui-même » (par. 65 (références omises)). Notre Cour a entériné à l’unanimité cette déclaration dans *Lavigne*, par. 25.

[51] De plus, dans l’arrêt *Alberta (Information and Privacy Commissioner) c. Travailleuses et travailleuses unis de l’alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733 (« *TTUAC* »), qui a été jugé dans le contexte d’une loi régissant l’utilisation de renseignements par des organisations, il a été reconnu que l’objectif de fournir à une personne un certain droit de regard sur les renseignements la concernant était « intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l’importance va de soi » (par. 24). L’importance de la vie privée, son « caractère quasi constitutionnel » et son rôle dans la protection de l’autonomie morale continuent de trouver écho dans notre jurisprudence récente (voir, p. ex., *Lavigne*, par. 24; *Bragg*, par. 18, la juge Abella, citant *Toronto Star Newspaper Ltd. c. R.*,

In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that “the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests” (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).<sup>3</sup> Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which “the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process” was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012), 75 *Mod. L. Rev.* 806, at p. 823; P. Gewirtz, “Privacy and Speech” (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean,

<sup>3</sup> At the time of writing the House of Commons is considering a bill that would replace part one of PIPEDA: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

2012 ONCJ 27, 289 C.C.C. (3d) 549, par. 40-41 et 44; *Douez c. Facebook, Inc.*, 2017 CSC 33, [2017] 1 R.C.S. 751, par. 59). Dans l’arrêt *Douez*, les juges Karakatsanis, Wagner (maintenant juge en chef) et Gascon ont insisté sur le même point, ajoutant que « la croissance d’Internet — un réseau quasi atemporel au rayonnement infini — a exacerbé le préjudice susceptible d’être infligé à une personne par une atteinte à son droit à la vie privée » (par. 59).

[52] La protection de la vie privée en tant qu’intérêt public est mise en évidence par des aspects particuliers de cette protection présents dans les lois fédérales et provinciales (voir, p. ex., *Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21; *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5 (« LPRPDE »); *Loi sur l’accès à l’information et la protection de la vie privée*, L.R.O. 1990, c. F.31; *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 5; *Code civil du Québec*, art. 35 à 41)<sup>3</sup>. En outre, en examinant la constitutionnalité d’une exception législative au principe de la publicité des débats judiciaires, notre Cour a reconnu que la protection de la vie privée de la personne pouvait constituer un objectif urgent et réel (*Edmonton Journal*, p. 1345, le juge Cory; voir également les motifs concordants de la juge Wilson, à la p. 1354, dans lesquels a explicitement été souligné « l’intérêt public à la protection de la vie privée de l’ensemble des parties aux affaires matrimoniales par rapport à l’intérêt public à la publicité du processus judiciaire »). L’importance sociale et publique de la vie privée de la personne trouve également un appui continu dans la doctrine (voir, p. ex., A. J. Cockfield, « Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies » (2007), 40 *U.B.C. L. Rev.* 41, p. 41; K. Hughes, « A Behavioural Understanding of Privacy and its Implications for Privacy Law » (2012), 75 *Mod. L. Rev.* 806, p. 823; P. Gewirtz,

<sup>3</sup> Au moment de la rédaction des présents motifs, la Chambre des communes étudiait un projet de loi destiné à remplacer la première partie de la LPRPDE : le projet de loi C-11, *Loi édictant la Loi sur la protection de la vie privée des consommateurs et la Loi sur le Tribunal de la protection des renseignements personnels et des données et apportant des modifications corrélatives et connexes à d’autres lois*, 2<sup>e</sup> sess., 43<sup>e</sup> lég., 2020.

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

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

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

« Privacy and Speech », [2001] *Sup. Ct. Rev.* 139, p. 139). Il est donc inapproprié, en toute déférence, de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. Cela ne signifie pas, cependant, que la vie privée est, de façon générale, un intérêt public important dans le contexte de l'imposition de limites à la publicité des débats judiciaires.

[53] Le fait que l'affaire dont était saisi le juge de première instance concernait des personnes défendant leurs propres intérêts en matière de vie privée, intérêts qui étaient indéniablement importants pour elles en tant qu'individus, ne signifie pas qu'il n'y a aucun intérêt public en jeu. Dans *F.N. (Re)*, il était question de l'intérêt personnel que les jeunes contrevenants avaient à garder l'anonymat dans les procédures judiciaires afin de favoriser leur réadaptation personnelle (par. 11). Selon le juge Binnie, la société dans son ensemble avait un intérêt dans les perspectives personnelles de réadaptation de l'adolescent visé. Cette même idée exposée dans *F.N. (Re)* a été citée à l'appui de la conclusion selon laquelle l'intérêt en cause dans *Sierra Club* était un intérêt public. Cet intérêt, qui prenait tout d'abord sa source dans une entente touchant personnellement les parties contractantes concernées, était une question de nature privée qui, en plus de son intérêt personnel pour les parties, faisait état d'un « intérêt public à la confidentialité » (*Sierra Club*, par. 55). De même, si les fiduciaires ont un intérêt personnel à protéger leur vie privée, cela ne signifie pas que le public n'a pas un intérêt à cet égard, car — comme l'a clairement souligné la Cour —, cet intérêt est lié à l'autonomie morale et à la dignité, lesquelles constituent des préoccupations urgentes et réelles.

[54] Dans le présent pourvoi, le Toronto Star avance que les préoccupations légitimes en matière de vie privée seraient efficacement protégées par une ordonnance discrétionnaire dans le cas où il y aurait [TRADUCTION] « quelque chose de plus » pour les élever au-delà des préoccupations et de la susceptibilité personnelles (m.i., par. 73). Le Centre d'action pour la sécurité du revenu, par exemple, soutient que la protection de la vie privée sert les intérêts du public qui consistent à prévenir les préjudices et à faire en sorte que les particuliers ne soient pas

privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

dissuadés de recourir aux tribunaux. Je reconnais que ces notions sont liées, mais il faut, à mon avis, prendre soin de ne pas confondre l'importance pour le public de la vie privée avec l'importance pour le public d'autres intérêts; des aspects de la vie privée, comme la dignité, peuvent constituer des intérêts publics importants en soi. Un risque pour la vie privée personnelle peut être lié à un risque de préjudice psychologique, comme c'était le cas dans l'affaire *Bragg* (par. 14; voir également J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 2.4.1). Cependant, il se peut que les préoccupations relatives à la vie privée ne coïncident pas toujours avec le désir d'éviter un préjudice psychologique et soient plutôt axées, par exemple, sur la protection de la réputation professionnelle d'une personne (voir, p. ex., *R. c. Paterson* (1998), 102 B.C.A.C. 200, par. 76, 78 et 87-88). De même, il peut y avoir des circonstances où la perspective de devoir communiquer les renseignements personnels nécessaires à la poursuite d'une action en justice peut dissuader une personne d'intenter cette action (voir *S. c. Lamontagne*, 2020 QCCA 663, par. 34-35 (CanLII)). De la même manière, la perspective de devoir communiquer des renseignements commerciaux sensibles aurait nui à la conduite de la défense d'une partie dans *Sierra Club* (par. 71), ou pourrait inciter une personne à régler un litige prématurément (K. Eltis, *Courts, Litigants, and the Digital Age* (2<sup>e</sup> éd. 2016), p. 86). Cependant, cela ne signifie pas nécessairement qu'un intérêt public en matière de vie privée est entièrement subsumé dans de telles préoccupations. Je tiens à souligner, par exemple, que les préoccupations relatives à l'accès à la justice ne s'appliquent pas lorsque l'intérêt à protéger en matière de vie privée est celui d'un tiers au litige, comme un témoin, dont l'accès aux tribunaux n'est pas en cause et à qui il n'est pas loisible de mettre fin au litige et d'éviter toute incidence sur sa vie privée (voir, p. ex., *Himel c. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, par. 58; voir également Rossiter, section 2.4.2(2)). En tout état de cause, la reconnaissance de ces importants intérêts publics connexes et valides ne permet pas de savoir si certains aspects de la vie privée constituent en eux-mêmes des intérêts publics importants et ne diminue en rien le caractère public distinctif de la vie privée, examiné précédemment.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that “[i]f we are serious about peoples’ private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way” (“Courts, Transparency and Public Confidence – To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy

[55] En fait, les atteintes particulières à la vie privée ayant été occasionnées par la publicité des débats judiciaires ne sont pas passées inaperçues et n’ont pas non plus été écartées au motif qu’il s’agissait de simples préoccupations personnelles. Les tribunaux ont exercé leur pouvoir discrétionnaire de limiter la publicité des débats judiciaires afin de protéger les renseignements personnels de la publicité, y compris pour empêcher que soient divulgués l’orientation sexuelle d’une personne (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), sa séropositivité (voir, p. ex., *A.B. c. Canada (Citoyenneté et Immigration)*, 2017 CF 629, par. 9 (CanLII)), et ses antécédents de toxicomanie et de criminalité (voir, p. ex., *R. c. Pickton*, 2010 BCSC 1198, par. 11 et 20 (CanLII)). Notre Cour a souligné cette nécessité de concilier l’intérêt du public à l’égard de la vie privée et le principe de la publicité des débats judiciaires (voir, p. ex., *Edmonton Journal*, p. 1353, la juge Wilson). Dans un article de doctrine, la juge en chef McLachlin a expliqué que [TRADUCTION] « [s]i nous nous préoccupons sérieusement de la vie intime des gens, nous devons protéger un minimum de vie privée. De même, si nous nous préoccupons sérieusement de notre système judiciaire, les débats judiciaires doivent être publics. La question est de savoir comment concilier ces deux impératifs d’une manière qui soit équitable et raisonnée » (« Courts, Transparency and Public Confidence – To the Better Administration of Justice » (2003), 8 *Deakin L. Rev.* 1, p. 4). En cherchant à concilier ces deux impératifs, il faut alors se demander si la dimension de la vie privée en cause constitue un intérêt public important qui, lorsqu’il est sérieusement menacé, justifierait de réfuter la forte présomption en faveur de la publicité des débats judiciaires.

C. *L’intérêt public important en matière de vie privée se rapporte à la protection de la dignité de la personne*

[56] Bien que l’importance pour le public de la protection de la vie privée ait clairement été reconnue par la Cour dans divers contextes, la prudence est de mise lorsqu’il s’agit d’utiliser cette notion dans le cadre du test des limites discrétionnaires à la publicité des débats judiciaires. Il est bien établi en droit que les procédures judiciaires publiques, de par leur

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

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

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For

nature, peuvent être une source de désagrément et d’embarras, et l’on considère généralement que ces atteintes à la vie privée ne sont pas suffisamment importantes pour réfuter la présomption de publicité des débats. Le Toronto Star a exprimé la crainte que la reconnaissance de la vie privée en tant qu’intérêt public important n’allège le fardeau de preuve incombant aux demandeurs, car la vie privée des parties à un litige sera, à certains égards, toujours menacée dans les procédures judiciaires. Je conviens que l’exigence de démontrer l’existence d’un risque sérieux pour un intérêt important est un élément préliminaire clé de l’analyse qui doit être maintenu afin de protéger le principe de la publicité des débats judiciaires. La reconnaissance d’un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité si la vie privée est définie trop largement sans tenir compte de son caractère public.

[57] La vie privée pose des défis dans l’application du test des limites discrétionnaires à la publicité des débats judiciaires en raison de la diffusion nécessaire de renseignements que supposent des procédures publiques. Il convient de rappeler que lorsqu’il a écrit, dans l’arrêt *MacIntyre*, que « le secret est l’exception et que la publicité est la règle », le juge Dickson, plus tard juge en chef, examinait explicitement un argument relatif à la vie privée en revenant sur un point de vue préconisé maintes fois auparavant devant les tribunaux selon lequel « le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos » (p. 185 (je souligne)), et en rejetant celui-ci. Le juge Dickson a rejeté l’opinion selon laquelle les préoccupations personnelles en matière de vie privée exigent des audiences à huis clos, expliquant qu’« [e]n règle générale, la susceptibilité des personnes en cause ne justifie pas qu’on exclut le public des procédures judiciaires » (*ibid.*).

