COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-015317-050
(500-11-023447-044)
(500-11-023448-042)

DATE: MARCH 3, 2006

CORAM : THE HONOURABLE JOSEPH R. NUSS J.A.
PIERRETTE RAYLE J.A.
ALLAN R. HILTON J.A.

IN THE MATTER OF:
GLOBE-X MANAGEMENT LIMITED and
GLOBE-X CANADIANA LIMITED (Collectively "Globe-X")
Debtors
and
MONTREAL GAZETTE GROUP INC. ("The Gazette") and
LA PRESSE LTÉE ("La Presse")
APPELLANTS - Respondents
and
JOHN XANTHOUDAKIS
RESPONDENT - Petitioner
and
HASANAIN PANJU
INTERVENER
and
MR. CLIFFORD A. JOHNSON and MR. WAYNE J. ARANHA ("Joint Liquidators")
MIS EN CAUSE – Joint Liquidators
and
CINAR CORPORATION ("Cinar")
MIS EN CAUSE - Respondent
and
ROBERT DAVIAULT
MIS EN CAUSE

JUDGMENT

[1] **THE COURT:** - on an appeal from a judgment of the Superior Court (Commercial Division), District of Montreal, (the Honourable Clément Gascon) rendered on January 19, 2005, which granted respondent's motion seeking an order to remove from the Court record the transcript of the deposition of Mis en cause, Daviault, being an examination under oath pursuant to s. 271 (5) of the *Bankruptcy and Insolvency Act*, and an order for the destruction of all copies of the transcript in the possession of appellants as well as other orders;

[2] Having studied the file, heard the parties through counsel and having deliberated;

[3] For the reasons of Justice Joseph R. Nuss, with which Justices Pierrette Rayle and Allan R. Hilton concur;

[4] **ALLOWS** the appeal with costs;

[5] **SETS ASIDE** the judgment of the Superior Court (Commercial Division);

[6] **DISMISSES** respondent's motion with costs.

JOSEPH R. NUSS J.A.

PIERRETTE RAYLE J.A.

ALLAN R. HILTON J.A.

Mtre Mark Bantey
(GOWLING, LAFLEUR, HENDERSON)
For the appellants

Mtre Bernard Boucher
Mtre Claude Baril
(BLAKE, CASSELS, GRAYDON)
For the respondent

Mtre Jacques Rossignol
(LAPOINTE, ROSENSTEIN)
For the intervener

Mtre Jacques Darche (absent)
(BORDEN, LADNER, GERVAIS)
For the mis en cause Robert Daviault

Mtre Neil Stein
(STEIN & STEIN)
For the mis en cause Clifford A. Johnson

Date of hearing: May 27, 2005

REASONS OF NUSS, J.A.

[7] This is an appeal from a judgment of the Superior Court, District of Montreal (the Honourable Clément Gascon), rendered on January 19, 2005, which ordered that the transcript of the testimony of Robert Daviault, being an examination under oath conducted pursuant to an order of the Court under s. 271 (5) of the *Bankruptcy and Insolvency Act*[1] (BIA), be removed from the court record and that copies of the transcript in the possession of the Montreal Gazette Group Inc. and La Presse, Ltée (appellants) be destroyed. The judgment also ordered these newspapers not to publish or disclose anything from the contents of the transcripts.

THE CONTEXT

[8] Globe-X Management Limited and Globe-X Canadiana Limited are two Bahamian companies (Debtors). Pursuant to petitions by Cinar Corporation (Cinar), a Canadian corporation, alleging that the Debtors could not repay the capital sum of U.S. $41,592,730.95 and were insolvent, the Supreme Court of the Commonwealth of the Bahamas (Bahamian Court) on September 5, 2002 ordered that the Debtors be wound-up. Clifford A. Johnson and Wayne J. Aranha, (Joint Liquidators) both chartered accountants in the Bahamas, were named joint official liquidators by order of the Bahamian Court.

