C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED,
QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY, LIMITED

Mises-en-cause

-and-

HER MAJESTY IN RIGHT OF NEWFOUNDLAND & LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS

THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON

UNITED STEEL WORKERS, LOCALS 6254 AND 6285

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL LTD., IN ITS CAPACITY AS REPLACEMENT PENSION PLAN ADMINISTRATOR

Mis-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

BOOK OF AUTHORITIES AND REPORTS OF THE SUPERINTENDENT OF PENSIONS OF NEWFOUNDLAND & LABRADOR

Doctrine **TAB**

Jurisprudence

Monitor's Reports

MONTREAL, May 19, 2017

(s) IRVING MITCHELL KALICHMAN LLP

M[e] Doug Mitchell
M[e] Edward Béchard-Torres
ebechardtorres@imk.ca
IRVING MITCHELL KALICHMAN LLP
3500 De Maisonneuve Boulevard West
Suite 1400
Montreal, Quebec H3Z 3C1
T: 514 934-7743 | F: 514 935-2999
Lawyers for the Newfoundland & Labrador
Superintendent of Pensions
Our file: 1606-4
BI0080

Domgroup Ltd. *Appellant*

v.

Crystalline Investments Ltd. and Burnac Leaseholds Ltd. *Respondents*

INDEXED AS: CRYSTALLINE INVESTMENTS LTD. *v.* DOMGROUP LTD.

Neutral citation: 2004 SCC 3.

File No.: 29196.

2003: November 7; 2004: January 29.

Present: McLachlin C.J. and Iacobucci, Major, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy — Proposals — Disclaimer of commercial leases — Tenant validly assigning leases and assignee subsequently becoming insolvent — Assignee giving landlords notice of intention to repudiate leases pursuant to s. 65.2 of Bankruptcy and Insolvency Act — Whether repudiation of leases under s. 65.2 relieved first tenant of its obligations as original lessee — Whether post-disclaimer, assignors and guarantors must be treated in same manner with respect to liability — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.2.

Landlord and tenant — Commercial leases — Assignment clause — Insolvent commercial tenant — Tenant validly assigning leases and assignee subsequently becoming insolvent — Assignee giving landlords notice of intention to repudiate leases pursuant to s. 65.2 of Bankruptcy and Insolvency Act — Whether rights between landlords and original tenant affected by proceedings under s. 65.2 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.2.

The appellant was the respondents' original tenant. Ultimately, F held the validly assigned leases. F later became insolvent and attempted reorganization under the *Bankruptcy and Insolvency Act*. F, through its trustee, repudiated the leases. Pursuant to s. 65.2(3) of the Act, the respondents received compensation payments equivalent to six months rent upon approval of the proposal. The respondents informed the appellant that F had repudiated

Domgroup Ltd. *Appelante*

c.

Crystalline Investments Ltd. et Burnac Leaseholds Ltd. *Intimées*

RÉPERTORIÉ : CRYSTALLINE INVESTMENTS LTD. *c.* DOMGROUP LTD.

Référence neutre : 2004 CSC 3.

N^{o} du greffe : 29196.

2003 : 7 novembre; 2004 : 29 janvier.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Binnie, LeBel, Deschamps et Fish.

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

Faillite — Propositions — Résiliation de baux commerciaux — Baux cédés validement par le locataire à un cessionnaire devenu subséquemment insolvable — Avis du cessionnaire aux locateurs les informant de son intention de résilier les baux conformément à l'art. 65.2 de la Loi sur la faillite et l'insolvabilité — La résiliation des baux effectuée en vertu de l'art. 65.2 a-t-elle libéré le premier locataire de ses obligations en tant que cessionnaire initial? — Après la résiliation d'un bail, les cédants et les garants devraient-ils être assujettis à la même responsabilité? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 65.2.

Locataires et locateurs — Baux commerciaux — Clause de cession — Locataire commercial insolvable — Baux cédés validement par le locataire à un cessionnaire devenu subséquemment insolvable — Avis du cessionnaire aux locateurs les informant de son intention de résilier les baux conformément à l'art. 65.2 de la Loi sur la faillite et l'insolvabilité — Les droits des locateurs et du locataire initial ont-ils été touchés par les procédures engagées en vertu de l'art. 65.2? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 65.2.

L'appelante était le locataire initial des intimées. Au moment pertinent, F était titulaire des baux, qui lui avaient été cédés validement. Devenue insolvable après la cession, F a tenté une réorganisation en vertu de la *Loi sur la faillite et l'insolvabilité*. Par l'intermédiaire de son syndic, F a résilié les baux. Par suite de l'approbation de la proposition, les intimées ont reçu, conformément au par. 65.2(3) de la Loi, des indemnités équivalant à six

the leases and asserted their right to be paid the outstanding rent under the assignment clause in the leases. The appellant declined to pay. The respondents filed suit and the appellant applied for summary judgment in both cases. Holding that the notices of repudiation given under s. 65.2 terminated the leases for all purposes, the motions judge granted summary judgment and dismissed the respondents' claims. The Court of Appeal reversed the judgment, finding that the rights between the respondents and the appellant were unaffected by proceedings under s. 65.2.

Held: The appeal should be dismissed.

The repudiation of the leases under s. 65.2 of the Act did not affect the appellant's obligations as the original lessee. Section 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Repudiation benefits only the insolvent. Nothing in the Act protects third parties, including assignors, from the consequences of an insolvent's repudiation of a commercial lease. From the time a lease is completed, the original tenant is bound by all the conditions of the lease, including the term. The covenant is fully enforceable even if it has been assigned. Explicit statutory language is required to divest persons of rights they otherwise enjoy at law. So long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

The mere possibility that the original tenant may have a right of indemnity against his insolvent assignee and is able to make a claim to participate in the proposal proceedings as an unsecured creditor is not inconsistent with the Act. On the contrary, it is consistent with the circumstances applicable to other alternative debtors, and does not affect or alter the nature of the original tenant's contractual relationship and obligations. More importantly, it does not require that the original tenant be discharged from liability.

In distinguishing between a guarantor and an assignor post-disclaimer, *Cummer-Yonge Investments Ltd. v.*

mois de loyer. Les intimées ont avisé l'appelante que F avait résilié les baux et elles ont fait valoir leur droit aux loyers impayés conformément à la clause de cession figurant dans les baux. L'appelante a refusé de payer. Les intimées ont chacune poursuivi cette dernière, qui a demandé et obtenu un jugement sommaire dans les deux instances. Concluant que les avis de résiliation donnés en vertu de l'art. 65.2 avaient mis fin aux baux à tous égards, le juge des motions a prononcé les jugements sommaires demandés et rejeté les actions des intimées. La Cour d'appel a infirmé la décision du juge de première instance et conclu que les droits des locateurs et du locataire initial n'étaient pas touchés par les procédures engagées en vertu de l'art. 65.2.

Arrêt : Le pourvoi est rejeté.

