Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C., 1985, C. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, POYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

AUTHORITIES OF THE UNDERWRITERS AND INITIAL PURCHASERS
(MOTION FOR APPROVAL OF CLAIMS AND DISTRIBUTION PROTOCOL)

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

John Fabello (LSUC #: 35449W)
Tel: 416.865.8228

Andrew Gray (LSUC #: 46626V)
Tel: 416.865.7630

Rebecca Wise (LSUC #: 60005W)
Tel: 416.865.7321

Lawyers for the Underwriters
and Initial Purchasers

TABLE OF CONTENTS

TABLE OF CONTENTS

1. *Dabbs v. Sun Life Assurance*, 1998 CarswellOnt 5823 (Gen. Div.)
2. *M.E.H. v. Williams*, 2012 ONCA 35
3. *Ontario (Liquor Control Board) v. Magnotta Winery Corp.*, 2009 CarswellOnt 8846
4. *R. v. CityTV*, 2000 CarswellOnt 2655 (SCJ)
5. *Sangha v. Reliance Investment Group Ltd*, 2012 CarswellBC 379 (SC)
6. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41
7. *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490

TAB 1

1998 CarswellOnt 5823, [1998] O.J. No. 1598

Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Ontario Court of Justice (General Division)

Sharpe J.

Judgment: February 24, 1998
Heard: February 5, 1998
Docket: Toronto 96-CT-022862

Counsel: *Michael A. Eizenga* and *Charles M. Wright*, for Plaintiff.

H. Lorne Morphy and *Patricia D.S. Jackson*, for Defendant.

Michael Deverett, for 3 Objectors.

Gary R. Will and *J. Douglas Barnett*, for 11 Objectors.

Subject: Civil Practice and Procedure

Practice --- Disposition without trial — Settlement — Enforcement of terms

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Practice --- Parties — Representative or class actions — Procedural requirements

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was

settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Cases considered by *Sharpe J.*:

Bowling v. Pfizer (1992), 143 F.R.D. 141 (U.S. Ohio) — referred to

Kevork v. R., [1984] 2 F.C. 753, 17 C.C.C. (3d) 426 (Fed. T.D.) — referred to

Mahar v. Rogers Cablesystems Ltd. (1995), 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690 (Ont. Gen. Div.) — referred to

Newman v. Stein (1972), 464 F.2d 689, Fed. Sec. L. Rep. P 93, 547 (U.S. 2nd Cir. N.Y.) — considered

Organ v. Barnett (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) — applied

Poulin v. Nadon, [1950] O.R. 219, [1950] O.W.N. 163, [1950] 2 D.L.R. 303 (Ont. C.A.) — referred to

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — applied

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 242(2) — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — pursuant to

s. 12 — considered

s. 14 — considered

s. 14(2) — considered

s. 29 — considered

s. 32(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 7.08(1) — referred to

RULING on hearingto determine procedure for court approval of settlement and class action certification.

***Sharpe J.*:**

1. Nature of Proceedings

1 In this action, commenced pursuant to the *Class Proceedings Act 1992*, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;

(b) Procedures for and scope of objection;

(c) The role of the court in approval of the agreement;

(d) Onus for approval of the agreement;

(e) Factors to be considered by the court for approval of the agreement;

(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on

January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement

(b) The role of the court in approval of the agreement

(c) Factors to be considered by the court for approval of the agreement

(d) Procedures for and scope of objection

(e) Cost consequences.

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. Analysis

(a) Onus for approval of the agreement

7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the *Act* provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: *the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.*

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement: see eg *Bowling v. Pfizer*, 143 F.R.D. 141 (U.S. Ohio 1992). I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (*Newman v. Stein*, 464 F.2d 689, (U.S. 2nd Cir. N.Y. 1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, *Newberg on Class Actions*, (3rd ed), para 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230-1 to be most helpful. Callaghan A.C.J.H.C.was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class actions:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of

upper and lower limits.

In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.

. . . . .

The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in *Yonge v. Katz*, 447 F.2d 431 (1971), it is stated:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

In another case cited by all parties in these proceedings, *Greenspun v. Bogan*, 492 F.2d 375 at p. 381 (1974), it is stated:

> ... any settlement is the result of a compromise — each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See *United Founders Life Ins. Co. v. Consumer's National Lifel Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Florida Trailer & Equipment co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). *It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.* (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The *Class Proceedings Act, 1992*, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

> 12. The court, on the motion or a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

18 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

19 In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

20 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

(i) Objectors' right to adduce evidence

21 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

22 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

23 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate". On behalf of the objectors he represents, Mr. Deverett

sought the right to conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

24 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objectors have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

25 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

26 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. *Kevork v. R.*, [1984] 2 F.C. 753 (Fed. T.D.) On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already stated, I view the approval process as one which the court must control and in which the court must take an active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place *viva voce* before the court on the dates set for the hearing of the certification/approval motion;

(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon which cross-examination is requested;

(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;

(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;

(5) that in any event, Mr Ritchie be in attendance for the motion;

(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

27 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

28 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

29 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.).

Conclusion

30 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

Order accordingly.