[9] By motion dated July 6, 2004, the Joint Liquidators applied to the Superior Court (Commercial Division) of the District of Montreal (Court) seeking an order under s. 271 (5) BIA to examine ten persons residing in Canada with respect to the affairs of the Debtors. The motion also requests that the persons to be examined be ordered to bring "books, documents, correspondence or papers" in their possession relating to the Debtors. The registrar of the Court, by judgment dated July 9, 2004, granted the motion, in a judgment which reads, in part, as follows:

(…)

> [4] **SEEING** Article 271(5) of the Bankruptcy & Insolvency Act;
>
> [5] **The Court** grants Petitioners' Motion in accordance with its conclusions, and authorizes the examination under oath by Petitioners through their attorneys in Canada of the following persons, reasonably thought to have knowledge of the affairs of the Companies, their dealings and property, wit: -
>
> - Mr. John Xanthoudakis

[1] R.S.C. 1985, C. B-3.

- Mr. Lino Matteo
- Mr. Mario Ricci
- Mr. Michael Maloney
- Mr. Robert Daviault
- Mr. Dale Smith
- Mr. Steven Tsokanos
- Mr. John Wickenden
- Mr. Hasanian Panju
- Mr. Eddie Koussaya

and any other persons in Canada whom the Petitioners reasonably believe have knowledge of the affairs of the Companies, or any person who is or has been an agent, clerk, servant, officer, director or employee of either of the Companies;

[6] AND that they be ordered by subpoena, to produce without limitation, all books, documents, correspondence or papers in their possession or power relating in whole or in part to the Companies, their dealings and property;

[7] THAT provisional execution be ordered notwithstanding any appeal herein;

(…)

(my underlining)

[10] Pursuant to the judgment of the Court rendered by the registrar a subpoena was addressed to Robert Daviault dated November 30, 2004, in which he was ordered, under penalty of law, to appear at the Courthouse[2] in Montreal on December 7, 8 and 9, 2004, and to bring with him the following documents:

(…)

Do you bring with you:

All correspondence, contracts, memos, accounting in your possession whether on computer disks or hard copies in respect of Globe-X Management Limited, Globe-X Canadiana Limited and Northshield Instructional Limited, Commax Management Inc., Northshield Composite Limited, M R Investments Limited, Globe-X Emerald Investments Limited, Northshield Mosaic Fund Limited, Northshield Director's Fund Limited, Olympus Univest Limited, Globe-X Instructional Limited, Globe-X Appreciation Limited, Globe-X Enhanced Yield Fund Limited, CMAX Advantage Fund Limited, Institutional Asset Management Inc., Northshield Group of Companies Montreal and John Xanthoudaxis, Mont Real Corporation, Real Vest Investments Limited and Mr. Lino Matteo and Mr.

[2] It appears that the examination, probably by agreement between the lawyers, was conducted at the offices of the lawyers for Daviault.

> Michael Maloney, Honey Bee Technologies, Meccain Capital Investments, Combellus Investments Inc., Mr. Eddie Koussaya, 3055221 Canada Inc., Skylark Holdings Inc., Mr. Andris E. Jpura, Adolfo Cello Enterprises Limited Mr. Jim Xanthoudakis.

[11] The lawyers for John Xanthoudakis (respondent), one of the persons named in the order of the Court, who was to testify at the request of the Joint Liquidators, sought to attend the examination of Daviault. The lawyers for the Joint Liquidators opposed the request and filed a discontinuance from the judgment authorizing them to examine respondent. The trial judge ruled that the discontinuance was invalid and a second one was deposited some weeks later. The examination of Daviault was conducted outside the presence of the lawyers of respondent. A similar request by the lawyers of Hasanian Panju, another person named in the order of the Court, was dealt with in the same way. Neither respondent nor Panju took legal proceedings to contest their exclusion from attending the examination. The validity of excluding respondent from attending the examination is not in issue before us.