La résiliation des baux effectuée en vertu de l'art. 65.2 de la Loi n'a eu aucune incidence sur les obligations incombant à l'appelante en tant que locataire initial. L'article 65.2 doit être interprété restrictivement et les objectifs manifestes de cet article sont de libérer une personne insolvable des obligations découlant d'un bail commercial qui sont devenues trop lourdes, d'indemniser le locateur pour la fin prématurée du bail et de permettre à la personne insolvable de reprendre autant que possible des activités viables. La résiliation ne bénéficie qu'à la personne insolvable. La Loi ne protège pas les tiers, notamment les cédants, des conséquences de la résiliation d'un bail commercial par une personne insolvable. À compter du moment où un bail est formé, le locataire initial est lié par toutes ses conditions, y compris sa durée. La convention en question est pleinement exécutoire, même si elle a fait l'objet d'une cession. Il faut une disposition législative explicite pour priver une personne de droits dont elle jouit par ailleurs en droit. Tant que la doctrine de la primauté des lois fédérales n'entre pas en jeu, on ne saurait utiliser des procédures en matière de faillite et d'insolvabilité régies par le droit fédéral pour écarter des droits de propriété et autres droits civils régis par le droit provincial.

La simple possibilité que le locataire initial dispose d'un droit d'indemnisation opposable à son cessionnaire insolvable et qu'il puisse présenter une réclamation afin de participer aux procédures de proposition en tant que créancier non garanti n'est pas incompatible avec le régime établi par la Loi. Au contraire, cette possibilité demeure pertinente dans les circonstances applicables aux autres débiteurs subsidiaires et ne modifie en rien la nature des obligations et relations contractuelles du locataire initial. Facteur plus important, elle ne commande pas que le locataire initial soit libéré de ses obligations.

L'affaire *Cummer-Yonge Investments Ltd. c. Fagot*, [1965] 2 O.R. 152, a engendré de l'incertitude dans

Fagot, [1965] 2 O.R. 152, has created uncertainty in leasing and bankruptcy and should be overruled. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability.

Cases Cited

Overruled: *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157*n*; **referred to:** *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *McNeil v. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385; *Francini v. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321; *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359; *Warnford Investments Ltd. v. Duckworth*, [1978] 2 All E.R. 517; *Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145; *Stacey v. Hill*, [1901] 1 Q.B. 660; *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Giffen (Re)*, [1998] 1 S.C.R. 91.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, Part III, ss. 62(3), 65.2 [ad. 1992, c. 27, s. 30], 179.
Landlord and Tenant (Covenants) Act 1995 (U.K.), 1995, c. 30.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.04(2).

Authors Cited

Goldfarb, Clifford S. "The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease". In H. M. Haber, ed., *Assignment, Subletting and Change of Control in a Commercial Lease*. Aurora, Ont.: Canada Law Book, 2002, 157.
Lem, Jeffrey W., and Stefan T. Proniuk. "Goodbye '*Cummer-Yonge*': A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 *D.R.P.L.* 419.

APPEAL from a judgment of the Ontario Court of Appeal (2002), 58 O.R. (3d) 549, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 27 B.L.R. (3d) 102, 49 R.P.R. (3d) 171, 31 C.B.R. (4th) 225, [2002] O.J. No. 883 (QL), reversing a judgment of the Superior Court of Justice (2001), 39 R.P.R. (3d) 49, 31

le domaine de la location et de la faillite du fait que le tribunal a considéré qu'il existe, après la résiliation, une distinction entre les garants d'une part et l'auteur d'une cession d'autre part. Cette décision doit être écartée. Après la résiliation, cédants et garants devraient être assujettis à la même responsabilité.

Jurisprudence

Arrêt renversé : *Cummer-Yonge Investments Ltd. c. Fagot*, [1965] 2 O.R. 152, conf. par [1965] 2 O.R. 157*n*; **arrêts mentionnés :** *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *McNeil c. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon c. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385; *Francini c. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321; *Transco Mills Ltd. c. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359; *Warnford Investments Ltd. c. Duckworth*, [1978] 2 All E.R. 517; *Peterborough Hydraulic Power Co. c. McAllister* (1908), 17 O.L.R. 145; *Stacey c. Hill*, [1901] 1 Q.B. 660; *Hindcastle Ltd. c. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Giffen (Re)*, [1998] 1 R.C.S. 91.

Lois et règlements cités

Landlord and Tenant (Covenants) Act 1995 (R.-U.), 1995, ch. 30.
Loi sur la faillite et l'insolvavilité, L.R.C. 1985, ch. B-3, Partie III, art. 62(3), 65.2 [aj. 1992, ch. 27, art. 30], 179.
Règles de procédure civile, R.R.O. 1990, Règl. 194, r. 20.04(2).

Doctrine citée

Goldfarb, Clifford S. « The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease ». In H. M. Haber, ed., *Assignment, Subletting and Change of Control in a Commercial Lease*. Aurora, Ont. : Canada Law Book, 2002, 157.
Lem, Jeffrey W., and Stefan T. Proniuk. « Goodbye "*Cummer-Yonge*" : A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants » (1993), 1 *D.R.P.L.* 419.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2002), 58 O.R. (3d) 549, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 27 B.L.R. (3d) 102, 49 R.P.R. (3d) 171, 31 C.B.R. (4th) 225, [2002] O.J. No. 883 (QL), qui a infirmé un jugement de la Cour supérieure de justice (2001), 39 R.P.R. (3d) 49, 31

C.B.R. (4th) 216, [2001] O.J. No. 736 (QL). Appeal dismissed.

Fred D. Cass, *Lawrence J. Crozier* and *David Stevens*, for the appellant.

Peter-Paul E. DuVernet, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

This appeal arises from a motion for summary judgment. The facts are undisputed. The respondents, Crystalline Investments Limited ("Crystalline") and Burnac Leaseholds Limited ("Burnac"), while owners of different properties, are referred to collectively as the "landlords".

Dominion Stores Limited was the original tenant of the landlords. It is not clear from the record nor is it relevant whether Dominion Stores Limited became Domgroup Limited ("Domgroup") by reorganization or by a change of name. For purposes of this appeal, the appellant Domgroup can be viewed as the original tenant.

Domgroup assigned the leases to Coastal Foods Limited ("Coastal Foods"), a wholly owned subsidiary. The consent of the landlords was not required under the leases for the assignments. Domgroup subsequently sold Coastal Foods which amalgamated to form Food Group Inc. ("Food Group"). Food Group later became insolvent and attempted a reorganization under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), as amended to 1994.

The question is whether the terms of the reorganization by the insolvent assignee through its trustee where it purported to repudiate the leases under s. 65.2 of the Act affect the obligations between the landlords and the original tenant.

C.B.R. (4th) 216, [2001] O.J. No. 736 (QL). Pourvoi rejeté.

Fred D. Cass, *Lawrence J. Crozier* et *David Stevens*, pour l'appelante.

Peter-Paul E. DuVernet, pour les intimées.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

1 Le présent pourvoi découle d'une motion sollicitant un jugement sommaire. Les faits ne sont pas contestés. Bien qu'elles soient propriétaires de biens différents, les intimées, Crystalline Investments Limited (« Crystalline ») et Burnac Leaseholds Limited (« Burnac »), sont appelées collectivement ci-après les « locateurs ».