[58] Bien qu’il ait rendu sa décision avant le prononcé de l’arrêt *Dagenais* et qu’il ne commente donc pas les étapes précises de l’analyse telles que nous les comprenons aujourd’hui, j’estime que le juge Dickson a, à juste titre, reconnu que le principe de la publicité des débats judiciaires apporte des limites nécessaires au droit à la vie privée. Quoique les particuliers puissent s’attendre à ce que les renseignements qui les concernent ne soient pas révélés

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

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

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

dans le cadre de procédures judiciaires, le principe de la publicité des débats judiciaires s’oppose par présomption à cette attente. Par exemple, dans l’arrêt *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, le juge LeBel a conclu que la « partie qui engage un débat judiciaire renonce, à tout le moins en partie, à la protection de sa vie privée » (par. 42). L’arrêt *MacIntyre* et les jugements similaires reconnaissent — en affirmant que la publicité est la règle et le secret, l’exception — que le droit à la vie privée, quelle qu’en soit la définition, cède le pas, dans une certaine mesure, à l’idéal de la publicité des débats judiciaires. Je partage le point de vue selon lequel le principe de la publicité des débats suppose que cette limite au droit à la vie privée est justifiée.

[59] Le *Toronto Star* a donc raison d’affirmer que la vie privée des personnes sera très souvent en quelque sorte menacée dans les procédures judiciaires. Les litiges entre et concernant des particuliers qui se déroulent dans le cadre de débats judiciaires publics révèlent nécessairement des renseignements qui pourraient autrement être restés à l’abri des regards du public. En fait, tout comme la Cour d’appel en l’espèce, les tribunaux ont explicitement fait mention de cette préoccupation lorsqu’ils ont conclu que de simples inconvénients ne suffisaient pas à franchir le seuil initial du test (voir, p. ex., *3834310 Canada inc. c. Chamberland*, 2004 CanLII 4122 (C.A. Qc), par. 30). Affirmer que toute incidence sur la vie privée d’une personne suffit à établir un risque sérieux pour un intérêt public important pour l’application du test des limites discrétionnaires à la publicité des débats judiciaires pourrait rendre cette exigence préliminaire théorique. Le sort de nombreuses causes dépendrait de la pondération à l’étape de la proportionnalité. Une telle évolution reviendrait à déroger à l’arrêt *Sierra Club*, qui constitue le cadre approprié à appliquer, lequel doit être maintenu.

[60] De plus, la reconnaissance d’un intérêt important à l’égard de la notion générale de vie privée pourrait s’avérer trop indéterminée et difficile à appliquer. La vie privée est une notion complexe et contextuelle (*Dagg*, par. 67; voir également B. McIsaac, K. Klein et S. Brown, *The Law of Privacy in Canada* (feuilles mobiles), vol. 1, p. 1-4; D. J.

*Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of “theoretical disarray” (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the *Toronto Star* that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy’s complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such

Solove, « Conceptualizing Privacy » (2002), 90 *Cal. L. Rev.* 1087, p. 1090). En fait, notre Cour a décrit la nature des limites à la vie privée comme étant dans un état de « confusion [. . .] sur le plan théorique » (*R. c. Spencer*, 2014 CSC 43, [2014] 2 R.C.S. 212, par. 35). Cela dépend en grande partie du contexte dans lequel la vie privée est invoquée. Je suis d’accord avec le *Toronto Star* pour dire que la reconnaissance de la vie privée, sans nuances, comme un intérêt important dans le contexte du test des limites discrétionnaires à la publicité des débats judiciaires, ainsi que le revendiquent les fiduciaires en l’espèce, susciterait énormément de confusion. Il serait difficile pour les tribunaux de mesurer un risque sérieux pour un tel intérêt, en raison de ses multiples facettes.

[61] Bien que je reconnaisse la validité de ces préoccupations, je ne suis pas d’accord pour dire qu’elles exigent que la vie privée ne soit jamais prise en considération lorsqu’il s’agit de décider s’il existe un risque sérieux pour un intérêt public important. J’arrive à cette conclusion pour deux raisons. Premièrement, il est possible d’atténuer le problème de la complexité de la vie privée en se concentrant sur l’objectif qui sous-tend la protection publique de la vie privée, lequel est pertinent dans le cadre du processus judiciaire, de manière à s’en tenir précisément à l’aspect qui transcende les intérêts des parties dans ce contexte. Cette dimension plus restreinte de la vie privée est la protection de la dignité, un intérêt public important qui peut être menacé par la publicité des débats judiciaires. D’ailleurs, plutôt que d’essayer d’appliquer une notion unique et complexe de la vie privée à tous les contextes, notre Cour s’est généralement arrêtée sur des intérêts plus précis en matière de vie privée adaptés à la situation particulière en cause (*Spencer*, par. 35; *Edmonton Journal*, p. 1362, la juge Wilson). C’est ce qu’il faut faire en l’espèce, en vue de cerner l’aspect public de la vie privée que la publicité des débats risque de miner indûment.

[62] Deuxièmement, je rappelle que, pour franchir la première étape de l’analyse, il ne suffit pas d’invoquer un intérêt important, mais il faut aussi réfuter la présomption de publicité des débats en démontrant l’existence d’un risque sérieux pour cet intérêt. Le

an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] “[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties’ privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban” (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

fardeau d’établir l’existence d’un risque pour un tel intérêt au vu des faits d’une affaire donnée constitue le véritable seuil initial à franchir pour la personne cherchant à restreindre la publicité. Il n’est jamais suffisant d’alléguer la seule existence d’un intérêt public important reconnu. Démontrer l’existence d’un risque sérieux pour cet intérêt demeure toujours nécessaire. Ce qui importe, c’est que l’intérêt soit précisément défini de manière à ce qu’il n’englobe que les aspects de la vie privée qui font entrer en jeu des objectifs publics légitimes, de sorte que le seuil à franchir pour établir l’existence d’un risque sérieux pour cet intérêt demeure élevé. De cette manière, les tribunaux peuvent efficacement maintenir la garantie de la présomption de publicité des débats.

[63] Plus particulièrement, pour maintenir l’intégrité du principe de la publicité des débats judiciaires, un intérêt public important à l’égard de la protection de la dignité devrait être considéré sérieusement menacé seulement dans des cas limités. Rien en l’espèce n’écarter le principe selon lequel le secret en matière de procédures judiciaires doit être exceptionnel. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte au principe de la publicité des débats judiciaires (*MacIntyre*, p. 185; *Nouveau-Brunswick*, par. 40; *Williams*, par. 30; *Coltsfoot Publishing Ltd. c. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, par. 97). Ces principes n’empêchent pas de reconnaître l’importance du caractère public d’un intérêt en matière de vie privée quand celui-ci est lié à la protection de la dignité. Ils obligent simplement à faire la preuve de l’existence d’un risque sérieux pour cet intérêt de manière à justifier, à titre exceptionnel, une restriction à la publicité des débats, comme c’est le cas pour tout intérêt public important au regard de l’arrêt *Sierra Club*. Comme l’expliquent les professeurs Sylvette Guillemard et Séverine Menétrey, « [l]a confidentialité des débats peut se justifier notamment pour protéger la vie privée des parties [. . .] La jurisprudence affirme cependant que l’embarras ou la honte ne sont pas des motifs suffisants pour ordonner le huis clos ou la non-publication » (*Comprendre la procédure civile québécoise* (2<sup>e</sup> éd. 2017), p. 57).

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

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

[64] Comment devrait-on considérer que l'intérêt en matière de vie privée en cause soulève un intérêt public important qui est pertinent pour les besoins du test des limites discrétionnaires à la publicité des débats judiciaires dans le présent contexte? Il est utile de rappeler que les ordonnances rendues en première instance avaient été demandées pour limiter l'accès aux documents et aux renseignements figurant dans les dossiers judiciaires. L'argument des fiduciaires sur ce point était directement axé sur le risque de diffusion immédiate et à grande échelle, par le *Toronto Star*, de renseignements permettant d'identifier des personnes ainsi que d'autres renseignements sensibles contenus dans les documents placés sous scellés. Les fiduciaires soutiennent que cette diffusion constituerait une atteinte injustifiée à la vie privée des personnes touchées, qui s'ajouterait à la contrariété qu'elles ont déjà subie en raison de la publicité ayant entouré le décès des Sherman.

[65] À mon avis, il est bon de laisser les personnes libres de fixer des limites quant à savoir à quel moment les renseignements très sensibles les concernant seront communiqués à d'autres personnes dans la sphère publique, et de quelle manière et dans quelle mesure ils le seront. En effet, en choisissant la manière dont on se présente en public, on protège son autonomie morale et sa dignité en tant que personne. La Cour a eu l'occasion de faire ressortir le lien entre l'intérêt en matière de vie privée mis en jeu par la tenue de procédures judiciaires publiques et la protection de la dignité plus particulièrement. Par exemple, dans l'arrêt *Edmonton Journal*, la juge Wilson a souligné que la disposition contestée, qui devait avoir pour effet de limiter la publication de détails sur des procédures matrimoniales, portait sur « un aspect un peu différent de la vie privée, un aspect qui se rapproche davantage de la protection de la dignité personnelle [. . .], c'est-à-dire l'angoisse et la perte de dignité personnelle qui peuvent résulter de la publication dans les journaux de détails gênants de la vie privée d'une personne » (p. 1363-1364). Citons comme autre exemple l'affaire *Bragg*, dans laquelle la protection de la capacité des jeunes à contrôler des renseignements sensibles avait été considérée comme favorisant le respect [TRADUCTION] « de leur dignité, de leur intégrité personnelle et de leur autonomie » (par. 18, citant *Toronto Star Newspaper Ltd.*, par. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 (“C.C.P.”), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 C.C.P., a discretionary exception to the open court principle can be made by the court if “public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests”, requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the “important public interest” that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff’d [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 C.C.P., the interest must be understood as defined [TRANSLATION] “in terms of a public interest in confidentiality” (see 3834310 *Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 C.C.P. alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 C.C.P. — [TRANSLATION] “what is part of one’s personal life, in short, what constitutes a minimum personal sphere” (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990

[66] Conformément à cette jurisprudence, je relève, par exemple, que le législateur québécois a expressément fait ressortir la protection de la dignité lorsque le test énoncé dans l’arrêt *Sierra Club* a été codifié dans le *Code de procédure civile*, RLRQ, c. C-25.01 (« C.p.c. »), art. 12 (voir Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 12). Selon l’art. 12 C.p.c., un tribunal peut faire exception de façon discrétionnaire au principe de la publicité si « l’ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d’intérêts légitimes importants » l’exige.

[67] La notion d’ordre public témoigne d’une souplesse analogue à la notion d’intérêt public important suivant l’arrêt *Sierra Club*; elle rappelle pourtant que l’intérêt invoqué transcende, en ce qui a trait à son importance et à ses conséquences, la susceptibilité purement subjective des personnes touchées. Tout comme l’« intérêt public important » qui doit être sérieusement menacé pour justifier des ordonnances de mise sous scellés dans le présent pourvoi, l’ordre public englobe un large éventail de principes généraux et de normes impératives qu’un législateur et les tribunaux considèrent comme fondamentaux pour une société donnée (voir *Goulet c. Cie d’Assurance-Vie Transamerica du Canada*, 2002 CSC 21, [2002] 1 R.C.S. 719, par. 42-44, citant *Godbout c. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), p. 2570, conf. par [1997] 3 R.C.S. 844). Comme l’a écrit un juge québécois en renvoyant à l’arrêt *Sierra Club* avant l’adoption de l’art. 12 C.p.c., l’intérêt doit être considéré comme étant défini « en termes d’intérêt public à la confidentialité » (voir 3834310 *Canada inc.*, par. 24, le juge Gendreau s’exprimant au nom de la Cour d’appel). Parmi les diverses considérations qui composent la notion d’ordre public et d’autres intérêts légitimes évoqués par l’art. 12 C.p.c., il est significatif que la dignité, et non une référence générale à la vie privée, au préjudice ou à l’accès à la justice, se soit vu accorder une place de choix. En effet, c’est cet aspect restreint de la vie privée considéré comme un droit fondamental que les tribunaux ont retenu avant l’adoption de l’art. 12 C.p.c. — « ce qui fait partie de la vie intime de la personne, bref ce qui constitue un

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

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

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

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

cercle personnel irréductible » (*Godbout*, p. 2569, le juge Baudouin; voir également *A. c. B.*, 1990 CanLII 3132 (C.A. Qc), par. 20, le juge Rothman).

[68] La « protection de la dignité des personnes concernées » est désormais consacrée comme l’archétype de l’intérêt d’ordre public à l’art. 12 *C.p.c.* C’est le modèle de l’intérêt public important à la confidentialité de *Sierra Club* qui sert à justifier une exception à la publicité des débats (S. Rochette et J.-F. Côté, « Article 12 », dans L. Chamberland, dir., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5<sup>e</sup> éd. 2020), vol. 1, p. 102; D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6<sup>e</sup> éd. 2020), vol. 1, par. 1-111). La dignité donne une expression concrète à cet intérêt d’ordre public parce que toute la société a intérêt à ce qu’elle soit protégée, malgré ses liens personnels avec les personnes touchées. Cette codification de la notion d’intérêt public important de *Sierra Club* souligne l’importance primordiale de la dignité humaine et la pertinence de limiter la publicité des débats judiciaires sur ce fondement au lieu de donner une interprétation trop large à la vie privée qui pourrait par ailleurs ne pas convenir au contexte de la publicité des débats.