[12] The lawyers for respondent then sought an assurance from the Joint Liquidators' lawyers that the transcript of the testimony given by Daviault would not be filed in the Court record. The Joint Liquidators took the position that they were going to file the transcript in the court record and that they were obliged to do so under s. 163 (3) BIA. In fact, the transcript of the testimony of Daviault was filed in the Court record on January 5, 2005. A copy of it was given to Daviault who in turn sent a copy to respondent. The lawyers for the Joint Liquidators sent a copy to a journalist for the Gazette and La Presse obtained a copy on its own initiative from the Court record.

[13] Upon learning of the filing of the transcript, respondent made a motion asking for its removal from the Court record. He also asked, *inter alia*, for the destruction of copies in the possession of appellants and an order enjoining them from citing or referring to the contents.

[14] At the hearing in Superior Court, Daviault and Panju supported respondent's motion while appellants, the Joint Liquidators and Cinar contested it.

[15] By judgment rendered on January 21, 2005, the principal conclusions of the motion were granted.

[16] The only appeal from the judgment was filed by appellants.

THE JUDGMENT OF THE SUPERIOR COURT (COMMERCIAL DIVISION)

[17] The conclusions of the judgment of the Court read as follows:

> [139] **FOR THESE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:**

[140] **GRANTS** Petitioner's Motion in part;

[141] **ORDERS** the joint Liquidators and their attorneys to immediately remove from the Court Records numbered 500-11-023447-044 and 500-11-023448-042 (the "Court Records") any and all copies of the transcripts of the Daviault's examination held on December 7, 8 and 9, 2004 (the "Transcripts");

[142] **ORDERS** the office of the clerk of the Commercial Division of the Superior Court to strike from the relevant "plumitifs" of the Court Records any entry referring to the filing of the Transcripts in these Court Records;

[143] **ORDERS** the Joint Liquidators and their attorneys not to file any other original or copy of the Transcripts in the Court Records;

[144] **ORDERS** the Joint Liquidators, their employees, representatives and agents, as well as their attorneys, not to provide to any person a copy of the Transcripts:

a) on the grounds that they are documents of public record filed in the Court Records; or

b) as having been filed in the Court Records;

[145] **ORDERS** the Gazette and La Presse, their respective officers, directors, employees, representatives and agents, to immediately destroy any and all copies of the Transcripts still in their possession, whether on computer disks or hard copies:

a) received by them from the Joint Liquidators' attorneys on the grounds that they are documents of public record filed in the Court Records or as having been filed in the Court Records; or

b) obtained by them directly from the Court Records;

[146] **ORDERS** the Gazette and La Presse, their respective officers, directors, employees, representatives and agents, not to refer to, cite from or comment on in their respective newspapers, on their website or otherwise, nor to communicate, divulge or disclose to any person, any of the contents of the Transcripts:

a) received by them from the Joint Liquidators' attorneys on the grounds that they are documents of public record filed in the Court Records or as having been filed in the Court Records; or

b) obtained by them directly form the Court Records;

> [147] **EXEMPTS** Petitioner from any obligation to serve this Judgment upon any of the parties represented herein, namely the Joint Liquidators, Cinar, The Gazette and La Presse, in view of the presence of their respective attorneys at the hearing;
>
> [148] **WITH COSTS** in favour of Petitioner, including the costs of the stenographer requested by the Court for the transcript of the reasons for this Judgment.

[18] The trial judge concluded that the Joint Liquidators' contention that they were obliged to file the transcripts because of the provisions of s. 163 (3) BIA[3] was ill-founded. He also ruled that they were wrong in their subsidiary contention that, even if they had no obligation to file the transcript under s. 163 (3) BIA, there was no prohibition preventing them from filing it in the Court record and that they were free do so.

[19] The trial judge considered that there was no suit ("instance") before the Court and that there was no purpose for the filing of the transcript in the records of the Court .