2 Dominion Stores Limited était le locataire initial des locateurs. Le dossier n'indique pas clairement — information qui n'est d'ailleurs pas pertinente — si Dominion Stores Limited est devenue Domgroup Limited (« Domgroup ») à la suite d'une réorganisation ou d'un changement de dénomination. Pour les besoins du présent pourvoi, l'appelante Domgroup peut être considérée comme le locataire initial.

3 Domgroup a cédé les baux à Coastal Foods Limited (« Coastal Foods »), une filiale en propriété exclusive. Cette cession pouvait intervenir sans le consentement des locateurs. Domgroup a par la suite vendu Coastal Foods, qui s'est fusionnée pour former Food Group Inc. (« Food Group »). La société Food Group est plus tard devenue insolvable et a tenté une réorganisation en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (la « Loi »), dans sa version en vigueur en 1994.

4 Il s'agit de décider si les conditions de la réorganisation qu'a effectuée la cessionnaire insolvable par l'intermédiaire de son syndic et au moyen de laquelle elle entendait résilier les baux en vertu de l'art. 65.2 de la Loi ont une incidence sur les obligations convenues entre les locateurs et le locataire initial.

5 The procedure for granting summary judgment in Ontario was set out in rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided as follows at the time:

20.04 . . .

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

6 In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27, Iacobucci and Bastarache JJ. discussed the legal principles that govern a motion for summary judgment:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, *supra*, at para. 15).

The parties do not dispute the test for summary judgment.

7 The motions judge held that notices of repudiation given under s. 65.2 terminated the leases for all purposes. Relying on *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152 (H.C.), he found that, since the leases no longer existed, the liabilities that would have been owed by the original tenant to the landlords also disappeared. He granted summary judgment dismissing the claims of the landlords who sought damages from the original tenant. The Ontario Court of Appeal reversed the trial judge and held that the rights between the landlords and the original tenant were unaffected by proceedings under s. 65.2. The appeal was allowed and the summary judgments set aside.

En Ontario, jugement sommaire est rendu dans les cas prévus par la règle 20.04(2) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, qui est rédigée ainsi :

20.04 . . .

(2) Le tribunal, s'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse, rend un jugement sommaire en conséquence.

Dans l'arrêt *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, par. 27, les juges Iacobucci et Bastarache ont examiné les principes juridiques régissant les motions sollicitant un jugement sommaire :

> Le critère qu'il convient d'appliquer à une motion visant à obtenir un jugement sommaire est respecté lorsque le requérant démontre qu'il n'y a aucune véritable question de fait importante qui requiert la tenue d'un procès et qu'il est donc opportun que le tribunal examine s'il y a lieu d'accorder un jugement sommaire. Voir *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, au par. 15; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A. Ont.), aux pp. 267 et 268; *Irving Ungerman Ltd. c. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), aux pp. 550 et 551. Une fois que l'auteur de la motion a fait cette démonstration, il incombe ensuite à la partie intimée « d'établir que son action a vraiment des chances de réussir » (*Hercules*, précité, au par. 15).

Les parties ne contestent pas ce critère.

Le juge des motions a conclu que les préavis de résiliation donnés en vertu de l'art. 65.2 ont eu pour effet de résilier les baux à tous égards. S'appuyant sur l'affaire *Cummer-Yonge Investments Ltd. c. Fagot*, [1965] 2 O.R. 152 (H.C.), le juge a conclu que, puisque les baux n'existaient plus, les obligations du locataire initial envers les locateurs avaient également disparu. Le juge a prononcé des jugements sommaires rejetant les demandes des locateurs, qui réclamaient des dommages-intérêts du locataire initial. La Cour d'appel de l'Ontario a infirmé la décision du juge de première instance et conclu que les droits des locateurs et du locataire initial n'étaient pas touchés par les procédures engagées en vertu de l'art. 65.2. L'appel a été accueilli et les jugements sommaires ont été annulés.

For the reasons that follow, I agree with the Ontario Court of Appeal that the insolvency of the assignee and the order made pursuant to the Act do not affect the landlords who can continue to look to the original tenant for enforcement of the leases. The order affects the insolvent assignee and its creditors, including the original tenant and assignor of the leases, but does not reach to the landlords. I would dismiss the appeal.

In this appeal, the appellant sought to rely on certain common law remedies and, in particular, advanced the defence of surrender which was neither pleaded nor raised before the motions judge or the Court of Appeal. Surrender must be pleaded. See *McNeil v. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385 (H.C.), at p. 562. In these circumstances the court refused to consider the question.

This appeal is limited to confirming that Food Group's repudiation of the leases assigned to it by Domgroup did not, by virtue of s. 65.2 alone, terminate Domgroup's rights and obligations under the leases. Section 65.2 relates to the repudiation of leases by insolvent commercial tenants. It is not concerned with the effects of that repudiation on third parties, such as assignors and guarantors. Whether the leases were terminated by surrender, as Domgroup argues for the first time in the Court, or by the application of some other principle of common law, is a question best left for trial.

II. Background

On April 30, 1979, Domgroup leased premises from Crystalline. On April 24, 1980, Domgroup leased a different location from Burnac. Both premises were located in New Brunswick. The leases had 25-year terms and contained the following assignment clause:

Notwithstanding any assignment or sublease the Lessee shall remain fully liable under this lease and shall

Pour les motifs qui suivent, je suis d'avis, tout comme la Cour d'appel de l'Ontario, que l'insolvabilité du cessionnaire et l'ordonnance rendue en application de la Loi ne touchent pas les locateurs, qui peuvent continuer d'exiger du locataire initial le respect des baux. L'ordonnance produit ses effets à l'égard du cessionnaire insolvable et de ses créanciers, y compris le locataire initial qui a cédé les baux, mais non à l'égard des locateurs. Je rejetterais le pourvoi. 8

En l'espèce, l'appelante a voulu invoquer certains moyens de défense prévus par la common law et elle a notamment fait valoir la défense d'abandon qui n'avait été ni plaidée par écrit ni soulevée devant le juge des motions ou devant la Cour d'appel. L'abandon est un moyen qui doit être plaidé. Voir *McNeil c. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon c. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385 (H.C.), p. 562. Dans ces circonstances, les tribunaux ont refusé d'examiner cette question. 9

Le présent pourvoi confirme uniquement que la résiliation par Food Group des baux que lui avait cédés Domgroup n'a pas, par la seule application de l'art. 65.2, éteint les droits et obligations de Domgroup découlant des baux. L'article 65.2 porte sur la résiliation de baux par des locataires commerciaux insolvables. Il ne traite pas des effets de cette résiliation sur les tierces parties, par exemple les cédants et les garants. La question de savoir s'il a été mis fin aux baux soit par abandon, comme l'invoque pour la première fois Domgroup devant notre Cour, soit par application d'un autre principe de common law est un problème qui devrait être débattu en première instance. 10

II. Contexte

Le 30 avril 1979, Domgroup a loué des locaux de Crystalline. Le 24 avril 1980, Domgroup a loué un autre local de Burnac. Tous ces locaux étaient situés au Nouveau-Brunswick. Les baux, d'une durée de 25 ans, comportaient la clause de cession suivante : 11

[TRADUCTION] Nonobstant toute cession ou sous-location, le locataire demeure entièrement responsable du

not be released from performing any of its covenants, obligations or agreements in this lease and shall continue to be bound by this lease.