END OF DOCUMENT

TAB 2

2012 CarswellOnt 1100, 2012 ONCA 35, 108 O.R. (3d) 321, [2012] W.D.F.L. 2136, 212 A.C.W.S. (3d) 735, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37

H. (M.E.) v. Williams

M.E.H., Applicant (Respondent) and David Russell Williams, Respondent and The Ottawa Citizen (a division of Postmedia Network Inc.), CTV Inc., The Canadian Broadcasting Corporation, Global Television (a division of Shaw Communications), and The Ottawa Sun (a division of Sun Media Corporation), Interveners (Appellants)

Ontario Court of Appeal

Doherty, Robert P. Armstrong, Alexandra Hoy JJ.A.

Heard: November 29, 2011
Judgment: January 24, 2012
Docket: CA C53701

Proceedings: reversing *H. (M.E.) v. Williams* (2011), 105 O.R. (3d) 344, 2011 ONSC 2022, 2011 CarswellOnt 3058 (Ont. S.C.J.)

Counsel: Richard G. Dearden, Ryan Kennedy, for Interveners / Appellants

Mary Jane Binks, Q.C., Jonathan M. Richardson, for Respondent

Subject: Family; Contracts; Civil Practice and Procedure; Constitutional

Family law --- Domestic contracts and settlements — Enforcement — Practice and procedure

Husband engaged in notorious criminal conduct resulting in two convictions for first degree murder, and numerous convictions for sexual assault, break and enter and forcible confinement — Significant public and media attention was on wife — Wife commenced application for various matrimonial relief, including divorce — Temporary publication ban with respect to wife's medical information and domestic contract was issued — Wife brought motion for permanent publication ban — Motion was granted in part — It was ordered that temporary publication ban with respect to domestic contract remain in effect until it was tendered as exhibit in case — Certain media corporations appealed — Appeal allowed — Appeal allowed with one modification made to set aside sealing and non-publication orders made except to extent that those orders were not challenged on appeal — Modification related to non-publication order made with respect to medical information filed on motion — Orders made by motion judge must be set aside — Motion judge erred in law in exercising discretion in favour of granting non-publication and sealing orders — Material presented by wife did not provide kind of convincing evidence needed to satisfy first branch of test — It was consequently unnecessary to consider second branch of

test — Evidence did not support motion judge's conclusion that orders were necessary to prevent serious risk to proper administration of justice — Absent that finding, orders could not have been made under controlling jurisprudence.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Publication bans

Husband engaged in notorious criminal conduct resulting in two convictions for first degree murder, and numerous convictions for sexual assault, break and enter and forcible confinement — Significant public and media attention was on wife — Wife commenced application for various matrimonial relief, including divorce — Temporary publication ban with respect to wife's medical information and domestic contract was issued — Wife brought motion for permanent publication ban — Motion was granted in part — It was ordered that temporary publication ban with respect to domestic contract remain in effect until it was tendered as exhibit in case — Certain media corporations appealed — Appeal allowed — Appeal allowed with one modification made to set aside sealing and non-publication orders made except to extent that those orders were not challenged on appeal — Modification related to non-publication order made with respect to medical information filed on motion — Orders made by motion judge must be set aside — Motion judge erred in law in exercising discretion in favour of granting non-publication and sealing orders — Material presented by wife did not provide kind of convincing evidence needed to satisfy first branch of test — It was consequently unnecessary to consider second branch of test — Evidence did not support motion judge's conclusion that orders were necessary to prevent serious risk to proper administration of justice — Absent that finding, orders could not have been made under controlling jurisprudence.

Cases considered by *Doherty J.A.*:

A.B. (Litigation Guardian of) v. Bragg Communications Inc. (2011), 97 C.P.C. (6th) 54, (sub nom. *B. (A.) v. Bragg Communications Inc.)* 228 C.R.R. (2d) 181, (sub nom. *A.B. v. Bragg Communications Inc.)* 301 N.S.R. (2d) 34, (sub nom. *A.B. v. Bragg Communications Inc.)* 953 A.P.R. 34, 80 C.C.L.T. (3d) 180, 2011 CarswellNS 135, 2011 NSCA 26 (N.S. C.A.) — referred to

Canadian Broadcasting Corp. v. R. (2010), 102 O.R. (3d) 673, (sub nom. *R. v. Canadian Broadcasting Corp.)* 262 C.C.C. (3d) 455, (sub nom. *R. v. Canadian Broadcasting Corp.)* 327 D.L.R. (4th) 470, 2010 ONCA 726, 2010 CarswellOnt 8225, (sub nom. *R. v. Canadian Broadcasting Corporation)* 221 C.R.R. (2d) 242, 271 O.A.C. 7 (Ont. C.A.) — referred to

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112 (S.C.C.) — considered

John Doe, Re (2005), 20 C.P.C. (6th) 306, 2005 NLTD 214, 2005 CarswellNfld 360, 253 Nfld. & P.E.I.R. 141, 759 A.P.R. 141 (N.L. T.D.) — referred to

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — followed

Ottawa Citizen Group Inc. v. Ontario (2005), (sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 201 O.A.C. 208, 2005 CarswellOnt 2205, (sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 131 C.R.R. (2d) 332, 31 C.R. (6th) 144, (sub nom. *Ottawa Citizen Group Inc. v. R.)* 75