[20] Respondent filed an affidavit of Michael Scott, a Barrister of the Bahamas Bar Association, who affirmed that under Bahamian law a transcript of this nature may not be filed unless the Bahamian Court gives authorization to do so. Affidavits affirming a contrary view by Emerick Knowles and Michael Barnett, both also members of the Bahamian Bar Association were filed by the Joint Liquidators and Cinar respectively. The judge in first instance concluded, on the balance of probabilities, that he accepted the opinion set out in the affidavit of Michael Scott.

ANALYSIS

[21] The trial judge, at the inception of his reasons, correctly sets out the sole issue to be determined in this case in the following terms:

---

[3] Section 163 (3) reads :

163.	**163.**
(…)	(…)
(3) Le témoignage de toute personne interrogée sous l'autorité du présent article doit, s'il a été transcrit, être produit au tribunal et peut être lu lors de toute procédure prise devant le tribunal aux termes de la présente loi et à laquelle est partie la personne interrogée.	(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the Court under this Act to which the person examined is a party.

> **INTRODUCTION**
>
> [1] Notwithstanding how some readers may qualify the consequences of the answer to the question, this case raises in essence nothing more than the following limited legal issue:
>
> - Pursuant to an application under Subsection 271(5) of the B.I.A., does the Foreign Representative have either the obligation or the right to file in the public records of the Quebec Superior Court the transcripts of the examination authorized to be conducted in this province?
>
> [2] It is recognized by everyone involved that, apparently, this issue has never been decided before. No less than ten (10) experienced litigators, many of whom specialized in commercial and insolvency matters, were present or made representations at the hearing. None of them, and neither the Court, found any decision, be it reported or unreported, on this specific issue.
>
> (…)
>
> (my underlining)

[22] It is to be noted that, before our Court, appellants do not question the trial judge's conclusion that there was no obligation to file the deposition of Daviault under s. 163 (3) BIA. The provisions of s. 163 (3), which require that testimony taken under that section be filed, if it has been transcribed, do not apply to examinations under s. 271 (5). The trial judge was right and an appeal on that ground would, in my view, have been futile.

[23] The sole question remaining is a fundamental one, namely; whether, absent a statutory obligation to file the transcript of an examination under s. 271 (5) BIA, is it nonetheless permissible for the Joint Liquidators to do so? If it is permissible to file the transcript, then consideration must be given to respondent's argument that under Bahamian law there was a prohibition to file it without the permission of the Bahamian Court, to which the Superior Court should give effect.

Was it permissible for the Joint Liquidators to file the transcript?

[24] Court records in Canada are public (provided there is no legislative restriction), and unless they are by order of the Court placed under seal or their perusal is otherwise restricted, members of the public have access to them and the media can report on or communicate their contents.

[25] Section 271 is found in Part XIII of the BIA entitled International Insolvencies. Terms relevant to an examination of the issue before us are defined as follows:

PARTIE XIII – INSOLVABILITÉ EN CONTEXTE INTERNATIONAL	PART XIII – INTERNATIONAL INSOLVENCIES
Définitions	***Interpretation***
267. Définitions – Les définitions qui suivent s'appliquent à la présente partie.	**267. Definitions** – In this Part,
« débiteur » La personne insolvable ou le failli qui a des biens au Canada ainsi que la personne qui se trouve, par application du droit étranger, en situation de failli au titre de procédures intentés à l'étranger et a des bien au Canada. (*« debtor »*)	**"debtor"** means an insolvent person who has property in Canada, a bankrupt who has property in Canada or a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Canada; (*"débiteur "*)
« procédures intentés à l'étranger » Les procédures judiciaires ou administratives engagées à l'étranger contre un débiteur au titre du droit relatif à la faillite où à l'insolvabilité et touchant les droits de l'ensemble des créanciers. (*« foreign procedure »*)	**"foreign proceeding"** means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally; (*" procédures intentées à l'étranger "*)
« représentant étranger » Sauf le débiteur, la personne qui, au titre du droit étranger applicable, exerce, dans le cadre de procédures intentées à l'étranger, des fonctions semblables à celles d'un syndic, liquidateur, administrateur ou séquestre nommé par le tribunal, quel que soit son titre. (*« foreign representative »*)	**"foreign representative"** means a person, other than a debtor, holding office under the law of jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court. (*" représentant étranger "*)

[26] The Joint Liquidators are foreign representatives within the meaning of s. 267.