[69] Dans le même ordre d’idée, on a fait valoir qu’il est utile de considérer que la vie privée se fonde sur la dignité dans le contexte des défis que posent les communications numériques (K. Eltis, « The Judicial System in the Digital Age : Revisiting the Relationship between Privacy and Accessibility in the Cyber Context » (2011), 56 *R.D. McGill* 289, p. 314).

[70] Il est également significatif, à mon avis, que le juge de première instance en l’espèce ait explicitement reconnu, en réponse aux arguments pertinents des fiduciaires, un intérêt à [TRADUCTION] « la protection de la vie privée et de la dignité des victimes d’actes criminels ainsi que de leurs êtres chers » (par. 23 (je souligne)). Cela montre clairement que la préoccupation centrale des personnes touchées à cet égard n’est pas simplement de protéger leur vie privée en tant que telle, mais bien de protéger leur vie privée là où elle coïncide avec le caractère public de leurs intérêts en matière de dignité.

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

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

[71] Les atteintes à la vie privée qui entraînent une perte de contrôle à l'égard de renseignements personnels fondamentaux peuvent porter préjudice à la dignité d'une personne, car elles minent sa capacité à présenter de manière sélective certains aspects de sa personne aux autres (D. Matheson, « Dignity and Selective Self-Presentation », dans I. Kerr, V. Steeves et C. Lucock, dir., *Lessons from the Identity Trail : Anonymity, Privacy and Identity in a Networked Society* (2009), 319, p. 327-328; L. M. Austin, « Re-reading Westin » (2019), 20 *Theor. Inq. L.* 53, p. 66-68; Eltis (2016), p. 13). La dignité, employée dans ce contexte, est un concept social qui consiste à présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée (voir de manière générale Matheson, p. 327-328; Austin, p. 66-68). La dignité est minée lorsque les personnes perdent le contrôle sur la possibilité de fournir des renseignements sur elles-mêmes qui touchent leur identité fondamentale, car un aspect très sensible de qui elles sont qu'elles n'ont pas décidé consciemment de communiquer est désormais accessible à autrui et risque de façonner la manière dont elles sont perçues en public. Cela a même été évoqué par le juge La Forest, dissident mais non sur ce point, dans l'arrêt *Dagg*, lorsqu'il a parlé de la notion de vie privée comme « [é]tant l'expression de la personnalité ou de l'identité unique d'une personne » (par. 65).

[72] En cas d'atteinte à la dignité, l'incidence sur la personne n'est pas théorique, mais pourrait entraîner des conséquences humaines réelles, y compris une détresse psychologique (voir de manière générale *Bragg*, par. 23). Dans l'arrêt *Dyment*, le juge La Forest a fait remarquer dans ses motifs concordants que la notion de vie privée est essentielle au bien-être d'une personne (p. 427). Vu sous cet angle, un intérêt en matière de vie privée, lorsqu'il protège les renseignements fondamentaux associés à la dignité qui est nécessaire au bien-être d'une personne, commence à ressembler beaucoup à l'intérêt relatif à la sécurité physique également soulevé en l'espèce, dont la nature importante et publique n'est pas débattue, et n'est pas non plus, selon moi, sérieusement discutable. Lorsque le fonctionnement des tribunaux menace le bien-être physique d'une

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

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

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

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

personne, l'administration de la justice en souffre, car un système judiciaire responsable est sensible aux dommages physiques qu'il inflige aux individus et s'efforce d'éviter de tels effets. De même, j'estime qu'un tribunal responsable doit être sensible et attentif aux dommages qu'il cause à d'autres éléments fondamentaux du bien-être individuel, notamment la dignité individuelle. Ce parallèle aide à comprendre que la dignité est une dimension plus limitée de la vie privée, pertinente en tant qu'intérêt public important dans le contexte de la publicité des débats judiciaires.

[73] Je suis donc d'avis que protéger les gens contre la menace à leur dignité qu'entraîne la diffusion de renseignements révélant des aspects fondamentaux de leur vie privée dans le cadre de procédures judiciaires publiques constitue un intérêt public important pour l'application du test.

[74] Insister sur la valeur sous-jacente de la vie privée lorsqu'il s'agit de protéger la dignité d'une personne de la diffusion de renseignements privés dans le cadre de débats judiciaires publics permet de surmonter les critiques selon lesquelles la vie privée sera toujours menacée dans un tel cadre et constitue une notion théoriquement complexe. La publicité des débats donne lieu à des atteintes à la vie privée personnelle dans presque tous les cas, mais la dignité en tant qu'intérêt public dans la protection de la sensibilité fondamentale d'une personne entre plus rarement en jeu. Plus précisément, et conformément à l'approche prudente servant à reconnaître des intérêts publics importants, cet intérêt en matière de vie privée, bien qu'il soit déterminé par rapport au contexte factuel plus large, ne sera sérieusement menacé que lorsque le caractère sensible des renseignements touche à l'aspect le plus intime de la personne.

[75] S'il porte essentiellement sur la protection de la dignité d'une personne, cet intérêt sera miné dans le cas de renseignements qui révèlent quelque chose de sensible sur elle en tant qu'individu, par opposition à des renseignements d'ordre général révélant peu ou rien sur ce qu'elle est en tant que personne. Par conséquent, les renseignements qui

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

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

seront révélés en raison de la publicité des débats judiciaires doivent être constitués de détails intimes ou personnels concernant une personne — ce que notre Cour a décrit, dans sa jurisprudence relative à l’art. 8 de la *Charte*, comme le cœur même des « renseignements biographiques » — pour qu’un risque sérieux pour un intérêt public important soit reconnu dans ce contexte (*R. c. Plant*, [1993] 3 R.C.S. 281, p. 293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 60; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 46). La dignité transcende les inconvénients personnels en raison de la nature très sensible des renseignements qui pourraient être révélés. Notre Cour a tracé dans l’arrêt *Cole* une ligne de démarcation similaire entre le caractère sensible des renseignements personnels et l’intérêt du public à protéger ces renseignements en ce qui a trait au cœur même des renseignements biographiques. Elle a conclu que « les Canadiens raisonnables et bien informés » seraient plus disposés à reconnaître l’existence d’un intérêt en matière de vie privée lorsque les renseignements pertinents concernent le cœur même des « renseignements biographiques » ou, « [a]utrement dit, plus les renseignements sont personnels et confidentiels » (par. 46). La présomption de publicité des débats signifie que le simple désagrément associé à des atteintes moindres à la vie privée sera généralement toléré. Cependant, il est dans l’intérêt public de veiller à ce que cette publicité n’entraîne pas indûment la diffusion de ces renseignements fondamentaux qui menacent la dignité — même s’ils sont « personnels » pour la personne touchée.

[76] Selon le test des limites discrétionnaires à la publicité des débats judiciaires, il incombe au demandeur de démontrer que l’intérêt public important est sérieusement menacé. Reconnaître que la vie privée, considérée au regard de la dignité, n’est sérieusement menacée que lorsque les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles permet d’établir un seuil compatible avec la présomption de publicité des débats. Ce seuil est tributaire des faits. Il répond à la préoccupation, mentionnée précédemment, portant que les dossiers judiciaires comportent fréquemment des renseignements personnels, mais conclure que cela suffit à franchir le

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

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

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

seuil du risque sérieux dans tous les cas mettrait en péril la structure du test. Exiger du demandeur qu'il démontre le caractère sensible des renseignements comme condition nécessaire à la conclusion d'un risque sérieux pour cet intérêt a pour effet de limiter le champ d'application de l'intérêt aux seuls cas où la justification de la non-divulgence des aspects fondamentaux de la vie privée d'une personne, à savoir la protection de la dignité individuelle, est fortement en jeu.

[77] Il n'est aucunement nécessaire en l'espèce de fournir une liste exhaustive de l'étendue des renseignements personnels sensibles qui, s'ils étaient diffusés, pourraient entraîner un risque sérieux. Qu'il suffise de dire que les tribunaux ont démontré la volonté de reconnaître le caractère sensible des renseignements liés à des problèmes de santé stigmatisés (voir, p. ex., *A.B.*, par. 9), à un travail stigmatisé (voir, p. ex., *Work Safe Twerk Safe c. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, par. 28 (CanLII)), à l'orientation sexuelle (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), et au fait d'avoir été victime d'agression sexuelle ou de harcèlement (voir, p. ex., *Fedeli c. Brown*, 2020 ONSC 994, par. 9 (CanLII)). Je prends acte également de l'observation du Centre d'action pour la sécurité du revenu, intervenant, selon laquelle des renseignements détaillés quant à la structure familiale et aux antécédents professionnels pourraient, dans certaines circonstances, constituer des renseignements sensibles. Dans chaque cas, il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

[78] Je marque ici un temps d'arrêt pour souligner que je renvoie ci-dessus aux décisions relatives à l'art. 8 de la *Charte* à seule fin de donner une idée des types de renseignements qui sont plus ou moins personnels et qui méritent donc une protection publique. Pour mesurer avec précision l'incidence de la divulgation sur la dignité, il est essentiel que l'analyse différencie ainsi les renseignements. Ce qui est utile, c'est que l'un des facteurs permettant de déterminer si l'attente subjective d'un demandeur en

on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today,

matière de vie privée est objectivement raisonnable dans la jurisprudence relative à l'art. 8 met l'accent sur la mesure dans laquelle les renseignements sont privés (voir, p. ex., *R. c. Marakah*, 2017 CSC 59, [2017] 2 R.C.S. 608, par. 31; *Cole*, par. 44-46). Cependant, bien que la consultation de ces décisions puisse être avantageuse à cette fin précise, cela ne veut pas dire que le reste de l'analyse relative à l'art. 8 est pertinent pour l'application du test des limites discrétionnaires à la publicité des débats. Par exemple, demander aux fiduciaires quelle était leur attente raisonnable en matière de vie privée en l'espèce pourrait entraîner une analyse circulaire visant à déterminer s'ils s'attendaient raisonnablement à ce que leurs dossiers judiciaires soient accessibles au public ou s'ils s'attendaient raisonnablement à réussir à obtenir leur mise sous scellés. En conséquence, la jurisprudence relative à l'art. 8 n'est utile qu'à la fin décrite ci-dessus.

[79] Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. Bien qu'il s'agisse manifestement d'une question de fait, il est possible de faire certaines observations générales en l'espèce pour guider cette appréciation.

[80] Je souligne que la mesure dans laquelle les renseignements seraient diffusés en l'absence d'une exception au principe de la publicité des débats judiciaires peut avoir une incidence sur le caractère sérieux du risque. Si le demandeur invoque le risque que les renseignements personnels en viennent à être connus par un large segment de la population en l'absence d'une ordonnance, il s'agit manifestement d'un risque plus sérieux que si le résultat était qu'une poignée de personnes prendrait connaissance des mêmes renseignements, toutes autres choses étant égales par ailleurs. Par le passé, l'obligation d'être physiquement présent pour obtenir des renseignements dans le cadre de débats judiciaires publics ou à partir d'un dossier judiciaire signifiait que les renseignements étaient, dans une certaine

courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305, at p. 346).

mesure, protégés parce qu’ils n’étaient [TRANSLATION] « pratiquement pas connus » (D. S. Ardia, « Privacy and Court Records : Online Access and the Loss of Practical Obscurity » (2017), 4 *U. Ill. L. Rev.* 1385, p. 1396). Cependant, aujourd’hui, les tribunaux devraient prendre en considération le contexte des technologies de l’information, qui a facilité la communication de renseignements et le renvoi à ceux-ci (voir Bailey et Burkell, p. 169-170; Ardia, p. 1450-1451). Dans ce contexte, il peut fort bien être difficile pour les tribunaux d’avoir la certitude que les renseignements ne seront pas largement diffusés en l’absence d’une ordonnance.