O.R. (3d) 590 (Ont. C.A.) — referred to

R. v. Lavallee (1990), [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, [1990] 1 S.C.R. 852, 108 N.R. 321, 76 C.R. (3d) 329, 55 C.C.C. (3d) 97, 1990 CarswellMan 198, 1990 CarswellMan 377, 132 W.A.C. 243 (S.C.C.) — referred to

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Société Radio-Canada c. Québec (Procureur général) (2011), 2011 SCC 2, 2011 CarswellQue 43, 2011 CarswellQue 44, (sub nom. *Société Radio-Canada v. Québec (Procureur Général))* 328 D.L.R. (4th) 34, (sub nom. *Société Radio-Canada v. Québec (Procureur Général))* 264 C.C.C. (3d) 1, (sub nom. *CBC v. Canada (A.G.))* [2011] 1 S.C.R. 19, (sub nom. *Canadian Broadcasting Corp. v. Canada (Attorney General))* 411 N.R. 23, 1 C.P.C. (7th) 1 (S.C.C.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2003), 178 C.C.C. (3d) 349, 232 D.L.R. (4th) 217, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 178 O.A.C. 60, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 110 C.R.R. (2d) 288, 17 C.R. (6th) 392, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 67 O.R. (3d) 577, 2003 CarswellOnt 3986 (Ont. C.A.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, 197 C.C.C. (3d) 1, [2005] 2 S.C.R. 188, 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 76 O.R. (3d) 320 (note), (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, 132 C.R.R. (2d) 178 (S.C.C.) — followed

Vancouver Sun, Re (2004), (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, 33 B.C.L.R. (4th) 261, [2004] 2 S.C.R. 332, 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Supreme Court Act, R.S.C. 1985, c. S-26

s. 40 — referred to

APPEAL by media corporation from judgment reported at *H. (M.E.) v. Williams* (2011), 105 O.R. (3d) 344, 2011 ONSC 2022, 2011 CarswellOnt 3058 (Ont. S.C.J.), which granted wife's motion for permanent publication ban.

***Doherty J.A.*:**

I

Overview

1 The respondent proposes to commence a proceeding in which she will seek a divorce and corollary relief from her husband, David Russell Williams ("Williams"). She brought a motion seeking an order sealing the entire record in the proceeding she proposes to bring against Williams. Alternatively, the respondent sought an order banning publication of the medical evidence relied on in support of her motion and banning publication of any financial or medical records that may be produced during the proceedings against Williams. Although not specifically requested in the notice of motion, the respondent also sought an order prohibiting publication of any information that would identify her by name as the person bringing the proceedings against Williams.

2 Williams did not oppose the motion. Various media organizations were served with notice of the motion and several, including the Ottawa Citizen and the Canadian Broadcasting Corporation (appellants), were granted intervener status on the motion. They opposed the motion.

3 The motion judge made a non-publication and sealing order. The orders were broad, but not as broad as requested by the respondent. The terms of the non-publication order can be summarized as follows:

- A term banning publication of any information that served to identify the name, address or contact information of the respondent. She was to be referred to in the title of proceedings as M.E.H. Any accounts relating to the divorce proceedings were to refer to her by those initials or as the wife of Williams.

- A term banning publication of any photograph or likeness of the respondent in any report or publication relating to the motion or to any aspect of the divorce proceeding.

- A term banning publication of the name, address, or contact coordinates of the respondent's employer in any report or publication relating to the motion or divorce proceedings.

- A term banning publication of the respondent's social insurance number, her date and place of birth, the address of her real property, the names of any financial institutions with which she deals and the respondent's account numbers at those institutions in any report or publication relating to the motion or the divorce proceedings.

- A term banning publication of any information filed in the divorce proceedings referable to the assets or liabilities of the respondent not derived from transfers or assignments to her from Williams after February 2010.

4 To give effect to the non-publication order, the motion judge provided that a redacted version of the record with the information covered by the non-publication order removed from it would constitute the public record of the proceedings.

5 In addition to the non-publication order, the motion judge ordered that any tax returns or income and expense portions of financial statements filed in the divorce proceedings by the respondent could be filed under seal.

6 The motion judge also made a non-publication order in respect of the medical information filed on the motion and the domestic contract between Williams and the respondent produced on the motion. While the order itself is not clear, the parties have proceeded on the basis that the non-publication order with respect to the medical information and the domestic contract does not extend to the references to that information in the motion judge's reasons. I will also proceed on that basis.

7 The appellants appeal from the order of the motion judge. They challenge most, but not all of the terms of the order. The appellants do not challenge the non-publication order as it relates to the respondent's social insurance number, her date of birth, or her bank account numbers. They also do not challenge the non-publication order applicable to the medical information and the domestic contract produced on the motion.

8 I do not understand the appellants to concede that the unchallenged aspects of the motion judge's order were properly made. Instead, they simply choose not to make any arguments against those parts of the order because they regard the information covered by those terms to be irrelevant to their purposes, and they accept that the references in the motion judge's reasons to the medical evidence and the domestic contract are sufficient for their purposes.