12 On May 25, 1985, Domgroup assigned both leases to Coastal Foods which later became Food Group.

13 Food Group encountered financial difficulty and attempted a reorganization. In February of 1994, Food Group filed a notice of intention to make a proposal pursuant to Part III of the Act.

14 Food Group then prepared and filed its proposal, stating that it believed the proposal would be "of benefit to its creditors and employees, and will enable the Food Group to continue in business, albeit on a much reduced scale". Part of the proposal was that Food Group's leases with Burnac and Crystalline be terminated pursuant to s. 65.2.

15 On February 18, 1994, the insolvent Food Group, through its trustee, gave the original landlords, Burnac and Crystalline, notice of its intention to repudiate the leases. Neither Burnac nor Crystalline applied to the court to challenge the repudiation of the lease although entitled to do so under the Act. At no time did Food Group advise Domgroup of the proceedings.

16 On March 18, 1994, the proposal was approved by the Court of Queen's Bench for New Brunswick in Bankruptcy. On March 24, 1994, Burnac and Crystalline received compensation payments of $173,704.39 and $131,154.54, respectively, being the equivalent of six months rent under the leases pursuant to s. 65.2(3) of the Act. The repudiation was declared to be effective as of March 31, 1994.

17 Food Group vacated Crystalline's premises in March of 1994. It had previously vacated Burnac's premises one year earlier, but had continued to pay rent.

18 Burnac, one of the original landlords, entered into short-term leases with a bingo operation and started modifications to the premises to accommodate another tenant. Similarly, the other landlord,

présent bail, il n'est pas libéré des engagements ou autres obligations énoncés dans ce bail et il continue d'être lié par celui-ci.

Le 25 mai 1985, Domgroup a cédé les deux baux à Coastal Foods, devenue par la suite Food Group.

Éprouvant des difficultés financières, Food Group a tenté une réorganisation. En février 1994, Food Group a déposé un avis d'intention de faire une proposition selon la partie III de la Loi.

Food Group a ensuite rédigé et déposé sa proposition, où elle affirmait croire que celle-ci serait [TRADUCTION] « avantageuse pour ses créanciers et ses employés et permettrait à Food Group de poursuivre ses activités, mais à une échelle plus modeste ». La proposition prévoyait notamment la résiliation, conformément à l'art. 65.2, des baux de Food Group avec Burnac et Crystalline.

Le 18 février 1994, Food Group — qui était alors insolvable — a, par l'intermédiaire de son syndic, donné préavis de son intention de résilier les baux aux locateurs initiaux, Burnac et Crystalline. Même si la Loi les autorisait à le faire, ni Burnac ni Crystalline n'ont contesté la résiliation des baux devant le tribunal. Food Group n'a à aucun moment avisé Domgroup de ces procédures.

Le 18 mars 1994, la proposition a été approuvée par la Cour du Banc de la Reine du Nouveau-Brunswick siégeant en matière de faillite. Le 24 mars 1994, Burnac et Crystalline ont reçu, conformément au par. 65.2(3) de la Loi, des indemnités respectives de 173 704,39 $ et de 131 154,54 $, soit l'équivalent de six mois de loyer selon les conditions des baux. Le tribunal a déclaré que la résiliation prenait effet le 31 mars 1994.

Food Group a quitté les locaux de Crystalline en mars 1994. Elle avait laissé ceux de Burnac un an auparavant, mais continué à payer le loyer.

Burnac, l'un des locateurs initiaux, a conclu des baux de courte durée avec un exploitant de salle de bingo et entrepris des modifications aux locaux pour répondre aux besoins d'un autre locataire. De

Crystalline, licensed its premises to kiosk-based vendors.

On January 20, 1995, Burnac and Crystalline informed the original tenant, Domgroup, by mail that the insolvent, Food Group, had repudiated the leases. At the same time, they asserted their rights to be paid outstanding rent pursuant to the assignment clause in the leases. The letters did not acknowledge the termination of the leases as of March 31, 1994.

Domgroup declined to pay. Burnac and Crystalline both sued in Ontario Superior Court. Domgroup, on application, was granted summary judgment in both cases. Both were later reversed by the Ontario Court of Appeal.

III. Relevant Statutory Provisions

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

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may repudiate the lease on giving thirty days notice to the landlord in the prescribed manner, subject to subsection (2).

(2) Within fifteen days after being given notice of the repudiation of a lease under subsection (1), the landlord may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to such parties as it may direct, shall make such a declaration unless the insolvent person satisfies the court that the insolvent person would not be able to make a viable proposal, or that the proposal the insolvent person has made would not be viable, without the repudiation of that lease and all other leases that the tenant has repudiated under subsection (1).

(3) Where a lease is repudiated pursuant to subsection (1), a proposal filed by the insolvent person must provide for payment to the landlord, immediately after court approval of the proposal, of compensation equal to the lesser of

(*a*) an amount equal to six months rent under the lease, and

son côté, Crystalline, l'autre locateur, a autorisé l'occupation de ses locaux par des vendeurs en kiosques.

19 Le 20 janvier 1995, Burnac et Crystalline ont avisé par courrier Domgroup, le locataire initial, que Food Group, qui était alors insolvable, avait résilié les baux. Les locateurs ont par la même occasion fait valoir leur droit aux loyers impayés conformément à la clause de cession figurant dans les baux. Les lettres ne contenaient aucune mention reconnaissant la résiliation des baux survenue le 31 mars 1994.

20 Domgroup a refusé de payer. Burnac et Crystalline ont chacune poursuivi cette entreprise en Cour supérieure de l'Ontario. Domgroup a demandé et obtenu un jugement sommaire dans les deux instances. Ces jugements ont par la suite été infirmés par la Cour d'appel de l'Ontario.

III. Dispositions législatives pertinentes

21 *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3

65.2 (1) Entre le dépôt d'un avis d'intention et celui d'une proposition relative à une personne insolvable qui est un locataire commercial en vertu d'un bail immobilier, ou lors du dépôt d'une telle proposition, cette personne peut, sous réserve du paragraphe (2), résilier son bail sur préavis de trente jours donné de la manière prescrite.

(2) Le locateur peut, dans les quinze jours suivant le jour où préavis lui a été donné aux termes du paragraphe (1), demander au tribunal de déclarer ce paragraphe inapplicable au bail en question; le tribunal est tenu, sur avis donné aux parties qu'il ordonne d'aviser, de rendre l'ordonnance souhaitée, sauf si la personne insolvable le convainc que, sans la résiliation du bail en question et de tout autre bail résilié par le locataire aux termes du paragraphe (1), elle ne serait pas en mesure de faire une proposition viable ou que la proposition déjà faite ne serait pas viable.