[81] Il y aura lieu, bien sûr, d’examiner la mesure dans laquelle les renseignements font déjà partie du domaine public. Si la tenue de procédures judiciaires publiques ne fait que rendre accessibles ce qui est déjà largement et facilement accessible, il sera difficile de démontrer que la divulgation des renseignements dans le cadre de débats judiciaires publics entraînera effectivement une atteinte significative à cet aspect de la vie privée se rapportant à l’intérêt en matière de dignité auquel je fais référence en l’espèce. Cependant, le seul fait que des renseignements soient déjà accessibles à un segment de la population ne signifie pas que les rendre accessibles dans le cadre d’une procédure judiciaire n’exacerbera pas le risque pour la vie privée. La vie privée n’est pas une notion binaire, c’est-à-dire que les renseignements ne sont pas simplement soit privés, soit publics, d’autant plus que, en raison de la technologie en particulier, il vaut mieux considérer la confidentialité absolue comme difficile à atteindre (voir, de manière générale, *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 37; *TTUAC*, par. 27). Le fait que certains renseignements soient déjà accessibles quelque part dans la sphère publique n’empêche pas qu’une diffusion additionnelle de ceux-ci puisse nuire davantage à l’intérêt en matière de vie privée, en particulier si la diffusion appréhendée de renseignements très sensibles est plus large ou d’accès plus facile (voir de manière générale Solove, p. 1152; Ardia, p. 1393-1394; E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 346).

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

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

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

[82] De plus, la probabilité que la diffusion évoquée par le demandeur se produise réellement a également une incidence sur le caractère sérieux du risque. Je m'empresse de dire qu'il est implicite dans la notion de risque que le demandeur n'a pas besoin d'établir que la diffusion appréhendée se produira assurément. Cependant, plus la probabilité de diffusion des renseignements est grande, plus le risque pour l'intérêt en matière de vie privée lié à la protection de la dignité sera sérieux. Bien qu'elle l'ait fait dans un contexte différent, la Cour a déjà conclu que l'ampleur du risque est le fruit de la gravité du préjudice appréhendé et de sa probabilité (*R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 86).

[83] Cela dit, la probabilité que les renseignements personnels très sensibles d'une personne soient diffusés en l'absence de mesures de protection de la vie privée sera difficile à quantifier avec précision. Il convient également de souligner que la probabilité dans ce contexte n'a pas à être quantifiée en termes mathématiques ou numériques. Les tribunaux peuvent plutôt simplement déterminer cette probabilité à la lumière de l'ensemble des circonstances et mettre en balance ce facteur avec d'autres facteurs pertinents.

[84] Enfin, rappelons que la susceptibilité individuelle à elle seule, même si elle peut théoriquement être associée à la notion de « vie privée », est généralement insuffisante pour justifier de restreindre la publicité des débats judiciaires lorsqu'elle ne surpasse pas les inconvénients et les désagréments inhérents à la publicité des débats (*MacIntyre*, p. 185). Un demandeur ne pourra établir que le risque est suffisant pour justifier une limite à la publicité des débats que dans des cas exceptionnels, lorsque la perte de contrôle appréhendée des renseignements le concernant est fondamentale au point de porter atteinte de manière significative à sa dignité individuelle. Ces circonstances mettent en jeu « des valeurs sociales qui ont préséance », qui vont au-delà des atteintes plus ordinaires propres à la participation à une procédure judiciaire et qui, comme l'a reconnu le juge Dickson, pourraient justifier de restreindre la publicité des débats (p. 186-187).

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

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

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

[85] En résumé, l'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a certainement un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Bien qu'il soit évalué en fonction des faits de chaque cas, le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. La reconnaissance de cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée et de la valeur sous-jacente de la dignité individuelle, tout en permettant aussi de maintenir la forte présomption de publicité des débats.

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

[86] Comme il a été clairement indiqué dans *Sierra Club*, une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour un intérêt public important. Les arguments soulevés dans le présent pourvoi portaient sur la question de savoir si la vie privée constitue un intérêt public important et si les faits en l'espèce révèlent l'existence de risques sérieux pour la vie privée et la sécurité. Bien que le large intérêt en matière de vie privée que font valoir les fiduciaires ne puisse être invoqué pour justifier une limite à la publicité des débats, la notion plus restreinte de vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test. Je reconnais aussi qu'un risque pour la sécurité physique représente un intérêt public important, un point qui n'est pas

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

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

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

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

contesté en l’espèce. Par conséquent, la question pertinente à la première étape est celle de savoir s’il existe un risque sérieux pour l’un de ces intérêts ou pour ces deux intérêts. Pour les motifs qui suivent, les fiduciaires n’ont pas établi l’existence d’un risque sérieux pour l’un ou l’autre de ces intérêts. Cela suffit en soi pour conclure que les ordonnances de mise sous scellés n’auraient pas dû être rendues.

(1) Le risque pour la vie privée allégué en l’espèce n’est pas sérieux

[87] Comme je l’ai déjà dit, l’intérêt public important en matière de vie privée doit être considéré comme un intérêt propre à la protection de la dignité individuelle et non comme l’intérêt largement défini que les fiduciaires ont demandé à la Cour de reconnaître. Pour établir l’existence d’un risque sérieux à l’égard de cet intérêt, les renseignements contenus dans les dossiers judiciaires qui préoccupent les fiduciaires doivent être suffisamment sensibles du fait qu’ils touchent au cœur même des renseignements biographiques des personnes touchées. Si ce n’est pas le cas, il n’y a pas de risque sérieux qui justifierait une exception à la publicité des débats. Si, par contre, c’est le cas, il faut alors se demander si les faits de l’espèce permettent d’établir l’existence d’un risque sérieux.

[88] Le juge de première instance n’a jamais explicitement constaté de risque sérieux pour l’intérêt en matière de vie privée qu’il a relevé, mais, dans la mesure où il est implicitement arrivé à cette conclusion, je ne puis, en toute déférence, partager son point de vue. Sa conclusion se limitait à l’observation selon laquelle [TRADUCTION] « [l]e degré d’atteinte à cette vie privée et à cette dignité [c.-à-d. celle des victimes et de leurs êtres chers] est déjà extrême et, j’en suis sûr, insoutenable » (par. 23). Cependant, l’attention intense dont les Sherman ont fait l’objet jusqu’à la présentation de leur demande n’est qu’une partie de l’équation. Comme les ordonnances de mise sous scellés ne peuvent qu’offrir une protection contre la divulgation des renseignements contenus dans les dossiers judiciaires se rapportant à l’homologation, le juge de première instance était tenu d’examiner le

no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that

caractère sensible des renseignements précis qu'ils contenaient. Or, il n'a pas procédé à une telle appréciation. Sa conclusion sur le caractère sérieux du risque s'est alors entièrement concentrée sur le risque de préjudice physique, alors que rien n'indiquait qu'il avait conclu que les fiduciaires s'étaient acquittés de leur fardeau quant à la démonstration d'un risque sérieux pour l'intérêt en matière de vie privée. En toute déférence, et en sachant qu'il ne disposait pas du cadre d'analyse précédemment exposé, j'estime qu'en n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique. Cela justifiait une intervention en appel.

[89] En appliquant le cadre approprié aux faits de la présente affaire, je conclus que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées, que j'ai défini précédemment au regard de la dignité, n'est pas sérieux. Les renseignements que les fiduciaires cherchent à protéger ne sont pas très sensibles, ce qui suffit en soi pour conclure qu'il n'y a pas de risque sérieux pour l'intérêt public important en matière de vie privée ainsi défini.

[90] Il y a peu de controverse en l'espèce sur la probabilité de diffusion des renseignements contenus dans les dossiers de succession et sur l'étendue de cette diffusion. Il est presque certain que le Toronto Star publiera au moins certains aspects des dossiers de succession si on lui en donne l'accès. Compte tenu de l'important auditoire de l'entreprise médiatique en cause et de la nature très médiatisée des événements entourant la mort des Shermans, je n'ai aucune difficulté à conclure que les personnes touchées perdraient, dans une large mesure, le contrôle des renseignements en question si les dossiers étaient rendus accessibles.

[91] Cependant, en ce qui concerne le caractère sensible des renseignements, ceux contenus dans ces dossiers ne révèlent rien de particulièrement privé sur les personnes touchées. Ce qui serait révélé pourrait bien causer des inconvénients et peut-être de l'embarras, mais il n'a pas été démontré que la divulgation toucherait au cœur même des renseignements

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

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

biographiques de ces personnes d'une manière qui minerait leur contrôle sur l'expression de leur identité. Leur vie privée serait certes perturbée, mais il n'a pas été démontré que l'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées serait sérieusement menacé. Tout au plus, les renseignements contenus dans ces dossiers pourraient-ils révéler quelque chose sur la relation entre les défunts et les personnes touchées, en ce qu'ils pourraient dévoiler à qui les défunts ont confié l'administration de leur succession respective, et qui ils voulaient voir ou étaient présumés vouloir voir devenir héritiers de leurs biens à leur décès. Ils pourraient également révéler certaines données personnelles de base, par exemple des adresses. On peut à juste titre présumer qu'il se peut fort bien que certains des bénéficiaires portent un nom de famille autre que Sherman. Je suis conscient que les décès font l'objet d'une enquête pour homicides par le service de police de Toronto. Cependant, même dans ce contexte, aucun de ces renseignements ne donne des indications importantes sur qui ils sont en tant que personnes, et aucun d'eux n'entraînerait non plus un changement fondamental dans leur capacité à contrôler la façon dont ils sont perçus par les autres. Le fait pour des personnes d'être liées par des documents de succession aux victimes d'un meurtre non résolu n'est pas en soi un renseignement très sensible. Il peut être la source de désagréments, mais il n'a pas été démontré qu'il constitue une atteinte à la dignité, en ce qu'il ne touche pas au cœur même des renseignements biographiques de ces personnes. En conséquence, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important comme l'exige l'arrêt *Sierra Club*.

[92] Le fait que certaines des personnes touchées puissent être mineures ne suffit pas non plus à franchir le seuil du caractère sérieux. Bien que le droit reconnaisse que les mineurs sont particulièrement vulnérables aux atteintes à la vie privée (voir *Bragg*, par. 17), le simple fait que des renseignements concernent des mineurs n'écarte pas l'analyse généralement applicable (voir, p. ex., *Bragg*, par. 11). Même en tenant compte de la vulnérabilité accrue des mineurs pouvant être des personnes touchées

they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

dans les dossiers d'homologation, rien dans la preuve n'indique qu'ils perdraient le contrôle des renseignements les concernant qui révèlent quelque chose se rapprochant du cœur de leur identité. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexplicquée des Sherman ne suffit pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité.

[93] De plus, bien qu'elle indique que les renseignements seraient probablement largement diffusés, l'intense attention médiatique dont a fait l'objet la famille à la suite des décès n'est pas en soi révélatrice du caractère sensible des renseignements contenus dans les dossiers d'homologation.

[94] Démontrer que les renseignements qui seraient révélés en raison de la publicité des débats judiciaires sont suffisamment sensibles et privés pour toucher au cœur même des renseignements biographiques des personnes touchées est une condition préalable nécessaire pour établir l'existence d'un risque sérieux pour l'aspect pertinent de la vie privée relatif à l'intérêt public. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Lorsque l'on affirme qu'il existe un risque pour la vie privée, il est essentiel de démontrer non seulement que les renseignements qui concernent des personnes échapperont au contrôle de celles-ci — ce qui sera vrai dans tous les cas —, mais aussi que ces renseignements concernent ce qu'elles sont en tant que personnes, d'une manière qui mine leur dignité. Or, les fiduciaires n'ont pas fait cette preuve.

[95] Par conséquent, même si certains des éléments contenus dans les dossiers judiciaires peuvent fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraîne un risque sérieux pour l'intérêt public important en matière de vie privée, qui a été défini adéquatement dans le présent contexte au regard de la dignité. Pour cette seule raison, je conclus que les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour cet intérêt.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was “foreseeable” and “grave” (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the *Toronto Star* agrees that the application judge’s conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity

(2) Le risque pour la sécurité physique allégué en l’espèce n’est pas sérieux

[96] Contrairement à ce qu’il en est pour l’intérêt en matière de vie privée soulevé en l’espèce, nul n’a contesté l’existence d’un intérêt public important dans la protection des personnes contre un préjudice physique. Il convient de souligner que le juge de première instance a correctement traité la protection contre un préjudice physique comme un intérêt important distinct de l’intérêt à l’égard de la protection de la vie privée, et a conclu que ce risque était [TRA-DUCTION] « prévisible » et « grave » (par. 22-24). La question consiste à savoir si les fiduciaires ont établi que cet intérêt est sérieusement menacé pour l’application du test des limites discrétionnaires à la publicité des débats judiciaires. Le juge de première instance a fait remarquer qu’il aurait été préférable d’inclure des éléments de preuve objectifs du caractère sérieux du risque fournis par le service de police menant l’enquête pour homicides. Il a néanmoins conclu que la preuve de risque pour la sécurité physique des personnes touchées était suffisante pour que le test soit respecté. Selon la Cour d’appel, il s’agit d’une mauvaise interprétation de la preuve, et, de son côté, le *Toronto Star* convient que la conclusion du juge de première instance quant à l’existence d’un risque sérieux pour la sécurité constitue une simple conjecture.