9 I would allow the appeal. The motion judge correctly identified the applicable legal principles. However, the evidence cannot support her conclusion that the orders were necessary to prevent a serious risk to the proper administration of justice. Absent that finding, the orders could not have been made under the controlling jurisprudence.

II

Background

10 In February 2010, Williams, who was at the time a colonel in the Canadian Forces and the commander of the air force base at Trenton, Ontario, was charged with two counts of first degree murder, two counts each of sexual assault and forcible confinement, and 82 counts of break and enter. The allegations were stunning in their depravity, especially in light of Williams' high military rank and his apparently sterling character. In October 2010, Williams pled guilty to the charges and was sentenced to life imprisonment without eligibility for parole for 25 years on both counts of first degree murder. Concurrent sentences were imposed on the other charges.

11 Understandably, the charges and prosecution of Williams sparked widespread public interest. That interest has been reflected in intense media coverage, particularly when the charges were laid and when Williams pled guilty and was sentenced.

12 According to the material filed on the motion, and I do not understand the appellants to challenge this, the respondent was shocked and devastated by the charges laid against her husband. Through the revelations that followed the laying of the charges, the respondent learned that her husband, to whom she had been married for many years and who she believed to be a highly respected, successful and loving man, was in reality a sexual predator and coldblooded serial murderer. On the unchallenged evidence, the respondent is indeed yet another victim of Williams' depravity.

13 The respondent finds herself associated in media reports with Williams, now one of Canada's most notorious murderers. Some media reports have identified her by name and referred to her place of employment and her position there. The respondent's photograph has appeared in the newspaper in association with some of these articles.

III

The Proceedings on the Motion

(i) The Submissions

14 The respondent's request for non-publication and sealing orders was based entirely on the affidavit of her treating psychiatrist, Dr. W. Quan. He was cross-examined on his affidavit.

15 Counsel for the respondent argued that Dr. Quan's evidence established a real and substantial risk to the respondent's mental wellbeing if the media was allowed to identify her by name or other details and/or publish the kind of financial and personal information routinely filed in divorce proceedings and available to the media in Ontario. Respondent's counsel submitted that the evidence went beyond evidence demonstrating the respondent's personal distress and embarrassment and spoke to the respondent's ability to gain access to the courts, an issue of public importance to the administration of justice. Counsel contended that a litigant like the respondent, who is required to go to court to obtain a divorce to sever her relationship with her husband, should not be put in a position where the publicity attendant upon gaining that court access would pose a substantial risk to the litigant's mental health.

16 Counsel for the respondent next argued that the salutary effects of the non-publication and sealing orders sought outweighed the deleterious effects of those orders, including the inevitable negative impact on freedom of expression and the open court principle. Counsel stressed that while divorce proceedings, like any court proceeding, have an important public component, the matters at issue in this proceeding were essentially private matters between the respondent and Williams.

17 Counsel for the appellants submitted that, absent an affidavit from the respondent, the evidence of Dr. Quan was inadmissible. Counsel further submitted that even if Dr. Quan's evidence was admissible, it did not provide the kind of convincing evidence needed to establish harm to the administration of justice that would warrant the wide-ranging non-publication and sealing orders sought.

18 Counsel stressed the absence of any affidavit from the respondent and her ongoing participation since June 2010 in a lawsuit in which she and Williams are defendants in a fraudulent conveyance action brought by one of Williams' victims. The respondent's statement of defence and an affidavit she filed in that proceeding revealed a good deal of the information that she sought cloaked in non-publication and sealing orders in her pending divorce proceedings. No non-publication or sealing order had been made in respect of the respondent's identity or the information contained in her statement of defence and the affidavit filed in the fraudulent conveyance action. The media had referred to the contents of that material and nothing filed on the motion suggested that the media reports had caused any harm to the respondent or interfered with her ability to defend herself in that proceeding.

19 The appellants also led evidence on the motion that the respondent's lawyer had given an interview to a reporter of the Ottawa Citizen in late December 2010 in which she identified the respondent by name, referred to

her place of employment, her intention to seek a divorce, and described in a generic way the material that would be filed in the anticipated divorce proceeding. The media again reported on this information in early 2011. The respondent led no evidence that she suffered any adverse consequences from the media reports.

20 Counsel for the appellant also rejected the characterization of the litigation as essentially a private matter. He submitted that media access to and reporting on divorce proceedings, as with other court proceedings, furthered the transparency of those proceedings, the public accountability of those involved in the proceedings, and in some cases the reliability of the results achieved. Counsel stressed that transparency, accountability and reliability are all essential to the continued public confidence in and respect for the administration of justice. On a more specific plane, counsel submitted that the division of property between the respondent and Williams, especially as it related to his military pension, was a matter of public interest.

(ii) The Motion Judge's Reasons

21 The motion judge appreciated that the order sought was an extraordinary one in that it would compromise the open court principle, which she described (at para. 6), as one of "fundamental importance... to our democratic society". She approached her task using the two-step approach identified in a series of cases from the Supreme Court of Canada involving non-publication orders and/or sealing orders: see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.), at para. 26; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), at paras. 45-46; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.), at para. 32. This approach is commonly referred to as the *Dagenais/Mentuck* test.