[27] Section 271 (5) BIA states:

271.	**271.**
(…)	(…)
(5) Sur demande présentée par le représentant étranger à l'égard du débiteur, le tribunal peut l'autoriser à interroger sous serment le débiteur ou toute autre personne qui, si le débiteur était le failli mentionné au paragraphe 163(1), pourrait être interrogé au titre de ce paragraphe.	(5) On application of a foreign representative in respect of a debtor, the court may authorize the examination under oath by the foreign representative of the debtor or of any person in relation to the debtor who, if the debtor were a bankrupt referred to in subsection 163(1), would be a person who could be examined under that subsection.

(my underlining)

[28] The obligation, to attend under penalty of law, before the Court to be examined under oath and to produce documents results from an order of the Court, and is a matter which must be considered in the broader perspective of the administration of justice in this jurisdiction. This examination under oath, ordered by the Court, is in a judicial proceeding and engenders the application of general principles of public order inherent in our judicial system and fundamental to the proper functioning of courts under our Constitution, such as the "open court principle",[4] respect for the rights of witnesses under compulsion to attend, protection against self-incrimination, the right to counsel and, in general, legal and, at times, constitutional protections pertaining to the giving of evidence under the compulsion of judicial process.

[29] Section 3 of the General Rules adopted under the BIA[5] states:

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.	**3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that procedure is not inconsistent with the Act or these Rules.

[30] Section 115 of the General Rules reads:

INTERROGATOIRES	**EXAMINATIONS**
115. Sauf disposition contraire de la Loi, les interrogatoires, sauf ceux prévus aux articles 159 et 161 de la Loi, se déroulent devant le registraire, devant toute personne autorisée à	**115.** Unless the Act otherwise provides, examinations, other than those pursuant to section 159 or 161 of the Act, must be held before a registrar, before a person who is

4 More fully discussed hereafter at paras. 45 to 47.
5 Section 209 of the BIA.

> mener des interrogatoires préalables ou des interrogatoires de débiteurs judiciaires ou devant toute autre personne que le tribunal désigne par ordonnance sur demande *ex parte*, et sont tenus conformément aux règles du tribunal applicables aux instances civiles.
>
> qualified to hold examinations for discovery or examinations of judgment debtors, or before such other person as the court may on *ex parte* application order, and must be conducted in accordance with the rules of court in civil cases.
>
> (my underlining)

[31] The examination of Daviault concerning the assets of the two Bahamian Debtors was authorized by the registrar under s. 271 (5) BIA. The trial judge was of the view that Rule 115 does not apply to an examination under that section but rather is limited to the other examinations mentioned in the BIA, such as those under s. 163. With respect, I disagree. Rule 115 makes no distinction between examinations under s. 271 (5) and those under the other sections of the Act except that examinations under s. 159 or s. 161 are specifically excluded. Those under s. 271 (5) are not. It is my opinion that the Rule applies to an examination under s. 271 (5). Thus the examinations under the latter section of the BIA, in conformity with Rule 115, must be conducted according to the rules of court in civil cases before the registrar or other official mentioned in the Rule.

[32] Are there any rules of court in civil cases in Quebec which assist in providing an answer to the question before us?

[33] I take it that, in Quebec, rules of court in civil cases refer to the *Code of Civil Procedure* and the Rules of Practice adopted under its provisions.

[34] Respondent argues that the examination under s. 271 (5) is akin to an examination on discovery foreseen in the *Code of Civil Procedure*. Relying on the judgment of the Supreme Court of Canada in the *Lac D'Amiante*[6] case, he contends that such examinations may not be made public.