[97] D’entrée de jeu, je souligne qu’une preuve directe n’est pas nécessairement exigée pour démontrer qu’un intérêt important est sérieusement menacé. Notre Cour a statué qu’il est possible d’établir l’existence d’un préjudice objectivement discernable sur la base d’inférences logiques (*Bragg*, par. 15-16). Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Une inférence doit tout de même être fondée sur des faits circonstanciels objectifs qui permettent raisonnablement de tirer la conclusion par inférence. Lorsque celle-ci ne peut raisonnablement être tirée à partir des circonstances, elle équivaut à une conjecture (*R. c. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, par. 45).

[98] Comme le soutiennent à juste titre les fiduciaires, ce n’est pas seulement la probabilité du

of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the *Toronto Star*, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed

préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. La question consiste finalement à savoir si le présent dossier permettrait au juge de première instance de discerner de manière objective l'existence d'un risque sérieux de préjudice physique.

[99] Il n'était pas loisible au juge de première instance de tirer cette conclusion au vu du dossier. Nul ne conteste que le préjudice physique appréhendé est grave. Je conviens cependant avec le *Toronto Star* que la probabilité que ce préjudice se produise était conjecturale. La conclusion du juge de première instance quant au caractère sérieux du risque de préjudice physique était fondée sur ce qu'il a appelé [TRADUCTION] « le degré de mystère qui persiste en ce qui concerne à la fois le coupable et le mobile » en lien avec la mort des Sherman et sur sa supposition que ce mobile pourrait être « transposé » aux fiduciaires et aux bénéficiaires (par. 5; voir aussi par. 19 et 23). L'étape suivante du raisonnement, selon laquelle le fait de lever les scellés sur les dossiers de succession amènerait les coupables à commettre leur prochain crime contre une personne mentionnée dans les dossiers, repose sur des conjectures, et non sur les éléments de preuve par affidavit présentés, et ne peut être considérée comme une inférence appropriée ou un quelconque préjudice ou risque de préjudice objectivement discerné. Si tel était le cas, le dossier de succession de chaque victime d'un meurtre non résolu franchirait le seuil initial du test applicable pour déterminer si une ordonnance de mise sous scellés peut être rendue.

[100] En outre, je rappelle que la question à trancher en l'espèce n'est pas de savoir si les personnes touchées sont exposées à un risque pour leur sécurité en général, mais plutôt si la publicité des présents dossiers judiciaires les expose à un tel risque. À la lumière du contenu des dossiers en l'espèce, les

by this information becoming publicly available was more than negligible.

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

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

fiduciaires devaient avancer une autre raison pour laquelle le risque que posait le fait que ces renseignements deviennent accessibles au public était plus que négligeable.

[101] Le caractère conjectural du raisonnement menant à la conclusion selon laquelle il existe un risque sérieux de préjudice physique en l’espèce ressort des différences entre les faits en cause et ceux des affaires invoquées par les fiduciaires. Dans *X. c. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, le tribunal a inféré le risque de préjudice physique au motif que le demandeur était un policier qui avait enquêté sur des [TRADUCTION] « affaires portant sur la violence des gangs et des armes à feu dangereuses » et qui avait rédigé des rapports de détermination de la peine pour ces contrevenants, rapports dans lesquels il était identifié par son nom au complet (par. 6). Dans *R. c. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, le juge Watt a considéré qu’il était [TRADUCTION] « évident » que la divulgation d’éléments permettant d’identifier un agent d’infiltration travaillant dans le domaine du contre-terrorisme compromettrait la sécurité de l’agent (par. 41). Dans les deux cas, le danger découlait de faits établissant que les demandeurs entretenaient des relations antagonistes avec de prétendues organisations criminelles ou terroristes. Cependant, dans l’affaire qui nous occupe, les fiduciaires ont demandé au juge de première instance d’inférer non seulement le fait qu’un préjudice serait causé aux personnes touchées, mais également qu’il existe une ou des personnes qui souhaitent leur faire du mal. Il n’est pas raisonnablement possible au vu du dossier en l’espèce d’inférer tout cela en se fondant sur le décès des Sherman et sur les liens unissant les personnes touchées aux défunts. Il ne s’agit pas d’une inférence raisonnable, mais, comme l’a souligné la Cour d’appel, d’une conclusion reposant sur des conjectures.

[102] Si le simple fait d’invoquer un préjudice physique grave suffisait à démontrer un risque sérieux pour un intérêt important, il n’y aurait pas de seuil valable dans l’analyse. Le test exige plutôt que le risque sérieux invoqué soit bien appuyé par le dossier ou les circonstances de l’espèce (*Sierra*

at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination

*Club*, par. 54; *Bragg*, par. 15), ce qui contribue au maintien de la forte présomption de publicité des débats judiciaires.

[103] Encore une fois, dans d'autres affaires, des faits circonstanciels pourraient permettre à un tribunal d'inférer l'existence d'un risque sérieux de préjudice physique. Les demandeurs n'ont pas nécessairement à retenir les services d'experts qui attesteront l'existence du risque physique ou psychologique lié à la divulgation. Cependant, sur la foi du présent dossier, le simple fait d'affirmer qu'un tel risque existe ne permet pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel.

E. *Il y aurait des obstacles additionnels à l'octroi d'une ordonnance de mise sous scellés fondée sur le risque d'atteinte à la vie privée allégué*

[104] Bien que cela ne soit pas nécessaire pour trancher le pourvoi, il convient de mentionner que les fiduciaires auraient eu à faire face à des obstacles additionnels en cherchant à obtenir les ordonnances de mise sous scellés sur la base de l'intérêt en matière de vie privée qu'ils ont fait valoir. Je rappelle que, pour satisfaire au test des limites discrétionnaires à la publicité des débats judiciaires, une personne doit démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sierra Club*, par. 53).

[105] Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. La condition selon laquelle l'ordonnance doit être nécessaire oblige le tribunal à examiner s'il existe des mesures autres que l'ordonnance demandée et à restreindre l'ordonnance autant

of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same

qu'il est raisonnablement possible de le faire pour écarter le risque sérieux (*Sierra Club*, par. 57). Une ordonnance imposant une interdiction de publication pourrait restreindre la diffusion de renseignements personnels aux seules personnes qui consultent le dossier judiciaire pour elles-mêmes et interdire à celles-ci de diffuser davantage les renseignements. Comme je l'ai mentionné, la probabilité et l'étendue de la diffusion peuvent être des facteurs pertinents lorsqu'il s'agit de déterminer le caractère sérieux d'un risque pour la vie privée dans ce contexte. Alors que le Toronto Star serait en mesure de consulter les dossiers faisant l'objet d'une interdiction de publication, par exemple, ce qui pourrait l'aider dans ses enquêtes, il ne pourrait publier, et ainsi diffuser largement, le contenu des dossiers. Une interdiction de publication semble offrir une protection contre ce dernier préjudice, qui a été au centre de l'argumentation des fiduciaires, tout en permettant un certain accès au dossier, ce qui n'est pas possible aux termes des ordonnances de mise sous scellés. En conséquence, même si un risque sérieux pour l'intérêt en matière de vie privée avait été établi, ce risque n'aurait probablement pas justifié une ordonnance de mise sous scellés, car une ordonnance moins sévère aurait probablement suffi à atténuer ce risque de manière efficace. Je m'empresse cependant d'ajouter qu'une interdiction de publication ne peut être prononcée en l'espèce, puisque, comme il a été souligné, le caractère sérieux du risque pour l'intérêt en matière de vie privée en jeu n'a pas été établi.

[106] De plus, les fiduciaires auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables, y compris l'incidence négative sur le principe de la publicité des débats judiciaires (*Sierra Club*, par. 53). Pour mettre en balance les intérêts en matière de vie privée et le principe de la publicité des débats judiciaires, il importe de se demander si les renseignements que l'ordonnance vise à protéger sont accessoires ou essentiels au processus judiciaire (par. 78 et 86; *Bragg*, par. 28-29). Il y aura sans doute des affaires où les renseignements présentant un risque sérieux pour la vie privée, du fait qu'ils toucheront à la dignité individuelle, seront essentiels au litige. Cependant, l'intérêt à ce

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

## VI. Conclusion

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

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

*Appeal dismissed.*

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

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

que des renseignements importants et juridiquement pertinents soient diffusés dans le cadre de débats judiciaires publics pourrait bien prévaloir sur toute préoccupation à l'égard des intérêts en matière de vie privée relativement à ces mêmes renseignements. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

## VI. Conclusion

[107] La conclusion selon laquelle les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important met fin à l'analyse. En de telles circonstances, les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires, y compris les ordonnances de mise sous scellés qu'ils ont initialement obtenues. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires. Cette conclusion est déterminante quant à l'issue du pourvoi. La décision d'annuler les ordonnances de mise sous scellés rendues par le juge de première instance devrait être confirmée. Étant donné que je suis d'avis de rejeter le pourvoi eu égard au dossier existant, je rejetterais la requête en production de nouveaux éléments de preuve présentée par le Toronto Star au motif que celle-ci est théorique.

[108] Pour les motifs qui précèdent, je rejetterais le pourvoi. Le Toronto Star ne sollicite aucuns dépens, compte tenu des importantes questions d'intérêt public en litige. Dans les circonstances, aucuns dépens ne seront adjugés.

*Pourvoi rejeté.*

*Procureurs des appelants : Davies Ward Phillips & Vineberg, Toronto.*

*Procureurs des intimés : Blake, Cassels & Graydon, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.*

*Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.*

*Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.*

*Procureurs de l'intervenante l'Association canadienne des libertés civiles : DMG Advocates, Toronto.*

*Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.*

*Procureurs de l'intervenant le Centre d'action pour la sécurité du revenu : Borden Ladner Gervais, Toronto.*

*Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.*

*Procureurs des intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc. : Farris, Vancouver.*

*Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.*

*Procureurs de l'intervenante British Columbia Civil Liberties Association : McCarthy Tétrault, Toronto.*

*Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.*

*Procureurs des intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH and Mental Health Legal Committee : HIV & AIDS Legal Clinic Ontario, Toronto.*

# TAB 6

**CITATION:** Royal Bank of Canada v. Walker Hall Winery Ltd., 2011 ONSC 638  
**COURT FILE NO.:** 09-8457-00CL  
**DATE:** 20110127

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C.43, AS AMENDED AND RULE 14.05(d)(g) and (h) of the *RULES OF CIVIL PROCEDURE*

ROYAL BANK OF CANADA, Applicant

**AND:**

WALKER HALL WINERY LTD., WALKER HALL HOLDINGS LTD., AND LUKEZIC GROUP LTD., Respondents

**BEFORE:** MORAWETZ J.

**COUNSEL:** J. Ross Macfarlane, for the Applicant, Royal Bank of Canada

J. Lukezic, Self Representative of Walker Hall *et al* and as Shareholder of Walker Hall

R. van Kessel, for BDO Canada Limited, Receiver

**HEARD:** December 24, 2010

**ENDORSEMENT**

[1] The Receiver moved for an order:

- (a) approving its activities from May 1, 2010 - November 30, 2010;
- (b) approving an agreement to sell Walker Hall's ("Walker Hall" or the "Debtor") wine inventory, barrels and glasses;
- (c) approving the Receiver's fees and disbursements, including those of its legal counsel to November 30, 2010;
- (d) sealing the second wine appraisal, offers to purchase assets and the agreement to sell the wine inventory, barrels and glasses; and

(e) for such further direction as may be appropriate.

[2] In support of the requested relief, the Receiver filed its Second Report which provides complete details of the Receiver's activities.

[3] Counsel to the Receiver also submitted a detailed factum. Paragraphs 3 – 42 summarized the facts, followed by a statement of issues and law at 43 – 47.

[4] Counsel to RBC supported the submissions of the Receiver and also advised that RBC consents to the relief sought and that RBC is trying to mitigate its losses.

[5] Mr. Lukezic, representing the Debtor and himself, as shareholder, opposed the relief sought by the Receiver. Mr. Lukezic filed a Motion Record, which was somewhat unusual in its form.

[6] The first part of Mr. Lukezic's Motion Record was entitled Responding Motion. It commenced with a factual summary which related, in part, to events prior to the receivership and in other parts, to matters where Mr. Lukezic has commenced separate proceedings. The narrative then comments on the wine inventory. The narrative also states that there is a pending appeal of my decision of July 30, 2010 which denied Mr. Lukezic's motion to set aside or vary the receivership order.