22 In *Mentuck*, Iacobucci J. said, at para. 32:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

23 The motion judge concluded (at para. 27) that the first requirement in *Mentuck* had been met by the respondent:

> The applicant has shown a real and substantial risk to herself which goes beyond personal sensibilities or discomfort, mere embarrassment or personal preference. She requires access to this court in order to obtain a divorce and to finalize her financial affairs with the Respondent. *There is a real risk that her fragile recovery could be compromised by the likely renewed publicity that the proposed litigation will occasion.* She has established a real and serious risk to the public interest that access to the court not be barred by personal consequences of publicity.
>
> [Emphasis added.]

IV

Analysis

24 The first branch of the two-part inquiry set out in *Mentuck*, described as the "necessity" branch, is the focus of this appeal. Before turning to the evidence, I will set out some of the important features of that branch of the test.

(i) There Must be a Public Interest at Stake

25 *Mentuck* describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the *Dagenais*/*Mentuck* test: *Sierra Club of Canada*, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at p. 185; *Sierra Club of Canada*, at para. 55; *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2011 NSCA 26, 301 N.S.R. (2d) 34 (N.S. C.A.), at paras. 73-75.

26 The respondent framed her claim in terms of her right to gain access to the courts to seek legal redress. I agree with her contention that access to the courts is an essential component of the "proper administration of justice". There is no need to give any further consideration to other interests which may qualify under the first branch of the *Dagenais*/*Mentuck* test.

27 There can be no doubt that an individual's right to seek and obtain appropriate relief in a court proceeding is a matter of significant public interest impacting on the proper administration of justice. The public interest in access to the courts for legal relief is particularly important where that access is required to give legal effect to a decision as integral to personal autonomy as the decision to seek a divorce. If insisting on the openness usually demanded of court proceedings will effectively close the courtroom door to a litigant because of the physical and/or emotional consequences to that litigant of maintaining the openness of the courts, I am satisfied that the first component of the *Dagenais/Mentuck* test would be made out assuming that there was no reasonable alternative to some limit on the openness of the courts. The court would then have to go on and address the competing interests under the second component of that test before deciding what limit, if any, would be placed on the openness of the courts.

28 Counsel for the appellants accepted that access to the courts is a matter of public interest that affects the proper administration of justice. He submitted that the public interest is engaged only where it is established that the litigant would not go to court absent the privacy protections afforded by the non-publication and sealing orders.

29 In my view, it is not necessary that a litigant establish that he or she would not go to court absent the privacy protections requested. Access to the courts should not come at the cost of a substantial risk of serious debilitating emotional or physical harm to the party seeking access. Access to the courts at that cost would be more illusory than real.

30 The distinction between personal emotional distress and embarrassment, which cannot justify limiting publication of or access to court proceedings and records, and serious debilitating physical or emotional harm that goes to the ability of a litigant to access the court is one of degree. Expert medical opinion firmly planted in reliable evidence of the specific circumstances and the condition of the litigant will usually be crucial in drawing

that distinction: see *John Doe, Re*, 2005 NLTD 214 (N.L. T.D.), at para. 43.

(ii) The Necessity Inquiry Comes First

31 The necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of non-publication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: *Mentuck*, at para. 34. Unless a serious risk to a public interest is established, the court does not proceed to the second branch of the inquiry where competing interests must be balanced.

32 As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?

(iii) Freedom of Expression and the Open Court Principle

33 In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis. Freedom of expression, including freedom of the press and other media communications, is a constitutionally protected fundamental freedom. The constitutional right to freedom of expression protects the media's access to and ability to report on court proceedings. The exercise of this fundamental freedom in the context of media coverage of court proceedings is essential to the promotion of the open court principle, a central feature of not only Canadian justice, but Canadian democracy: *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2, [2011] 1 S.C.R. 19 (S.C.C.), at paras. 1-2; *Vancouver Sun, Re*, 2004 SCC 43, [2004] 2 S.C.R. 332 (S.C.C.), at para. 26; *Ottawa Citizen Group Inc. v. Ontario* (2005), 75 O.R. (3d) 590 (Ont. C.A.), at paras. 50-55; *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673 (Ont. C.A.), at paras. 22-24.

34 Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": *Canadian Broadcasting Corp. v. R.*, at para. 40; *Toronto Star Newspapers Ltd. v. Ontario* (2003), 67 O.R. (3d) 577 (Ont. C.A.), at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.), at para. 41; see also *Ottawa Citizen Group Inc.*, at para. 54.

V

Standard of Review

35 As I have already indicated, the motion judge applied the correct legal principles to the facts as she

found them. Normally, this kind of exercise attracts a deferential standard of review: see e.g. *Bragg Communications*, at paras. 36, 100-103. However, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at pp. 864-65, Lamer J. for the majority held that any discretionary order banning publication must be consistent with *Charter* principles and that, if the order goes beyond the scope tolerated by the proper application of *Charter* principles, the making of the order constitutes an error of law. The same analysis has been applied to sealing orders: *Ottawa Citizen Group*, at para. 26.