[35] However, the examination in question is not an examination on discovery and respondent is not the party being examined.

[36] Daviault is the person being examined and, although he supported respondent's motion before the Court, he at one time, through counsel, agreed to the filing. He did not take any written proceedings on his own or file any material. Although he is a party before our Court, he merely filed an appearance through counsel, but filed no material and made no representations.

[37] Moreover, I am of the view that the examination under s. 271 (5), which has as its principal object the examination of the debtor or third parties regarding the assets

---

6 *Lac D'Amiante Québec v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743.

and the business of the debtor, is rather akin to an examination under the provisions of the *Code of Civil Procedure* pertaining to the examination of debtors or third parties after judgment:

543. Lorsqu'un jugement est devenu exécutoire, le créancier peut assigner le débiteur à comparaître devant le juge ou le greffier, soit du district où le jugement a été rendu, soit de celui où le débiteur a sa résidence, pour y être interrogé sur tous les biens qu'il possède ou qu'il a possédés depuis la naissance de la créance qui a donné lieu au jugement, ainsi que sur ses sources de revenu.	**543.** When a judgment has become executory, the creditor may summon the debtor to appear before the judge or the clerk, either of the district where the debtor has his residence, to be examined as to all the property that he possesses or has possessed since the incurring of the obligation which was the basis of the judgment, and as to his sources of revenue.
Lorsque le débiteur est une personne morale, l'assignation doit être donnée à l'un de des dirigeants; lorsqu'il est une société ou une personne morale étrangères faisant affaires au Québec, elle doit être donnée à son agent.	When the debtor is a legal person, the summons must be given to one of its senior officers; when the debtor is a foreign partnership or legal person doing business in Québec, it must be given to its agent.
544. Un juge peut, à la requête du créancier, ordonner au débiteur de produire tout livre ou document relatif aux matières qui peuvent faire l'objet de l'interrogatoire, et permettre que soit interrogée devant le greffier toute personne en état de donner des renseignements sur ces matières.	**544.** The judge may, at the instance of the creditor, order the debtor to produce any book or document relating to the matters which may be the subject of the examination and permit the examination before the clerk of any person capable of giving information about such matters.
545. Les dispositions des articles 280 à 284 et 293 à 331 régissent les cas prévus par les articles 543, 544 et 546.1, dans la mesure où elles peuvent s'appliquer.	**545.** The provisions of articles 280 to 284 and 293 to 331 apply, so far as may be, to the cases mentioned in articles 543, 544 and 546.1.
Toute difficulté qui surgit au cours de l'audition du témoin doit être soumise aussitôt que possible au juge pour adjudication.	Any dispute arising during the examination of the witness must be submitted as soon as possible for decision to the judge in chambers.

(my underlining)

[38] One notes that art. 544 *C.C.P.* permits the examination of any person having knowledge of the matters pertaining to the debtor upon authorization of a judge. Section 271 (5) BIA provides a similar possibility.

[39] Article 294 *C.C.P.* which, in so far as possible, applies to such examinations provides for the examination to be in open court:

294. Sauf lorsqu'il est autrement prescrit, dans toute cause contestée, les témoins sont interrogés à l'audience, la partie adverse présente ou dûment appelée.	**294.** Except where otherwise provided, in any contested case the witnesses are examined in open court, the opposite party being present or duly notified.
Chaque partie peut demander que les témoins déposent hors la présence les uns des autres.	Any party may demand that the witnesses testify outside each other's presence.

(my underlining)

[40] Although I am of the view that it is not required to have an examination of a debtor or others having knowledge of his or her affairs at a sitting of the court – "à l'audition", nonetheless the reference to examinations in open court supports the view that the examinations of third parties regarding the assets and affairs of a debtor are not clothed with any secrecy and are of a public nature.