[7] The Responding Motion concludes with the statement of requested relief that Mr. Lukezic seeks an order, that a stay be put into place regarding any and all actions or proceedings until the appellate court hears the matter. The narrative in the Respondent Motion was not sworn.

[8] The Responding Motion references a number of exhibits. Exhibits "A" to "E" were not part of any affidavit.

[9] Exhibit "A" is correspondence from Mr. Lukezic to Mr. van Kessel. Exhibit "B" is a Notice of Motion to consolidate Action CV-10-8837-00CL (James Lukezic and Walker Hall Winery Ltd., plaintiff and Genova *et al.*, defendants, with Action CV-10-8836-00CL (James Lukezic and Walker Hall, plaintiff and RBC, as defendant). Exhibit "C" is a Certificate of Perfection relating to the appeal of my July 30, 2010 decision. Exhibit "D" is a document entitled "Factum". The factum, however, appears to be directed at the conduct of RBC that Mr. Lukezic alleges amounts to a conspiracy and breach of duty on behalf of RBC. Exhibit "E" is an Inventory Breakdown Evaluation produced by Mr. Buzinel who describes himself as an enologist of Walker Hall.

[10] Exhibit "F" is an affidavit of Mr. Lukezic which recites some pre-receivership history and, as well, challenges the appraisal of the wine obtained by the Receiver. The affidavit does not reference Mr. Buzinel's report.

[11] This motion involves the Receiver's request to approve the items set out in [1]. It is noted that Mr. Lukezic brought a motion to set aside or vary the receivership order, which

motion has been dismissed and is presently under appeal. At the present time, the Debtor is in receivership and, in my view, the Receiver is authorized by its mandate to bring this motion.

[12] Mr. Lukezic takes issue with the appraisals of the wine provided to the Receiver. He states that the appraisal based on input from Mr. Jackson cannot be relied upon as Mr. Jackson was known to having a relationship with a competitor of Mr. Lukezic. This statement is contained in the Responding Motion. It is not sworn. There is no mention of Mr. Jackson in the affidavit of Mr. Lukezic, sworn December 21, 2010. In his affidavit, Mr. Lukezic challenges the second appraisal citing a possible conflict and that the appraisal was provided by a low-quality wine producer.

[13] Mr. Lukezic brought a motion to obtain copies of all appraisals obtained by the Receiver. This motion was dismissed by Lederman J. on October 6, 2010. Mr. Lukezic did not appeal this decision.

[14] Mr. Lukezic was provided the opportunity to obtain a third appraisal – provided that he paid for it. Mr. Lukezic did not obtain a third appraisal. As noted, his Responding Motion references the report of Mr. Buzinel. This document is not properly in evidence as it does not form part of any affidavit. In any event, Mr. Buzinel, being described as the enologist of Walker Hall cannot said to be independent. Even if the document was properly in evidence, I would give it little or no weight.

[15] Thus, the only appraisals properly in evidence are those obtained by the Receiver. Mr. Lukezic takes issue with the appraisals, but the only reference in his affidavit is to the effect that the second appraisal was obtained from Degasperis, a competitor of the Debtor and a low quality producer of wine. These allegations were not supported by any other evidence and, in any event, do not address the issue of the value of the wine.

[16] The sales and marketing process was approved by order dated May 12, 2010. The marketing efforts of the Receiver are summarized in the Receiver's factum at 37 – 39.

[17] I accept the summary of facts provided by the Receiver as well as the statements of law. I do not accept the submissions of Mr. Lukezic. His submissions are not supported by the evidence. I have not been persuaded that the Receiver has acted improperly.

[18] In my view, the appraisals obtained by the Receiver support the submissions of the Receiver that the proposed sale is fair and reasonable in the circumstances.

[19] I am satisfied that the Receiver has complied with the *Soundair* principles (*Royal Bank v. Soundair Corp.* 1991 CarswellOnt 205) in all respects. I am also satisfied that the proposed sale of the wine inventory, barrels and glasses is fair and reasonable in the circumstances. In arriving at this conclusion, I have also taken into account that RBC has consented to the sale and is taking steps to mitigate its losses. RBC is the primary secured creditor and has the significant economic interest in these proceedings.

[20] The proposed sale is approved.

[21] The Receiver has also requested that the appraisals, the offers and the Sale Agreement be sealed, submitting that the documents contain sensitive commercial information, the disclosure of which could pose a serious threat to the commercial interests of the stakeholders, and further that, in view of Mr. Lukezic's ongoing activities, it would be detrimental to the sales process to divulge the information to Mr. Lukezic.

[22] I have been persuaded by these submissions. I have also considered the principles forth in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and, in my view, it is both necessary and appropriate to seal the appraisals, the offers and the Sale Agreement, pending the closing of the transaction or further order.

[23] I have reviewed the requested fees and disbursements of the Receiver and its counsel. Although the requested fees are significant and Mr. Lukezic challenges all aspects of the receivership, I consider them to be reasonable in the circumstances. These fees have to be considered in the context of these proceedings which have involved a number of court attendances that have been required to respond to litigation initiated by Mr. Lukezic.

[24] The fees and disbursements of the Receiver and its counsel are approved.

[25] Finally, the Receiver seeks approval of its activities from May 1, 2010 to November 30, 2010. No adverse comment to the activities of the Receiver has been reported other than the comments of Mr. Lukezic. I have not been persuaded by the submissions of Mr. Lukezic to the effect that the Receiver has not acted properly in the discharge of its mandate.

[26] I am satisfied that the Receiver has conducted itself appropriately and, accordingly, the activities of the Receiver for the period May 1, 2010 to November 30, 2010 are approved.

[27] Finally, in my view, Mr. Lukezic has failed to establish any basis for a stay regarding any and all actions or proceedings until the appellate court hears the matter. The motion brought by Mr. Lukezic on behalf of the respondents is dismissed.

[28] Counsel to the Receiver requested costs against Mr. Lukezic. The relief sought by the Receiver required court approval regardless of whether it was opposed by Mr. Lukezic. In the circumstances, I have not been persuaded that costs are appropriate.

[29] An order shall issue to give effect to the foregoing.

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MORAWETZ J.

**Date:** January 27, 2011

# TAB 7

## COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851  
DATE: 20141201  
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

**Pepall J.A.:**

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

[2] This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

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

## **Facts**

### **(a) Appointment of Receiver**

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately \$4.9 million (approximately \$2 million and \$2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

**(b) Receiver's Activities**

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of \$8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and

- sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.
- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
  - The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
  - The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

**(c) Application to Approve Fees**

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to \$138,297 plus \$9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of \$338.38. The highest hourly rate charged by the Receiver was \$525 per hour. Fees estimated to complete were \$20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to \$255,955, plus \$4,434.92 in disbursements and \$33,821.69 in taxes for a total account of \$294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of \$643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of \$750.00. The rates of the other 10 people on the account ranged from \$950 per hour for a senior lawyer to \$195 for a student and \$330 for a law clerk.

[14] Fees estimated to complete were \$20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- \$100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was \$500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to \$30,000.

### **Motion Judge's Decision**

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately \$8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of \$475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at \$157,500 from which the \$100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of \$4,434.92 and applicable HST.

## Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

## Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

## Analysis

### (a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

**(b) Passing of a Receiver's Accounts**

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in CCAA Proceedings” in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer’s financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

### **(c) The Rise and Dominance of the Billable Hour**

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association (“ABA”)’s Special Commission on the Economics of Law Practice published a study entitled “The 1958 Lawyer and his 1938 Dollar”. The study noted that lawyers’ incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers’ profits: see Stuart L. Pardau, *“Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated”* (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer’s record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

**(d) Fees in Context of Court Appointed Receiver**

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

**(e) Application to This Case**

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

**Disposition**

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of \$5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"  
"EAC"

"Sarah E. Pepall J.A."  
"I agree Alexandra Hoy A.C.J.O."  
"I agree E.A. Cronk J.A."

# TAB 8

COURT FILE NO.: CV-08-7672-00CL  
DATE: 20090728

SUPERIOR COURT OF JUSTICE – ONTARIO  
(COMMERCIAL LIST)

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF WINDSOR MACHINE & STAMPING  
LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD.,  
442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION  
MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN  
WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD.,  
TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY  
ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD  
FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH  
INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE  
MANUFACTURING INC. AND 383301 ONTARIO LIMITED**

**Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Tony Reyes and Evan Cobb, for RSM Richter Inc., Monitor**

**Raong Phalavong, for Saginaw Pattern**

**Andrew Hatnay, Andrea McKinnon and D. Youkaris, for U.A.W. Local  
251**

**Joseph Marin, for Windsor Machine & Stamping Ltd.**

**D. Dowdall and J. Dietrich, for Bank of Montreal**

**J. Archibald, for Magna**

**John D. Leslie, for Ford Motor Company**

**P. Shea, for Johnson Controls Inc.**

**Jackie Moher, for Ryder Finance Corporation**

**HEARD &  
DECIDED: MARCH 11, 2009**

**ENDORSEMENT**

[1] On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

[2] RSM Richter Inc., in its capacity as Monitor, brought this motion for:

- (a) an Approval and Distribution Order;
- (b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;
- (c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;
- (d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;
- (e) an Order approving the fees and disbursements of the Monitor and its counsel.

[3] The motion has the support of the Applicants, Bank of Montreal (the “Bank”), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

[4] I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm’s length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants’ assets.

[5] The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

[6] The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

[7] With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

[8] The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

[9] In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

[10] It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

[11] Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

[12] Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

[13] Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[14] As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

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**MORAWETZ J.**

**DATE:            Heard and Decided: March 11, 2009**

**Typed Reasons Released: July 28, 2009**

# TAB 9

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

**SUPERIOR COURT**

CANADA  
 PROVINCE OF QUEBEC  
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**


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**PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.**


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**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:****ABITIBIBOWATER INC.**

And

**ABITIBI-CONSOLIDATED INC.**

And

**BOWATER CANADIAN HOLDINGS INC.**

And

**The other Petitioners listed on Schedules "A", "B" and "C"**  
 Petitioners

And

**ERNST & YOUNG INC.**

Monitor

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**CORRECTED JUDGMENT  
 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING  
 AND FOR DISTRIBUTION OF CERTAIN PROCEEDS  
 OF THE MPC<sub>o</sub> SALE TRANSACTION TO THE TRUSTEE  
 FOR THE SENIOR SECURED NOTES (#312)**

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[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

500-11-036133-094

PAGE: 2

ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

**FOR THESE REASONS, THE COURT:**

**ULC DIP Financing**

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- a) a first draw of \$130 million to be advanced at closing;
- b) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- c) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

### **ACI DIP Agreement**

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

### **Senior Secured Notes Distribution**

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

### **Amendment to the Subrogation Provision**

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

#### **Subrogation to ACI DIP Charge**

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS.**

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**CLÉMENT GASCON, J.S.C.**

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500-11-036133-094

PAGE: 9

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Date of hearing: November 23, 2009

**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.
20. ABITIBI-CONSOLIDATED (U.K.) 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

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

**SUPERIOR COURT**

CANADA  
 PROVINCE OF QUEBEC  
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 16, 2009**


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**PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.**


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**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:****ABITIBIBOWATER INC.**

And

**ABITIBI-CONSOLIDATED INC.**

And

**BOWATER CANADIAN HOLDINGS INC.**

And

**The other Petitioners listed on Schedules "A", "B" and "C"**

Petitioners

And

**ERNST & YOUNG INC.**

Monitor

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**JUDGMENT**  
**ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING**  
**AND FOR DISTRIBUTION OF CERTAIN PROCEEDS**  
**OF THE MPCo SALE TRANSACTION TO THE TRUSTEE**  
**FOR THE SENIOR SECURED NOTES (#312)**

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## **INTRODUCTION**

[1] In the context of their CCAA<sup>1</sup> restructuring, the Abitibi Petitioners<sup>2</sup> present a Motion<sup>3</sup> for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders ("**SSNs**").

[2] More particularly, the Abitibi Petitioners seek:

- 1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a CDN\$230 million super-priority secured debtor in possession credit facility (the "**ULC DIP Facility**").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN\$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

- 2) Orders authorizing the distribution to the SSNs of up to CDN\$200 million upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

- 3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN\$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

<sup>1</sup> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

<sup>2</sup> In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

<sup>3</sup> *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the "**Bondholders**") opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN\$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

### **THE MPCo SALE TRANSACTION**

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec ("**HQ**") agreed to pay ACCC CDN\$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN\$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN\$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN\$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable<sup>4</sup>.