(3) En cas de résiliation du bail, la proposition déposée par la personne insolvable doit prévoir le paiement au locateur, dès que le tribunal approuve la proposition, d'une indemnité égale au moindre des deux montants suivants :

a) une somme égale à six mois de loyer, selon les termes du bail;

(*b*) the rent for the remainder of the lease, from the date on which the repudiation takes effect.

(4) For the purpose of voting on any question relating to a proposal referred to in subsection (3), the landlord does not have any claim in respect of accelerated rent, damages arising out of the repudiation, or the compensation referred to in subsection (3).

(5) Nothing in subsections (1) to (4) affects the operation of section 146 in the event of bankruptcy.

(6) Where an insolvent person who has made a proposal referred to in subsection (3) becomes bankrupt

(*a*) after court approval of the proposal and before the proposal is fully performed, and

(*b*) after compensation referred to in subsection (3) has been paid,

the landlord has no claim against the estate of the bankrupt for accelerated rent.

b) le loyer pour la partie du bail non écoulée à la date de prise d'effet de la résiliation.

(4) En ce qui a trait au vote sur toute question relative à la proposition visée au paragraphe (3), le locateur n'a aucune réclamation à faire valoir à l'égard soit du loyer perçu par anticipation, soit des dommages-intérêts découlant de la résiliation, soit de l'indemnité prévue à ce paragraphe.

(5) Les paragraphes (1) à (4) n'ont pas pour effet de porter atteinte, en cas de faillite, à l'application de l'article 146.

(6) Dans le cas où la personne insolvable qui a fait une proposition visée au paragraphe (3) devient un failli après l'approbation de la proposition par le tribunal, mais avant l'exécution intégrale de celle-ci, et après le paiement de l'indemnité prévue à ce paragraphe, le locateur n'a aucune réclamation à faire valoir contre l'actif du failli à l'égard du loyer perçu par anticipation.

IV. Judicial History

A. *Ontario Superior Court of Justice* (2001), 39 R.P.R. (3d) 49

22 The motions for summary judgment by Domgroup were heard by Trafford J. on March 1, 2001, and by consent, the legal issue was stated as follows:

> Is a landlord, following the Court-approved termination of a commercial lease under s. 65.2 of the 1992 Act and following acceptance of the compensation provided for by the statutory code, entitled to arrears of rent, or for damages, in respect of the unexpired term of the terminated lease as against the pre-proposal assignor of the lease?

23 The motions judge held that the court-approved termination of the leases ended all obligations of the parties and rendered the assignment clause inoperative. The compensation paid to the landlords under s. 65.2 constituted the total compensation for all damages to which they were entitled under the leases. Since the entire lease, including the assignment clause, was terminated by the court order, there was no basis in law for the claims made against the

IV. Historique des procédures judiciaires

A. *Cour supérieure de justice de l'Ontario* (2001), 39 R.P.R. (3d) 49

Les motions de Domgroup sollicitant un jugement sommaire ont été entendues par le juge Trafford le 1er mars 2001 et, par consentement, la question de droit en litige a été formulée comme suit :

> [TRADUCTION] Une fois la résiliation d'un bail commercial approuvée par le tribunal en application de l'article 65.2 de la Loi qui était en vigueur en 1992 et une fois acceptée l'indemnité prévue par le code législatif, un locateur a-t-il droit d'obtenir de celui qui a cédé le bail avant la proposition les loyers impayés, ou des dommages-intérêts, pour la période du bail résilié qui reste à courir?

Le juge des motions a estimé que la résiliation des baux approuvée par le tribunal avait éteint toutes les obligations des parties et rendu inopérante la clause de cession. Les sommes versées aux locateurs en application de l'art. 65.2 constituaient l'indemnité totale à laquelle ils avaient droit en vertu des baux au titre des dommages-intérêts. Étant donné que le bail au complet, y compris la clause de cession, avait été résilié par l'ordonnance du

original tenant, Domgroup. He granted summary judgment in both cases.

B. *Ontario Court of Appeal* (2002), 58 O.R. (3d) 549

The Ontario Court of Appeal rejected the conclusion of the motions judge that the provisions of s. 65.2 terminated the leases for all purposes. In the view of Carthy J.A., the rights between the landlords and the original tenant were unaffected by the insolvency proceedings. He found no change in this result was warranted by the 1997 amendment to the English version of s. 65.2 from the term "repudiate" to "disclaim".

The Court of Appeal held that the consequences of repudiation should be restricted to those provided for in s. 65.2 having regard to the purposes of insolvency proceedings as a whole. While the insolvency proceedings permitted Food Group as the insolvent to shed its obligations, the rights and liabilities of Domgroup to the landlords under the leases remained intact.

V. Analysis

A. *The Construction of Section 65.2*

The dispute is whether the Act has relieved the appellant Domgroup of its obligations by the assignment of the leases ultimately to the insolvent. More precisely, should s. 65.2 be interpreted to bring all the obligations between the appellant and respondents to an end when the leases were repudiated by the insolvent, Food Group?

While the drafting of s. 65.2 focusses on bilateral relationships, such as a simple lease between a landlord and a tenant, the effect of the repudiation does not change in circumstances such as the present ones, involving a tripartite arrangement resulting from the assignment of a lease. In both situations, the repudiation must be construed as benefiting only the insolvent.

tribunal, les réclamations présentées contre Domgroup, le locataire initial, n'étaient pas fondées en droit. Le juge des requêtes a rendu le jugement sommaire demandé dans les deux affaires.

B. *Cour d'appel de l'Ontario* (2002), 58 O.R. (3d) 549

24 La Cour d'appel de l'Ontario a rejeté la conclusion du juge des motions selon laquelle les dispositions de l'art. 65.2 avaient eu pour effet de résilier les baux à tous égards. Suivant le juge Carthy, les procédures en matière d'insolvabilité n'ont eu aucune incidence sur les droits des locateurs et du locataire initial. Il a estimé que la modification apportée en 1997 à la version anglaise de l'art. 65.2, qui a substitué le mot « *disclaim* » au mot « *repudiate* », ne commandait pas un résultat différent.

25 La Cour d'appel a jugé que les conséquences de la résiliation devaient se limiter à celles prévues à l'art. 65.2, compte tenu de l'objectif de l'ensemble des procédures en matière d'insolvabilité. Bien que ces procédures aient permis à Food Group, la société insolvable, de se libérer de ses obligations, les droits et obligations de Domgroup envers les locateurs aux termes des baux sont demeurés intacts.

V. Analyse

A. *L'interprétation de l'art. 65.2*

26 Il s'agit de décider si, du fait de la cession des baux à la société insolvable, l'appelante Domgroup est libérée par la Loi de ses obligations. Plus précisément, l'art. 65.2 a-t-il eu pour effet d'éteindre toutes les obligations liant l'appelante et les intimées lorsque les baux ont été résiliés par Food Group, la société insolvable?

27 Bien que le texte de l'art. 65.2 vise principalement des relations bilatérales, par exemple un simple bail entre un locateur et un locataire, l'effet de la résiliation n'est pas différent dans une situation comme la présente, où il y a arrangement tripartite résultant de la cession d'un bail. Dans l'un et l'autre cas, il faut considérer que la résiliation ne bénéficie qu'à la personne insolvable.