[41] It is my opinion that, even if it is not obligatory under the BIA or other provision of law to file the transcript of an examination under s. 271 (5) in the court record, it is nonetheless permissible for a party involved, as a result of an order emanating from the court, to do so for the following reasons:

1) The transcript of an examination under art. 543 or 544 *C.C.P.* may be filed in the court record and, insofar as the *Code of Civil Procedure* has application under Rule 115 BIA, an examination pursuant to s. 271 (5) may also be filed in the court record;

2) There are no provisions in the BIA or in the rules of court in Quebec in civil matters, namely the *Code of Civil Procedure* and the Rules of Practice, which prohibit the filing of the transcript;

3) As a general rule, the judicial system in Canada abhors secrecy with respect to acts done pursuant to process issued by a court and strives for transparency regarding matters before a court;

4) In certain clearly defined or exceptional instances the court may order, or legislation may provide, that a document or transcription be placed under seal or that access to it be restricted. In this case, there was no demonstration of any valid reason based on principle, which should either prevent the filing in the court record or, once filed, restrict examination of it;

5) Assuming that the laws of the Commonwealth of the Bahamas are to the effect that an examination made under the provisions of Bahamian law prohibit the filing of a transcript without the authorization of the Bahamian Court, those provisions must give way before the principles applicable in Canada which allow for the placing in the record of the court all matters pertaining to court proceedings or carried out pursuant to the issue of process by a court in Canada. In other words, the Bahamian law on this issue must give way to the rules, fundamental principles, including the "open court principle", concepts, and traditions prevalent in Canada.

[42] The trial judge, after referring to the Bahamian law, considered the application of certain provisions of the *Civil Code of Québec* with respect to Private International Law found in book Ten. His view is expressed, in part, as follows:

> [120] The Court retains the following from his reading of Mr. Scott's Affidavits:
>
> a) Under Bahamian law, without prior leave of the Bahamian Supreme Court, evidence obtained by a liquidator is subject to an implied undertaking that the liquidator will not use the evidence obtained for any purpose other than the Bahamas winding up.
>
> b) Under Bahamian law, the liquidator is obligated to keep the information so obtained by them confidential, unless waived by an Order of the Bahamian Supreme Court.
>
> c) Absent an order of the Supreme Court of the Bahamas, and short of a Canadian statutory provision requiring the Liquidators to file Mr. Daviault's examination transcripts in the Canadian Court records, it was in violation of Bahamian law to do so.
>
> d) In the Bahamas, the Court file relating to the liquidation of Globe-X is generally not accessible to the general public and not open to public inspection.
>
> [121] All of this indicates to the Court much more than a simple issue of procedure here. It indicates that a serious concern exists over the conditions for production and the administration of evidence, like the Daviault's examination, obtained in the context of a Bahamian liquidation proceeding.

[122] Either this is an issue of evidence, and because of Article 3130 of the Civil Code of Quebec, this should be an additional reason for this Court to be prudent, as the laws of the Bahamas would be applicable to the issue.

[123] If not, this is an issue of procedure and this time, because of Article 3079 of the Civil Code of Quebec, this Court is compelled not to ignore the foreign law in a situation like this one, where

1) there appears to be a mandatory provision for confidentiality, unless waived by Order of the Bahamian Courts;

2) there is a direct link between that provision and the filing of the examination at stake; and

3) there are legitimate and manifestly preponderant interests that require this Court not to ignore that foreign law. That is, the rule of international comity, which warrants here that the Courts of this jurisdiction, out of mutual deference and respect to the other jurisdiction, give effect to the Bahamian laws in an investigative process that relates to their laws, their proceedings, their liquidators, and their debtors.

[124] Either way, this is indicative, at the very least, of a delicate issue that is best kept in the hands of those directly responsible for the proceedings in which it arose.

[125] All in all, no matter from which angle this situation is therefore analysed, the conclusion remains the same. Not only are there no basis here to justify an obligation or a right to file the transcripts in the Court records, there are also compelling reasons not to allow it, considering the context and purpose of the examination held.