36 Although *Dagenais* and *Ottawa Citizen Group* both involved prerogative writ challenges to non-publication and sealing orders, I see no reason to characterize the nature of the decision differently because it is challenged by way of appeal rather than prerogative writ. I note that in *Mentuck*, an appeal to the Supreme Court pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, the court, without alluding to the standard of review, reviewed the orders made by the trial judge using a correctness standard: *Mentuck*, at paras. 41-43, 46-47; see also *Sierra Club of Canada*, at para. 48.

37 The characterization of non-publication and sealing orders that are not *Charter* compliant as errors in law strongly implies a review of those orders on a correctness standard. In my view, the motion judge's decision should be reviewed on a correctness standard. However, as I will explain in my review of the evidence, I am also satisfied that the motion judge's finding that the orders were necessary to prevent a serious risk to the proper administration of justice was unreasonable on the evidence proffered by the respondent. Consequently, even on a deferential standard of review, the orders cannot stand.

VI

Should the Order Have Been Granted?

(i) Dr. Quan's Evidence

38 Dr. Quan first saw the respondent in March 2010, about one month after Williams was charged. He has continued to see her about once a month since then. Dr. Quan described the respondent as initially "devastated" by the revelations about Williams. She was shocked, confused, unable to sleep, unable to focus and she had difficulties with her memory. The respondent felt as though her entire life had been "turned upside down". She found herself continually thinking about Williams' victims.

39 In the weeks immediately following the revelations, the respondent could not stay in the family home or go to work. Within about two to three months, she had returned to her home and was working full time at her former position.

40 The respondent has no immediate family, but does have strong support from a group of close friends and neighbours. Her employer and co-workers have been supportive. The respondent's job is a demanding but fulfilling one. It is very important to her.

41 Dr. Quan indicated that the respondent improved quite quickly after the intense initial shock of the disclosures about Williams. She had made significant gains by the summer of 2010. Dr. Quan reported continued progress in December 2010, despite the very intense publicity during the trial proceedings in October. The respondent had wisely mitigated the impact of those proceedings on her by leaving the country for a holiday while those proceedings were ongoing.

42 Dr. Quan reported that the respondent's physical symptoms included weight loss, back pain, headaches, and temporomandibular joint dysfunction caused by clenching her teeth. She also exhibited depressive symptomatology of a moderate degree of severity, anxiety of a moderate degree of severity, ongoing symptoms of emotional shock, and certain post-traumatic stress disorder symptoms of a moderate degree of severity. She had not required hospitalization, medication or treatment other than her monthly meetings with Dr. Quan.

43 Dr. Quan stressed that the respondent was very apprehensive about the publicity that would flow from her divorce proceedings. Each wave of publicity precipitated by a court proceeding increased her anxiety and presented coping challenges for her. The respondent believed that her job was threatened by the ongoing media coverage connecting her to Williams.

44 Dr. Quan believed that obtaining a divorce and related corollary relief was important to the respondent as it would enable her to make a complete break from Williams. This break was important to her emotional well-being.

45 The tenor of Dr. Quan's opinion is captured in his letter to counsel in December 2010, his report in January 2011 and his affidavit in February 2011. In the report, Dr. Quan stated:

> [The respondent] is a private individual and she does need calm, peace and quiet in order to continue functioning normally. She currently feels that she has no privacy left. If pushed beyond her ability to cope, [the respondent] will definitely become more seriously ill and most likely incapable of working any further. She has been successful in her workplace through sheer drive, determination and effort despite significant emotional distress and problems. If pushed further by constant invasions of her privacy, there is a very strong possibility that [the respondent] will deteriorate and be incapable of functioning at her current level of ability.
>
> [The respondent] is intending to seek a divorce from her husband. I support this decision since it will be of therapeutic benefit to her. However, I fear the added media attention this would attract would be severely detrimental and that it would probably result in a deterioration of her emotional heath.

46 In the letter, Dr. Quan opined:

> [T]here is a very real and grave potential that her fragile recovery can be seriously compromised if she cannot be protected from the persistent, insistent and incessant efforts of the media to gain entry into her private life.
>
> [The respondent] has made a very concerted and courageous effort to return to a normal productive life dedicated to the common good. These efforts are at risk of being destroyed by the unwanted, undeserved and unproductive efforts of media to meddle in her private life.

47 In his affidavit dated February 2, 2011, Dr. Quan reiterated the same concerns:

> [6] In particular I was concerned that [the respondent's] precarious mental and emotional state would be imperilled if she continued to be the subject of media harassment regarding her private life and Mr. Williams.
>
> [...]
>
> [19] [...The respondent] currently has a very tenuous hold on her mental health and is a mere shadow of her

> usual self.
>
> [20] [The respondent] requires calm, peace and quiet if she is to continue functioning normally, which I believe will not occur if her application for divorce plays out in the media.
>
> [21] In particular, her employment has been what has enabled her to keep what remains of her mental health intact. [The respondent] is particularly distressed and threatened that she will be unable to continue her current position if the media onslaught continues.
>
> [22] I believe that if pushed further by constant invasions of her privacy, there is a very strong possibility that [the respondent] will deteriorate and be incapable of functioning at her current level of ability.

48 Dr. Quan did not offer any opinion as to whether the respondent would seek a divorce if she was not guaranteed the kind of anonymity and privacy she sought through the non-publication and sealing orders.