28 I, thus, agree with the Court of Appeal that s. 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Nothing in s. 65.2, or any part of the Act, protects third parties (i.e., guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease. That is to say that they remain liable when the party on whose behalf they acted becomes insolvent.

29 When a lease is finalized, the landlord and tenant then have privity of contract and privity of estate. See *Francini v. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321 (C.A.), at pp. 322-23. When the lease is assigned, the landlord's privity of estate with the original tenant comes to an end, but the privity of contract continues and the original tenant remains liable upon its covenant. The estate or interest in the tenancy is transferred to the assignee, who, by being entitled to possession, is obliged to make payment of rent, but, subject to the terms of the lease and the agreement of the parties, the original tenant remains liable should his assignee not pay the rent. See C. S. Goldfarb, "The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease", in H. M. Haber, ed., *Assignment, Subletting and Change of Control in a Commercial Lease* (2002), 157.

30 Both the British Columbia Court of Appeal in *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359, at p. 366, and Carthy J.A., here, at para. 16, quoted from Vice-Chancellor Megarry in *Warnford Investments Ltd. v. Duckworth*, [1978] 2 All E.R. 517 (Ch. D.), at p. 526, where the position of an original tenant in bankruptcy proceedings is discussed. It is worth repeating:

> The original lessee is a person who as principal, undertook towards the lessor, the obligations of the lease for

En conséquence, je partage l'avis de la Cour d'appel que l'art. 65.2 doit recevoir une interprétation restrictive. Les objectifs manifestes de cet article sont de libérer une personne insolvable des obligations découlant d'un bail commercial qui sont devenues trop lourdes, d'indemniser le locateur pour la fin prématurée du bail et de permettre à la personne insolvable de reprendre autant que possible des activités viables. Ni l'article 65.2 ni quelque autre partie de la Loi ne protègent les tiers (c'est-à-dire les garants, cédants ou autres) des conséquences de la résiliation d'un bail commercial par une personne insolvable. C'est donc dire que les tiers demeurent responsables lorsque la partie au nom de laquelle ils ont agi devient insolvable.

Lorsqu'un bail a été conclu, il s'établit alors entre le locataire et le locateur un lien contractuel et une connexité de domaine. Voir *Francini c. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321 (C.A.), p. 322-323. En cas de cession du bail, la connexité de domaine entre le locateur et le locataire initial cesse d'exister, mais le lien contractuel survit et le locataire initial demeure tenu par son engagement. Le domaine ou l'intérêt dans la location est transféré au cessionnaire, qui, du fait de son droit à la possession, doit payer le loyer. Toutefois, sous réserve des conditions du bail et de l'entente entre les parties, le locataire initial demeure responsable du paiement du loyer si le cessionnaire fait défaut de le payer. Voir C. S. Goldfarb, « The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease », dans H. M. Haber, dir., *Assignment, Subletting and Change of Control in a Commercial Lease* (2002), 157.

Tant la Cour d'appel de la Colombie-Britannique dans l'arrêt *Transco Mills Ltd. c. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359, p. 366, que le juge Carthy au par. 16 de l'arrêt visé par le présent pourvoi ont cité les propos du vice-chancelier Megarry dans l'affaire *Warnford Investments Ltd. c. Duckworth*, [1978] 2 All E.R. 517 (Ch. D.), p. 526, qui examinait la situation du locataire initial dans le cadre de procédures de faillite. Il vaut la peine de reproduire le passage en question :

> [TRADUCTION] Le locataire initial est la personne qui, à titre de débiteur principal, assume envers le locateur

the whole term; and there is nothing in the process of assignment which replaced this liability by the mere collateral liability of a surety who must pay the rent only if the assignee does not. The bankruptcy of the assignee has for the time being destroyed the original lessee's right against the assignee to require him to discharge the obligations of the lease, and it has impaired the lessee's right of indemnity against him when he has to discharge the obligations himself; but it has not affected his primary liability towards the lessor, which continues unaffected. At no time does an original lessee become a mere guarantor to the lessor of the liability of any assignee of the lease. [Emphasis added.]

From the time a lease is completed, the original tenant is bound by all the conditions, including the term. Despite the hardship that may later develop, the covenant is fully enforceable even if it has been assigned. In England, however, public concern over the continuing liability of original tenants in post-assignment bankruptcy situations resulted in the enactment of the *Landlord and Tenant (Covenants) Act 1995* (U.K.), 1995, c. 30. As a result, when a tenant in England lawfully assigns a lease, that tenant will have no further obligations with respect to the covenant. To effect the same result in Canada, similar legislation is needed.

B. *Does the Common Law Indemnification Right Frustrate the Act?*

If the liabilities remain enforceable by the landlord against the original tenant, then presumably the original tenant can exercise its common law indemnification rights against its assignee as an unsecured creditor. See *Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145 (C.A.), at p. 151. The original tenant could therefore prove a claim in insolvency against that assignee under this right of indemnity. As a result, the insolvent assignee could face an additional claim on the lease in excess of the preferred payment required to be paid to the landlord under s. 65.2.

les obligations du bail pour toute la durée de celui-ci; de plus, le processus de cession n'a pas pour effet de substituer à cette obligation la simple obligation subsidiaire qu'a la caution de payer le loyer uniquement en cas de défaut du cessionnaire. La faillite du cessionnaire a éteint pour le moment le droit du locataire initial d'exiger du cessionnaire l'exécution des obligations prévues par le bail et a affaibli le droit du locataire d'être indemnisé par ce dernier lorsqu'il doit les exécuter lui-même; mais la faillite du cessionnaire n'a pas eu d'incidence sur l'obligation fondamentale du locataire initial envers le locateur, obligation qui, elle, reste intacte. En aucune circonstance le locataire initial ne devient simple garant envers le locateur des obligations du cessionnaire du bail. [Je souligne.]

31 À compter du moment où un bail est formé, le locataire initial est lié par toutes ses conditions, y compris sa durée. Quelles que soient les difficultés qui pourraient surgir ultérieurement, la convention en question est pleinement exécutoire même si elle a fait l'objet d'une cession. En Angleterre toutefois, les inquiétudes exprimées par la population au sujet du maintien de la responsabilité des locataires initiaux en cas de faillites postérieures à une cession ont entraîné l'adoption de la *Landlord and Tenant (Covenants) Act 1995* (R.-U.), 1995, ch. 30. Conséquemment, en Angleterre, le locataire qui cède légalement son bail n'est plus tenu aux obligations découlant de celui-ci. Une loi similaire serait nécessaire pour produire le même résultat au Canada.

B. *Le droit à indemnisation en common law fait-il obstacle à l'application de la Loi?*

32 Si les obligations demeurent opposables au locataire initial par le locateur, on peut alors supposer que le locataire initial peut, à titre de créancier non garanti, exercer contre son cessionnaire le droit à indemnisation que lui accorde la common law. Voir *Peterborough Hydraulic Power Co. c. McAllister* (1908), 17 O.L.R. 145 (C.A.), p. 151. Le locataire initial pourrait donc, en vertu de ce droit, établir l'existence d'une réclamation contre ce cessionnaire en contexte d'insolvabilité. En conséquence, en plus du paiement qui doit être fait en priorité au locateur conformément à l'art. 65.2, le cessionnaire insolvable pourrait être exposé à une réclamation additionnelle fondée sur le bail.