[43] Article 3079 *C.C.Q.* provides:

Art. 3079. Lorsque des intérêts légitimes et manifestement prépondérants l'exigent, il peut être donné effet à une disposition impérative de la loi d'un autre État avec lequel la situation présente un lien étroit.	**Art. 3079.** Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another country with which the situation is closely connected.
Pour en décider, il est tenu compte du but de la disposition, ainsi que des conséquences qui découleraient de son application.	In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

[44] Respondent has failed to show that there is any legitimate and manifestly preponderant interest in giving preference to the law of the Bahamas. In fact it is difficult to identify any interest based on principle. With respect, a reference to the rule of international comity, in and of itself, does not satisfy the required criteria in this case.

[45] The administration of justice and the proper functioning of the courts is a matter of public concern and falls in the domain of public law. What is done in this jurisdiction pursuant to process issued from our courts is also a matter of public concern. In the absence of a specific prohibition, either legislative or by order of a court, what occurs in court or pursuant to process issued by it should be open to the public. In the leading case of *Nova Scotia (A.G.) v. MacIntyre*[7], Dickson J., as he then was, enunciated the general principle on behalf of the majority of the Supreme Court of Canada:

(…)

> (…) It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. (…)
>
> (…)
>
> It is, of course, true that *Scott v. Scott*[8] and *McPherson v. McPherson*[9] were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pretrial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy.
>
> The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. *Ex parte* applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial

---

7 [1982] 1 S.C.R. 175.
8 [1913] A.C. 417.
9 [1936] A.C. 177.

> proceedings must be held in public. The editor of *Halsbury's* 4th Edition states the rule in these terms:
>
> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera [Vol. 10 para. 705, at p. 316].
>
> At every stage the rule should be one of public accessibility and concomitant judicial accountability; (…)
>
> (…)
>
> (my underlining)
>
> (pp. 185-186)

[46] A witness appearing as a result of an order of the court and being compelled to testify under oath is taking part in a judicial proceeding and must be secure in the knowledge that he or she answers to and comes under the protection of the court of this jurisdiction. The public also has the right to ascertain whether the process of the court is being fairly or appropriately exercised, in conformity with the principles governing the administration of justice in Canada. If the summoned party considers that the questions asked are improper, that they infringe his or her rights or that the party is being treated inappropriately, it is open for him or her to seek the intervention of the court. Likewise, a party whose rights may be affected by an examination, or the public, should be able to refer to what went on during the course of an examination resulting from process issued by the court. What occurs pursuant to process emanating from the judicial system is generally, and as a matter of principle, open to the public.

[47] In the *Vancouver Sun*[10] case, the Supreme Court of Canada stresses the importance of the "open court principle" in our system of justice. Iacobucci and Arbour J.J., writing for the majority, enunciate and confirm the principle, in part, as follows:

> [23] This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1966] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all

[10] *Vancouver Sun (Re) v. Attorney General of Canada, Attorney General of British Columbia, "The named Person", Ajab Singh Bagri and Ripudaman Singh Malik and Attorney General of Ontario*, [2004] 2 S.C.R. 332.

truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmondon Journal*, *supra*, at p. 1336.

[24] The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle … turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General of Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J.H. Burton, ed., *Benthiamana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

[25] Public access to courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

[26] The open court principle is inextricably linked to the freedom of expression protected by s. 2*(b)* of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal*, *supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

[27] Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre*, *supra*, at p. 183. Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

(pp. 345-347)

[48] Of course, if a transcript is filed in the court record without colour of right, for a malicious or illegal purpose, as defined by the law in Canada, the court may take such appropriate measures as may be available. That is not the situation with regard to the case before us.

[49] With great respect for the opinion of the trial judge, it is my view that the motion of respondent should have been dismissed.

[50] I would allow the appeal with costs, set aside the judgment of the Superior Court and dismiss the motion of respondent with costs.

JOSEPH R. NUSS J.A.