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US\$477,545,769.53 (US\$413 million in principal and US\$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

- a) Approved the terms and conditions of the Implementation Agreement;
- b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
- c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the "**MPCo Share Proceeds**");
- d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
- e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the "**MPCo Noteholder Charge**") in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
- f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the "**ULC Reserve Charge**"); and
- g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

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<sup>4</sup> See Monitor's 19<sup>th</sup> Report dated October 27, 2009.

from Investissement Quebec (“**IQ**”) to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN\$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN\$173.9 million.

### **THE ULC DIP FACILITY**

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN\$282.3 million.

[17] This amount may be used for a limited number of purposes (the “**Permitted Investments**”) that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN\$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor<sup>5</sup>, the significant terms of the ULC DIP Term Sheet are as follows:

- i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN\$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN\$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN\$50 million in increments of up to CDN\$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN\$50 million shall become available upon further order of the Court.
- ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;
- iii) **Fees** – No fees are payable in respect of the ULC DIP Facility;
- iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;
- v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

<sup>5</sup> See Monitor's 19<sup>th</sup> Report dated October 27, 2009.

- vi) Use of Proceeds** – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the “**Budget**”);
- vii) Events of Default** – The events of default include the following:
- (a) Substantial non-compliance with the Budget;
  - (b) Termination of the CCAA Stay of Proceedings;
  - (c) Failure to file a CCAA Plan with the Court by September 30, 2010; and
  - (d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;
- viii) Rights of Alcoa** – Alcoa will receive all reporting noted above and notices of events of default. Alcoa’s consent is required for any amendments or waivers;
- ix) Rights of Senior Secured Noteholders** – The Senior Secured Noteholders’ rights consist of:
- (a) Receiving all reporting noted above and any notice of an Event of Default;
  - (b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;
  - (c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;
  - (d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa’s sole discretion; and
  - (e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;
- x) Security** – Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN\$167 million.

### **THE QUESTIONS AT ISSUE**

[21] In light of this background, the Court must answer the following questions:

- 1) Should the ULC DIP Facility of CDN\$230 million be approved?
- 2) Should the proposed distribution of CDN\$200 million to the SSNs be authorized?
- 3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

### **ANALYSIS AND DISCUSSION**

#### **1) THE APPROVAL OF THE DIP FINANCING**

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN\$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US\$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US\$100 million loan to the Abitibi Petitioners by Bank of Montreal ("**BMO**"), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor<sup>6</sup>, the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

- a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19<sup>th</sup> Report at paragraphs 49, 50 and chart at paragraph 61);
- b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19<sup>th</sup> Report at paragraph 32);
- c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US\$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US\$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19<sup>th</sup> Report at paragraphs 54, 60 and 61);
- d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;
- e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and
- f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19<sup>th</sup> Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

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<sup>6</sup> See Monitor's 19<sup>th</sup> Report dated October 27, 2009.

[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

- a) Only about CDN\$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN\$335 million of liquidity (Monitor's 19<sup>th</sup> Report at paragraph 68);
- b) The Bower Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US\$400 million (Monitor's 19<sup>th</sup> Report at paragraph 69) and a DIP facility of approximately US\$200 million;
- c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;
- d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and
- e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US\$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended CCAA, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended CCAA, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

- a) The period during which the company is expected to be subject to CCAA proceedings;
- b) How the company's business and financial affairs are to be managed during the proceedings;

- c) Whether the company's management has the confidence of its major creditors;
- d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- e) The nature and value of the company's property;
- f) Whether any creditor would be materially prejudiced as a result of the security or charge; and
- g) The Monitor's report.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the CCAA.

[37] The Monitor's 19<sup>th</sup> Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN\$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN\$130 million. Subsequent additional draws up to CDN\$50 million will be in maximum increments of CDN\$25 million and subject to prior notice. The final CDN\$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

- a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
- b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

- c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and
- d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

- a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;
- b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;
- c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;
- d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and
- e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

## **2) THE DISTRIBUTION TO THE SSNs**

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN\$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN\$27.4 million per year in accruing interest costs on the CDN\$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN\$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the CCAA process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN\$230 million ULC DIP Facility, they still contest the CDN\$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN\$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN\$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN\$173.9 million. Accordingly, out of a CDN\$200 million distribution to the SSNs, only CDN\$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN\$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN\$200 million to the SSNs will create at the same time interest savings of approximately CDN\$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada<sup>7</sup>.

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

<sup>7</sup> See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*<sup>8</sup>, Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19<sup>th</sup> report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN\$27 million per year in interest savings; and
- d) Even taking into consideration the CDN\$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the CCAA. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the CCAA ultimate goals.

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<sup>8</sup> *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

### **3) THE ORDERS SOUGHT**

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in CCAA proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this CCAA process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

### **FOR THESE REASONS, THE COURT:**

#### **ULC DIP Financing**

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- d) a first draw of \$130 million to be advanced at closing;
- e) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- f) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

### **ACI DIP Agreement**

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

### **Senior Secured Notes Distribution**

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

### **Amendment to the Subrogation Provision**

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

### Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS.**

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**CLÉMENT GASCON, J.S.C.**

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500-11-036133-094

PAGE: 24

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Date of hearing: November 9, 2009

**SCHEDULE "A"**  
**ABITIBI PETITIONERS**

21. ABITIBI-CONSOLIDATED INC.
22. ABITIBI-CONSOLIDATED COMPANY OF CANADA
23. 3224112 NOVA SCOTIA LIMITED
24. MARKETING DONOHUE INC.
25. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
26. 3834328 CANADA INC.
27. 6169678 CANADA INC.
28. 4042140 CANADA INC.
29. DONOHUE RECYCLING INC.
30. 1508756 ONTARIO INC.
31. 3217925 NOVA SCOTIA COMPANY
32. LA TUQUE FOREST PRODUCTS INC.
33. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
34. SAGUENAY FOREST PRODUCTS INC.
35. TERRA NOVA EXPLORATIONS LTD.
36. THE JONQUIERE PULP COMPANY
37. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
38. SCRAMBLE MINING LTD.
39. 9150-3383 QUÉBEC INC.
40. ABITIBI-CONSOLIDATED (U.K.) INC.

**SCHEDULE "B"**  
**BOWATER PETITIONERS**

20. BOWATER CANADIAN HOLDINGS INC.
21. BOWATER CANADA FINANCE CORPORATION
22. BOWATER CANADIAN LIMITED
23. 3231378 NOVA SCOTIA COMPANY
24. ABITIBIBOWATER CANADA INC.
25. BOWATER CANADA TREASURY CORPORATION
26. BOWATER CANADIAN FOREST PRODUCTS INC.
27. BOWATER SHELBURNE CORPORATION
28. BOWATER LAHAVE CORPORATION
29. ST-MAURICE RIVER DRIVE COMPANY LIMITED
30. BOWATER TREATED WOOD INC.
31. CANEXEL HARDBOARD INC.
32. 9068-9050 QUÉBEC INC.
33. ALLIANCE FOREST PRODUCTS (2001) INC.
34. BOWATER BELLEDUNE SAWMILL INC.
35. BOWATER MARITIMES INC.
36. BOWATER MITIS INC.
37. BOWATER GUÉRETTE INC.
38. BOWATER COUTURIER INC.

**SCHEDULE "C"**  
**18.6 CCAA PETITIONERS**

17. ABITIBIBOWATER INC.
18. ABITIBIBOWATER US HOLDING 1 CORP.
19. BOWATER VENTURES INC.
20. BOWATER INCORPORATED
21. BOWATER NUWAY INC.
22. BOWATER NUWAY MID-STATES INC.
23. CATAWBA PROPERTY HOLDINGS LLC
24. BOWATER FINANCE COMPANY INC.
25. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
26. BOWATER AMERICA INC.
27. LAKE SUPERIOR FOREST PRODUCTS INC.
28. BOWATER NEWSPRINT SOUTH LLC
29. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
30. BOWATER FINANCE II, LLC
31. BOWATER ALABAMA LLC
32. COOSA PINES GOLF CLUB HOLDINGS LLC

# **TAB 10**

**CITATION:** Pinnacle v. Kraus, 2012 ONSC 6376  
**COURT FILE NO.:** CV-12-9731-00CL  
**DATE:** 20121109

**SUPERIOR COURT OF JUSTICE – ONTARIO  
COMMERCIAL LIST**

**RE:** Pinnacle Capital Resources Limited in its capacity as general partner of Red Ash Capital Partners II Limited Partnership, Applicant

**AND:**

Kraus Inc., Kraus Canada Inc., Strudex Fibres Limited and 538626 B.C. Ltd., Respondents

**BEFORE:** L.A. Pattillo J.

**COUNSEL:** *Linc Rogers and Jenna Willis*, for the Receiver

*Larry Ellis*, for the Applicant

*Raymond Slattery and David Ullmann*, for Equistar Chemicals, LP

**HEARD:** November 7, 2012

**ENDORSEMENT**

Introduction

[1] This matter involves two motions.

[2] The first is by PricewaterhouseCoopers Inc. (“PwC”) in its capacity as Court-appointed receiver (the “Receiver”) of the respondents Kraus Inc. (“Kraus”), Kraus Canada Inc. (“Kraus Canada”), Strudex Fibres Limited (“Strudex”) and 538626 B.C. Ltd. (collectively, the “Companies”) for, among other things, an order discharging it and releasing it from any and all further obligations as Receiver, upon filing its discharge certificate.

[3] The second is a motion by Equistar Chemicals, LP (“Equistar”) for a) An order varying paragraph 8 of the Sale and Approval and Vesting Order dated June 11, 2012 by unsealing the confidential appendices; b) An order directing PwC to provide answers to questions posed by Equistar; and c) An order directing PwC to pay Equistar \$35,425.25.

Background

[4] Red Ash Capital Partners II Limited Partnership was a secured creditor of the Companies.

[5] The applicant Pinnacle Capital Resources Limited, in its capacity as general partner of Red Ash Capital Partners II Limited Partnership (“Red Ash”), obtained an order of the Court dated May 28, 2012 appointing PwC Interim Receiver of Kraus, Kraus Canada and Strudex (collectively the “Operating Companies”) In that capacity, PwC filed two reports, the first dated May 29, 2012 and the second June 10, 2012.

[6] On June 11, 2012, again on Red Ash’s application, PwC was appointed trustee in bankruptcy of each of the Operating Companies. On the same day, and pursuant to Red Ash’s receivership application, PwC was appointed as Receiver of the Companies.

[7] Also on June 11, 2010, the Court issued a Sale Approval and Vesting Order approving a going concern sale transaction (the “Sale Transaction”) of substantially all of the assets of the Companies (the “Purchased Assets”) contemplated by an asset purchase agreement between the Receiver and Kraus Brands LP (the “Purchaser”), a party related to Red Ash, dated as of June 11, 2012 (the “Sale Agreement”).

[8] Paragraph 8 of the Sale Approval and Vesting Order provides that the documents marked as Confidential Appendices A, B and C to the Receiver’s First Report contain confidential information and shall remain confidential and shall not form part of the permanent court record pending further order of the Court.

[9] The Sale Transaction closed on June 11, 2012.

[10] The reasons for the interim receivership were set out in the material filed in support of the initial application. The Interim Receiver monitored the receipts and disbursements of the Companies but did not take possession of the assets of the Operating Companies nor did it manage or operate their businesses. The Interim Receivership ended when the Receivership Order became effective on June 11, 2012.

[11] Pursuant to the Receivership Order, the Receiver had a very narrow mandate. It was appointed specifically to complete the Sale Transaction in accordance with the Sale Agreement and convey the Purchased Assets “without taking possession or control thereof”.

[12] During the period of the Interim Receivership, and as suppliers received notice of the application to appoint a receiver of the Companies, the Interim Receiver and/or the Companies received claims for the repossession of property pursuant to s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “BIA”). As at June 11, 2012, the date of the Sale Approval and Vesting Order became effective, a total of nine claimants, including Equistar, had delivered 81.1 claims totalling \$2,248,734.

[13] Because certain of the Purchased Assets were subject to the s. 81.1 claims (the s. 81.1 Assets), the Sale Approval and Vesting Order provided in paragraph 6 thereof that the s. 81.1 Assets do not vest in the Purchaser until such time as the applicable s. 81.1 claim is determined by agreement of the parties or by further order of the Court. The Sale Approval and Vesting Order further provides that, notwithstanding the foregoing, the Purchaser is entitled to use and consume any s. 81.1 Asset, provided the Purchaser pays to the Receiver, in trust, the invoice amount of any s. 81.1 Asset used and consumed by the Companies or the Purchaser.

[14] Paragraph 6 of the Sale Approval and Vesting Order required that the Receiver file a report advising as to the s. 81.1 Assets in the possession of the Companies as at June 11, 2012 and “to the extent ascertainable, as at May 28, 2012.”