33 The appellant submits this result would frustrate the objectives of the Act and is the reason that a repudiation under s. 65.2 should terminate a lease for all purposes. I disagree for two reasons.

34 First, an assignor is no different from other alternative debtors, none of which is excused under the Act. For example, s. 179 states:

> **179.** An order of discharge does not release a person who at the date of the bankruptcy was a partner or cotrustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or in the nature of a surety for him.

While s. 62(3) provides:

> **62.** . . .
>
> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

Parliament therefore saw fit to conserve the liabilities of alternative debtors, yet chose not to extinguish their common law rights of indemnity.

35 Second, where an original tenant seeks indemnification on a contingent claim, provided the claim is provable and not disallowed, it would fall into the insolvency to be dealt with in accordance with the scheme of the Act. The assignor simply joins the other unsecured creditors in the proceedings. If such a claim is approved, it cannot satisfy and at the same time frustrate the Act.

36 Simply stated, the mere possibility that the original tenant may have a right of indemnity against his insolvent assignee and is able to make a claim to participate in the proposal proceedings as an unsecured creditor is not inconsistent with the statutory scheme. On the contrary, it is consistent with the circumstances applicable to other alternative covenantors, and does not affect or alter the nature of the original tenant's contractual relationship and

L'appelante fait valoir que ce résultat ferait obstacle à la réalisation des objectifs de la Loi et constitue la raison pour laquelle la résiliation prévue par l'art. 65.2 doit mettre fin au bail à tous égards. Je ne suis pas de cet avis, et ce pour deux raisons.

Premièrement, un cédant ne diffère pas des autres débiteurs subsidiaires, dont aucun n'est exempté de l'application de la Loi. À titre d'exemple, l'art. 179 dispose ainsi :

> **179.** Une ordonnance de libération ne libère pas une personne qui, au moment de la faillite, était un associé du failli ou coadministrateur avec le failli, ou était conjointement liée ou avait passé un contrat en commun avec lui, ou une personne qui était caution ou semblait être une caution pour lui.

Le paragraphe 62(3) prévoit ceci :

> **62.** . . .
>
> (3) L'acceptation d'une proposition par un créancier ne libère aucune personne qui ne le serait pas aux termes de la présente loi par la libération du débiteur.

Le législateur a donc jugé bon de maintenir les obligations des débiteurs « subsidiaires », mais il a choisi de ne pas éteindre leur droit à indemnisation en common law.

Deuxièmement, lorsqu'un locataire initial demande l'indemnisation d'une réclamation éventuelle, sa réclamation — pourvu qu'elle soit prouvable et qu'elle ne soit pas rejetée — est traitée conformément au régime établi par la Loi en matière d'insolvabilité. Le cédant joint simplement les rangs des autres créanciers non garantis participant aux procédures pertinentes. Si une telle réclamation est approuvée, elle ne saurait à la fois répondre aux exigences de la Loi et faire obstacle à la réalisation des objectifs de celle-ci.

En somme, la simple possibilité que le locataire initial dispose d'un droit d'indemnisation opposable à son cessionnaire insolvable et qu'il puisse présenter une réclamation afin de participer aux procédures de proposition en tant que créancier non garanti n'est pas incompatible avec le régime établi par la Loi. Au contraire, cette possibilité demeure pertinente dans les circonstances applicables aux autres contractants subsidiaires et ne modifie en rien la

obligations. More importantly, it does not require that the original tenant be discharged from liability.

I also question whether there is any justification for distinguishing between a guarantor and an assignor post-disclaimer. In *Cummer-Yonge*, *supra*, the landlord brought an action against guarantors of a bankrupt tenant for the unpaid rent accruing after the tenant's bankruptcy but prior to the reletting of the leased premises. The trustee in bankruptcy had disclaimed the lease in accordance with the trustees' rights under the then applicable federal bankruptcy and provincial landlord and tenancy legislation. The guarantee provision contained in the disclaimed lease provided as follows:

The Guarantors if one is a party hereto join for the first five (5) years of the term hereby granted for valuable consideration and for the purpose of guaranteeing the due performance by the Lessee of all its covenants in this lease including the covenant to pay rent on the part of the Lessee to be performed.

Gale C.J.H.C. applied the reasoning of the English Court of Appeal in *Stacey v. Hill*, [1901] 1 Q.B. 660. He read the guarantee clause strictly as a pure surety provision and found that when the lease was disclaimed by a trustee in bankruptcy, the bankrupt's covenants to perform were dissolved. Since the guarantors' obligation is to assure performance of those covenants, their obligations disappeared with the covenants. The Ontario Court of Appeal affirmed the decision without reasons ([1965] 2 O.R. 157*n*).

Cummer-Yonge has created uncertainty in leasing and bankruptcy. Not only have drafters of leases attempted to circumvent the holding in *Cummer-Yonge* by playing upon the primary and secondary obligation distinction, but courts have also performed what has been called "tortuous distinctions" in order to reimpose liability on guarantors. See J. W. Lem and S. T. Proniuk, "Goodbye '*Cummer-Yonge*': A Review of Modern Developments in

nature des obligations et relations contractuelles du locataire initial. Facteur plus important, cette possibilité ne commande pas que le locataire initial soit libéré de ses obligations.

37 Je me demande également s'il existe quelque raison justifiant d'établir une distinction, après la résiliation, entre un garant d'une part et l'auteur d'une cession d'autre part. Dans l'affaire *Cummer-Yonge*, précitée, le locateur a intenté une action contre les garants d'un locataire failli pour le loyer qui avait été impayé après la faillite du locataire mais avant le relouage des lieux. Le syndic de la faillite avait résilié le bail conformément aux droits reconnus aux syndics par les mesures législatives alors applicables, à savoir la loi fédérale sur la faillite et la loi provinciale régissant les rapports entre propriétaires et locataires. La clause de garantie qui figurait dans le bail résilié était rédigée ainsi :

[TRADUCTION] Les garants parties aux présentes, s'il en est, s'engagent, pour les cinq (5) premières années du bail qui est accordé par les présentes moyennant juste contrepartie, à garantir l'exécution par le locataire de toutes ses obligations découlant du présent bail, notamment son engagement de payer le loyer.

38 Le juge en chef Gale de la Haute Cour de l'Ontario a appliqué le raisonnement qu'avait suivi la Cour d'appel de l'Angleterre dans l'arrêt *Stacey c. Hill*, [1901] 1 Q.B. 660. Il a interprété la clause de garantie comme un simple cautionnement et il a conclu que, au moment où le syndic de faillite avait résilié le bail, les engagements du failli avaient été éteints. Comme l'obligation des garants consiste à assurer l'exécution de ces engagements, leurs obligations s'étaient éteintes en même temps que ces engagements. La Cour d'appel de l'Ontario a confirmé cette décision sans donner de motifs ([1965] 2 O.R. 157*n*).