49 Dr. Quan acknowledged in cross-examination that he had virtually no firsthand knowledge of any of the media coverage as it related to the respondent. He testified that he did his best not to read any of the newspaper reports that referred to the respondent.

50 Dr. Quan was also cross-examined about the impact of the publicity on the respondent's employment. He agreed that he had no contact with anyone at the respondent's place of employment and had no knowledge of how, if at all, the media coverage could affect that employment. Dr. Quan acknowledged that he understood from the respondent's comments to him that her employer had been supportive during the ordeal.

(ii) Assessing Dr. Quan's Evidence

51 Counsel for the appellants argued that Dr. Quan's evidence was not admissible in that it was based on statements made to him by the respondent. Counsel submitted that without an affidavit from the respondent attesting to the truth of what she said to Dr. Quan, and without affording the appellants the opportunity to test her assertions by cross-examination, Dr. Quan could not rely on the respondent's statements for their truth.

52 I do not agree that Dr. Quan's evidence was inadmissible. Dr. Quan is a qualified clinical psychiatrist. He saw the respondent about a dozen times between March 2010 and March 2011. He based his clinical judgment as to the respondent's mental state on his observations of her over one year, the results of certain psychological tests he administered, a report from the family doctor, and things said to him by the respondent. These are sources that clinical psychiatrists routinely look to when forming their opinions. Dr. Quan was entitled to advance the opinion he did: see *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.).

53 There is, however, force to the appellants' submission that the absence of any affidavit from the respondent significantly undermines the weight that can be given to Dr. Quan's opinion. Without evidence from the respondent, much of what Dr. Quan said in his letters and reports is properly characterized as speculation and assumption.

54 It is clear that Dr. Quan's opinion as to the need for the non-publication and sealing orders was premised on his belief that the media had engaged in an unrelenting and very intrusive invasion of the respondent's privacy beginning when Williams was charged and continuing through to the proposed divorce proceedings. Dr. Quan's letters to counsel and his report are replete with phrases like "the media onslaught", the "media harassment regarding her private life", "the constant invasions of her privacy", "the media feeding frenzy", "the un-

wanted, undeserved and unproductive efforts of media to meddle in her private life" and the "persistent, insistent and incessant efforts of the media to gain entry into her private life".

55 There is quite simply no evidence to support any of these characterizations. The respondent was clearly the person who could have spoken most directly to her experiences with the media and the nature and degree to which her privacy had been invaded by the media. She chose not to do so.

56 In the same vein, Dr. Quan expressed the view that the publicity surrounding the proposed divorce proceeding could adversely affect the respondent's employment which in turn could cause significant damage to her emotional wellbeing. Once again, there was no evidence to suggest any possible harm to the respondent's employment. If the potential for that harm existed, the respondent or her employer were the logical persons to give that evidence.

57 Assuming that Dr. Quan's opinion goes so far as to assert a real risk that the respondent would suffer the degree of emotional harm required to engage the public interest in maintaining access to the courts, that opinion rests entirely on his assumption that the respondent would be subject to media harassment occasioned by "persistent, insistent and incessant" efforts to invade her privacy. These assumptions have no foundation in the evidence. Consequently, Dr. Quan's opinion cannot be said to provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the *Dagenais*/*Mentuck* test.

58 I also have difficulty squaring Dr. Quan's opinion as to the dire potential effect of publicity surrounding the divorce proceeding with the respondent's reaction to the publicity surrounding the earlier court proceedings involving Williams. She has endured, and I would say overcome, the worst of the media storm surrounding Williams. After the intense initial shock, she has picked up the pieces of her life and gone about the business of living that life. There is no reason to think that any publicity arising from the divorce proceedings will come remotely close to the publicity that surrounded Williams' criminal proceedings at which Williams' crimes and his confessions to those crimes were publicly examined in minute detail. Any media attention arising from the divorce proceeding will surely be short-lived and hardly front page news.

59 Dr. Quan's opinion is also contradicted by the unchallenged evidence concerning the fraudulent conveyance proceeding. In that proceeding, the plaintiff, one of Williams' sexual assault victims, claims that Williams fraudulently transferred the family home to the respondent. The respondent's statement of defence and the contents of her affidavit have been referred to in the media.

60 There was no evidence filed on this motion to suggest that the media coverage of the fraudulent conveyance proceeding has amounted to a "feeding frenzy" or has been "persistent, insistent and incessant". Perhaps, more to the point, there was no evidence filed on the motion that media access to the fraudulent conveyance proceeding and publication of material filed in that proceeding have in any way negatively affected the respondent's ability to fully participate in that proceeding. The media's reporting of the fraudulent conveyance claim and the absence of evidence of any adverse impact on the respondent are significant as there is likely to be an overlap between the issues in that proceeding and some of the issues that may arise in the divorce proceeding.