[15] In satisfaction of the requirement in paragraph 6 of the Sale Approval and Vesting Order, the Receiver filed its Third Report dated June 14, 2012. The Third Report contained a list of the s. 81.1 claimants, the steps by the Receiver to determine the s. 81.1 Assets in the possession of the Companies on June 11, 2012, the steps taken to segregate and preserve those assets and the inspections by s. 81.1 claimants. It also detailed the Receiver’s attempts to determine the s. 81.1 Assets in the possession of the Companies on May 28, 2012.

#### Equistar’s s. 81.1 Claim

[16] On June 8, 2012, the Receiver received a s. 81.1 claim in the amount of \$551,951.00 from Equistar. Equistar supplied poly resin to the Companies.

[17] On June 12, 2012, a representative of Equistar attended at Strudex’s premises and was shown the silos where Equistar’s goods were normally delivered. The representative did a visual inspection of the goods remaining in the applicable silo and was provided production records for that silo. A digital meter reading of the silo was also taken in the presence of Equistar’s representative.

[18] Subsequently, the Receiver assessed the s. 81.1 claims using the criteria set out in s. 81.1 of the BIA. The Receiver assessed the eligible value of Equistar’s claim to be \$35,425.25. On June 19, 2012, the Receiver advised Equistar of its assessment.

[19] On July 31, 2012, Equistar’s US attorney sent a letter to the Receiver taking issue with the Receiver’s determination of value. Equistar’s position was that its claim should include all goods Equistar delivered within 30 days prior to May 28, 2012. It took issue with the challenges the Receiver reported it had faced in respect of assessing the status of the s. 81.1 Assets as at May 28, 2012 and requested further analysis.

[20] The Receiver responded to Equistar’s attorney’s letter on August 7, 2012. It provided further details as to Strudex’s inventory system, records, tracking, etc. as well as specific detail in respect of the use of product supplied by Equistar to Strudex in the period between May 28 and June 11, 2012, according to the records available to the Receiver. The letter further stated that if Equistar wished to conduct further investigation of the matter, the Receiver would attempt to facilitate such investigation with the Purchaser. The Receiver heard nothing further from Equistar.

[21] In the period since June 11, 2012, the Purchaser used or consumed the s. 81.1 Assets subject to Equistar’s claim that were in the Companies possession on June 11, 2012. In accordance with paragraph 6 of the Sale Approval and Vesting Order, the Purchaser paid to the Receiver, in trust, the invoice amount of the s. 81.1 Assets subject to Equistar’s s. 81.1 claim that it used or consumed subsequent to June 11, 2012 in the amount of \$35,425.25. The Receiver continues to hold such funds in trust pending agreement amongst the Purchaser and Equistar or further order of the Court.

Equistar's Motion

[22] The Receiver's discharge motion was originally returnable on October 16, 2012. At the request of counsel for Equistar who were retained on October 9, 2012, the motion was adjourned to November 5, 2012 "to permit further review by creditor". Equistar had been previously represented in the receivership proceedings.

[23] On October 24, 2012, Equistar's counsel sent a letter to the Receiver's counsel enclosing a list of 114 questions "for response by the Receiver in connection with the Receiver's impending motion for discharge."

[24] The questions cover a very broad range of topics, including:

- a. the relationship between the Receiver and Red Ash and the extent of Red Ash's control over the actions and decisions of the Receiver and the funding of the receivership;
- b. information available to proposed purchasers about the existence of s. 81.1 claims and the goods supplied by them;
- c. the extent of the relationship between PwC and the Companies and the extent of control exercised by PwC in that capacity prior to its appointment;
- d. the extent of PwC's control over the sale process;
- e. any advice given by PwC to the directors and officers of the Companies related to their obligations with respect to trading while insolvent;
- f. the decision to sell the cash gleaned from suppliers products as part of the assets on closing;
- g. the Liquidation Analysis (Confidential Appendices C) and whether or not the Receiver considered the impact on unsecured creditors in evaluating same;
- h. the decision to use the interim receivership structure and its impact on suppliers;
- i. forecasts of consumption of supplier goods available to or relied upon by the Receiver; investigations conducted by the Receiver, as described in the Third Report, which relate to the extent of goods supplied by Equistar;
- j. specific questions related to the quantities of the goods supplied by Equistar;
- k. general questions about how the Receiver perceived the treatment of unsecured creditors and the suppliers, and what steps, if any it took to advise the relevant parties in connection with same.

[25] On October 31, 2012, the Receiver replied to the October 24, 2012 letter and advised that it had reviewed and considered Equistar's questions and in the Receiver's view, the questions were inappropriate, irrelevant to Equistar's s. 81.1 claim, had been dealt with in the Receiver's prior communications with Equistar and/or related to activities already approved by the Court. Accordingly, it advised that it would not be answering any of the questions.

[26] On November 5, 2012, the Receiver's discharge motion was put over to November 7, 2012 to enable Equistar to bring its motion to obtain the answers to the questions and unseal the Confidential Appendices. It further amended its notice of motion to also seek payment of \$35,425.25

### Law and Analysis

#### (a) The Questions

[27] A court-appointed receiver is an officer of the court and is in a fiduciary capacity to all stakeholders: *Nash v. C.I.B.C. Trust Corp.*, 1996 CarswellOnt 2185 (O.C.J. Gen Div.) at para. 6. The fact that the receiver owes fiduciary duties to stakeholders does not, however, entitle a stakeholder to go on a fishing expedition for information: *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009), 81 C.B.R. (5<sup>th</sup>) 169 (Ont. S.C.J.) at para. 18.

[28] A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4<sup>th</sup>) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues. In addition, and as noted by Farley J. in *Bell Canada International Inc., Re* [2003] O.J. No. 4738 (S.C.J. [Commercial List]) at para. 9, the objectivity and neutrality of the officer of the court is also a factor to consider.

[29] Equistar submits that it is entitled to the answers to its questions in order to determine the correct amount of its s. 81.1 claim; who the directing minds were that caused the claim to arise; and whether or not any claim exists against any of the parties, including the Receiver for their actions in creating an unpaid debt owing to Equistar.

[30] The vast majority of the 114 questions relate to the Receiver's relationship with Red Ash and the Companies prior to and during the receivership as well as various steps during the receivership. Those questions have nothing to do with Equistar's s. 81.1 claim. Those questions are nothing more, in my view, than a fishing expedition to see if Equistar can uncover some sort of impropriety which it suspects may have occurred but of which it has no proof. In that regard, it is instructive that Equistar has provided no evidence of impropriety before or during the receivership. All it has are suspicions of impropriety which is not sufficient to elevate its questions into the reasonable category.

[31] Questions 12 and 13 and 75 to 97 relate for the most part to Equistar's s. 81.1 claim. The problem is that the Receiver has already answered Equistar's questions concerning its claim and provided it with all of its information. The Receiver duly and thoroughly investigated and provided all relevant facts it was able to obtain to Equistar. I would have thought that if Equistar

had any follow up questions, it would have contacted the Receiver directly with them. Equistar provided no evidence that it requires further information or that to its knowledge, the information is available and the Receiver has failed to provide it. In fact, it is a reasonable inference from a number of the questions that Equistar already knows the answer.

[32] The Receiver has no further information or documents relating to Equistar's claim. In my view, in responding as it has to Equistar's questions relating to its s. 81.1 claim, the Receiver has acted reasonably and in accordance with its duty. In the circumstances, it is not required, in my view, to answer Equistar's further questions which in the circumstances, are either irrelevant or unreasonable and in most cases, both.

[33] Equistar's motion in respect of the 114 questions is therefore dismissed.

(b) Unsealing the Confidential Appendices

[34] Equistar also seeks an order unsealing the Confidential Appendices as provided in paragraph 8 of the Sale Approval and Vesting Order.

[35] The First Report describes the three Appendices. Appendix A is a Confidential Information Memorandum prepared by PricewaterhouseCooper Corporate Finance with the assistance of the Companies management for the sale process in the fall of 2011. It describes the Companies business in significant detail. Appendix B is a detailed summary of the four highest offers received in December 2011 and the three revised offers received in January 2012 in respect of the sale of the Operating Companies. Appendix C is a Liquidation Analysis of assets and business of the Companies based on net book values as of March 31, 2012.

[36] In the First Report, the Receiver requested the sealing of the three Appendices from the public record until after closing of the Sale Transaction or further order of the court. As noted, paragraph 9 of the Sale Approval and Vesting Order provides that the Appendices contain confidential information and shall remain confidential and shall not form part of the permanent record pending further order of the court.

[37] Equistar submits that because the Sale Transaction is complete, there is no reason to continue with the sealing order and the documents should be unsealed. It submitted that the two circumstances justifying a sealing order as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) are no longer present here.

[38] Counsel for Red Ash opposed Equistar's request to unseal the documents. It submits that given the Court determined, as part of the Sale Approval and Vesting Order, that the Appendices were confidential, Equistar's motion for unsealing should fail as it has not established that the documents are no longer confidential. In the alternative, it submits that the documents remain confidential. In respect of that submission, because it was only served with Equistar's motion material on the eve of the motion, Red Ash requests an adjournment in order that it can file material to establish that the documents in question still remain confidential.

[39] As Newbould J. pointed out in *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 at para. 17, it is often the case that on the Commercial List sensitive

documents concerning an asset sale are sealed in order to protect the sale process. Once that process has been completed, it follows that the information in the documents is no longer confidential.

[40] I am mindful of the importance of public disclosure in the courts as discussed in *Sierra Club*. I therefore think, given the circumstances in which the Appendices were sealed, that Red Ash should be required to establish that the documents in issue still remain confidential. Accordingly, I intend to adjourn that portion of Equistar's motion, to be brought back on with proper notice to Red Ash in order to allow it to properly respond.

(c) The \$35,425.25

[41] The final relief requested by Equistar is the payment by the Receiver of the \$35,425.25 it is holding in trust in respect of its s. 81.1 claim.

[42] The Sale Approval and Vesting Order provide in paragraph 6(b) that a s. 81.1 claim is to be determined "by court order or by agreement amongst the Receiver, the applicable claimant to the s. 81.1 Asset and the Purchaser". Paragraph 6 (e) provides that where the Purchaser pays the Receiver in trust for the s. 81.1 assets its used or consumed, the cash payment "shall stand in place and stead of the s. 81.1 Asset, with such cash to be disposed of in accordance with" the determination as provided in paragraph 6(b).

[43] There has been no court order or agreement with respect to Equistar's s. 81.1 claim. Equistar has not yet sought such determination. Accordingly, pursuant to paragraph 6 of the Sale Approval and Vesting Order, the \$35,425.25 being held by the Receiver in trust cannot be disposed of until such determination.

[44] Equistar's request for payment of \$35,425.25 is therefore dismissed.

The Receiver's Motion

[45] The Receiver's appointment was for the narrow purposes of completing the sale of the assets of the Companies and certain miscellaneous post-closing matters and reporting on the s. 81.1 assets in possession of the Companies at the time of its appointment and if possible, on May 28, 2012. Those purposes have been completed.

[46] All s. 81.1 claims except for Equistar's have been resolved. The Receiver proposes that it pay the \$35,425.25 it is holding in trust on account of Equistar's s. 81.1 claim to be paid to the Trustee in Bankruptcy of the Operating Companies to permit Equistar's claim to be settled or resolved by court order in the bankruptcy. In my view, given that PwC is also the Trustee, this is a reasonable solution.

[47] The Receiver seeks a release and discharge from any and all claims arising out of its actions as Receiver save and except for gross negligence or wilful misconduct on its part. It is that request which prompted Equistar's list of questions. The release is a standard term in the Commercial List model order of discharge. In my view, in the absence of any evidence of

improper or negligent conduct on the part of the Receiver, the release should issue. A receiver is entitled to close its file once and for all. There is no such evidence here.

Conclusion

[48] Based on the material filed, the discharge order as requested by the Receiver should issue.

[49] Equistar's motion is dismissed except for the portion relating to the unsealing of the Confidential Appendices which shall be adjourned to be brought back on, if so desired, on proper notice to Red Ash and the Receiver.

[50] There will be no order of costs in respect of the Receiver's discharge motion. The Receiver is entitled, however, to costs in respect of Equistar's motion. In the absence of agreement, brief submissions of no more than two pages along with a cost outline shall be made by the Receiver within ten days. Equistar shall respond within ten days of receipt of the Receiver's submissions.

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L. A. Pattillo J.

**Released:** November 9, 2012

MERIDIAN CREDIT UNION LIMITED  
Applicant

-and- GARDEN VILLA RETIREMENT RESIDENCE INC.  
Respondent

Court File No. CV-23-00093034-0000

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
OTTAWA

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**COMPENDIUM OF THE RECEIVER**

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