39 L'arrêt *Cummer-Yonge* a engendré de l'incertitude dans le domaine de la location et de la faillite. Non seulement les rédacteurs de baux ont-ils tenté de contourner la conclusion de l'arrêt *Cummer-Yonge* en jouant sur la distinction entre obligation principale et obligation secondaire, mais les tribunaux ont eux aussi établi ce qu'on a décrit comme des [TRADUCTION] « distinctions tortueuses » pour rétablir la responsabilité des garants. Voir J. W. Lem

the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 *D.R.P.L.* 419, at p. 436.

40 Despite the division over *Cummer-Yonge*, the distinction between guarantors as having secondary obligations that disappear when a lease is disclaimed by a trustee in bankruptcy, and assignors as having primary obligations that survive a disclaimer, thrives in Canadian case law.

41 Not surprisingly, *Stacey v. Hill*, *supra*, led to a similar situation in England. In *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737 (H.L.), Lord Nicholls, faced with facts involving a guarantor of an assignor of a lease, gave a convincing illustration of the absurdity of maintaining this distinction, at p. 754:

> This would make no sort of legal or commercial sense. This would mean that directors who guarantee their company's obligations would *not* be liable if their *own* company became insolvent whilst tenant, but they *would* be liable if an *assignee* from their company encountered financial difficulties whilst tenant. Mr. Whitten, as guarantor of CIT's obligations, remains liable to the landlord. According to *Stacey v. Hill*, had he been a guarantor of Prest's liabilities [the assignee who became bankrupt], the disclaimer would have released him. What sort of a law would this be? [Emphasis in original.]

42 The House of Lords went on to overrule *Stacey v. Hill*. In my opinion, *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

43 The appellant submits that the English bankruptcy statute that was applied in *Hindcastle* clearly stated that disclaimer will not "affect the rights or liabilities of any other person", and that s. 65.2 of the Act has no similar wording. I agree with

et S. T. Proniuk, « Goodbye "Cummer-Yonge" : A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants » (1993), 1 *D.R.P.L.* 419, p. 436.

Malgré les désaccords qui sont survenus à propos de l'arrêt *Cummer-Yonge*, demeure toujours bien vivante dans la jurisprudence canadienne la distinction voulant que les garants soient tenus à une obligation secondaire qui disparaît en cas de résiliation du bail par le syndic de faillite et que les cédants soient tenus à une obligation principale qui survit à cette résiliation.

Il n'est pas étonnant que l'arrêt *Stacey c. Hill*, précité, ait conduit à une situation similaire en Angleterre. Dans l'affaire *Hindcastle Ltd. c. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737 (H.L.), p. 754, en présence d'un litige concernant la caution du cédant d'un bail, lord Nicholls a illustré de manière convaincante l'absurdité du maintien de cette distinction :

> [TRADUCTION] Un tel résultat n'aurait absolument aucun sens, ni sur le plan juridique ni sur le plan commercial. Il impliquerait que les administrateurs qui se portent garants des obligations de leur société *ne* seraient *pas* responsables si leur *propre* société devenait insolvable pendant qu'elle est locataire, mais qu'ils *seraient* responsables si un cessionnaire de leur société éprouvait des difficultés financières pendant qu'il est locataire. À titre de garant des obligations de CIT, M. Whitten demeure responsable envers le locateur. Suivant l'arrêt *Stacey c. Hill*, s'il avait été garant des obligations de Prest [le cessionnaire en faillite], la résiliation l'aurait libéré. Quelle sorte de règle de droit serait-ce donc? [En italique dans l'original.]

La Chambre des lords a par la suite infirmé l'arrêt *Stacey c. Hill*. À mon avis, l'arrêt *Cummer-Yonge* devrait subir le même sort. Après la résiliation d'un bail, cédants et garants devraient être assujettis à la même responsabilité. Le seul fait de la résiliation ne devrait libérer ni les uns ni les autres de leurs obligations contractuelles.

L'appelante a plaidé que la loi anglaise sur la faillite appliquée dans l'arrêt *Hindcastle* énonçait clairement que la résiliation [TRADUCTION] « n'a aucune incidence sur les droits ou obligations de toute autre personne », puis elle a ajouté que

the respondents' rebuttal to this argument that the English wording affirms the ordinary construction of the statute. In other words, explicit statutory language is required to divest persons of rights they otherwise enjoy at law. As Carthy J.A. observed in the Court of Appeal, at paras. 11-12, the lease may have real value to the original tenant and, on the wording of s. 65.2, cannot be eliminated in the absence of the original tenant's agreement. In any event, so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. See *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Giffen (Re)*, [1998] 1 S.C.R. 91.

l'art. 65.2 ne comporte pas ces mots. Je suis d'accord avec la réponse des intimées à cet argument, à savoir que ce passage du texte de loi anglais exprime l'interprétation normale de cette loi. En d'autres mots, il faut une disposition législative explicite pour priver une personne de droits dont elle jouit par ailleurs en droit. Comme l'a fait observer le juge Carthy de la Cour d'appel, aux par. 11 et 12, le bail peut avoir une valeur réelle pour le locataire initial et le libellé de l'art. 65.2 ne permet pas d'éliminer le bail sans son accord. Quoi qu'il en soit, tant que la doctrine de la primauté des lois fédérales n'entre pas en jeu, on ne saurait utiliser des procédures en matière de faillite et d'insolvabilité régies par le droit fédéral pour écarter des droits de propriété et autres droits civils régis par le droit provincial. Voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Giffen (Re)*, [1998] 1 R.C.S. 91.

As previously noted, the appellant sought to argue surrender in this Court despite not having pleaded surrender in either action as a defence, and not raising the issue before the motions judge or the Court of Appeal. Like the other defences, surrender represents an issue for trial. The decision whether to allow amendments to the pleadings, and on what terms if any, should be left to the trial judge.

44 Comme il a été dit précédemment, l'appelante a voulu invoquer devant la Cour la défense d'abandon, bien qu'elle n'ait pas plaidé ce moyen dans ses actes de procédure dans l'une ou l'autre action ni soulevé cette question devant le juge des motions ou la Cour d'appel. Comme les autres moyens de défense, l'abandon est une question qui doit être débattue en première instance. La décision d'autoriser ou non la modification des actes de procédure et, dans l'affirmative, de dire à quelles conditions cela doit être fait, devrait être laissée au juge de première instance.

VI. Disposition

I would dismiss the appeal and award the respondents their costs in this Court and below.

VI. Dispositif

45 Je suis d'avis de rejeter le pourvoi et d'accorder aux intimées leurs dépens tant devant notre Cour que devant les juridictions inférieures.

Appeal dismissed with costs.

Pourvoi rejeté avec dépens.

Solicitors for the appellant: Aird & Berlis, Toronto.

Procureurs de l'appelante : Aird & Berlis, Toronto.

Solicitors for the respondents: Glaholt & Associates, Toronto.

Procureurs des intimées : Glaholt & Associates, Toronto.

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

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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

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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.