61 The evidence filed on the motion by the appellants of the media reaction to the proposed divorce proceeding also undermines Dr. Quan's opinion. On that evidence, a reporter from the Ottawa Citizen sought information about the potential divorce proceedings from the respondent's lawyer. He did not approach the respondent directly. In the ensuing interview, counsel provided information, much of which the respondent now seeks to have cloaked in the non-publication and sealing orders. That information was reported in the press in a

matter of fact way. There was no evidence filed on the motion that the media reporting of the respondent's name, her intention to seek a divorce, and a generic description of the material that would be filed in the divorce proceeding had any negative impact on the respondent or had in any way affected her decision to proceed with the divorce action.

VII

Conclusion

62 The motion judge erred in law in exercising her discretion in favour of granting the non-publication and sealing orders. The material presented by the respondent did not provide the kind of convincing evidence needed to satisfy the first branch of the *Dagenais*/*Mentuck* test. It is consequently unnecessary to consider the second branch of that test. The orders made by the motion judge must be set aside.

63 I would allow the appeal and with one modification set aside the sealing and non-publication orders made except to the extent that those orders were not challenged on appeal (see para. 7 above). The one modification relates to the non-publication order made with respect to the medical information filed on the motion. As indicated above (para. 6), the parties agree that the motion judge's non-publication order referable to the medical information did not extend to the references to that information in her reasons. The appellants did not challenge that part of the non-publication order. I would vary that part of the order to provide that the non-publication order with respect to the medical information does not extend to references to that information found in either the motion judge's reasons or these reasons.

64 The interim order made on consent at the oral argument of this appeal prohibiting publication of material filed or information referred to in this court where that material or information was subject to the orders made on the motion expires with the release of these reasons. Normally, this court's order would take effect immediately. However, given the subject matter of this order, unless it is held in abeyance for some brief period of time, the respondent would not have any meaningful opportunity to consider what steps, if any, she should take to challenge this order. I would direct that the order of this court take effect 14 days after the release of these reasons. The order of the motion judge and the interim order of this court will remain in effect until then unless otherwise ordered.

65 The appellants are entitled to their costs, if demanded, both here and on the motion. I would fix the costs of the appeal in the amount of $15,000, inclusive of disbursements and HST.

66 The court was advised that the motion judge fixed the costs of the motion at $25,000 in favour of the respondent. The parties cannot agree as to the appropriate order in respect of the costs of the motion. This court is not in a position to fix those costs. I would remit the matter of the costs of the motion to the motion judge.

***Robert P. Armstrong J.A.*:**

I agree

***Alexandra Hoy J.A.*:**

I agree

Appeal allowed.

Appendix

The court orders that the non-publication and sealing order of Justice V. Jennifer Mackinnon dated April 12, 2011 and the interim order of this court prohibiting publication of material filed in this court or information referred to at the appeal hearing that was subject to the order of Justice Mackinnon will remain in effect for fourteen days following the release of these reasons unless otherwise ordered by a court of competent jurisdiction. Thereafter, subject to any such further order, the interim order of this court shall expire and the order of Justice Mackinnon is set aside, with the exception that the provisions of the non-publication order as it relates to the respondent's social insurance number, date of birth, bank account numbers and domestic contract produced on the motion shall continue. The provisions of the non-publication order as it relates to the medical information produced on the motion shall continue, but does not extend to references to that information found in either the motion judge's reasons or in the reasons of this court.

END OF DOCUMENT

TAB 3

2009 CarswellOnt 8846, 97 O.R. (3d) 665, 2 Admin. L.R. (5th) 273

Ontario (Liquor Control Board) v. Magnotta Winery Corp.

Liquor Control Board of Ontario (Applicant) and Magnotta Winery Corporation and Magnotta Winery Ltd. and Magnotta Wines Ltd. and Magnotta Cellars Corporation and Magnotta Vineyards Ltd. and Magnotta Brewery Ltd. and Magnotta Distillery Ltd., Magnotta Vintners Ltd. and Information and Privacy Commissioner (Respondents) and Attorney General of Ontario (Intervenor)

Ontario Superior Court of Justice (Divisional Court)

Carnwath, Bellamy, Pierce JJ.

Heard: March 12-13, 2009
Judgment: June 12, 2009
Docket: Toronto 64/07

Counsel: Jill Dougherty, April Brousseau, for Applicant

Ian Roher, for Respondents, Magnotta Group of Companies

William Challis, Allison Knight, for Respondent, Information and Privacy Commission

Leslie McIntosh, Erin Rizok, for Intervenor, Attorney General of Ontario

Subject: Public; Civil Practice and Procedure

Privacy and freedom of information --- Freedom of information — Provincial legislation — Grounds for refusal — Confidential information

Applicant received request from unidentified requester under Freedom of Information and Protection of Privacy Act for records of mediated settlement ("records") between applicant and respondent — Information and Privacy Commissioner directed applicant to release some records on ground that mediation was not part of litigation process and records were not exempt from release under s. 19 of Act — Applicant brought application seeking judicial review of commissioner's decisions — Application granted; portions of commissioner's order set aside; applicant's decision to withhold disclosure of records upheld — Common law settlement privilege exempted records from disclosure and public policy interest in protecting confidentiality of settlement discussions trumped public policy interest in transparency of government actions — Terms of settlement agreement required records to remain confidential — Records were exempted from disclosure by second branch of s. 19 of Act since they were prepared by or for Crown counsel in respect of mediation and settlement of ongoing litigation — Commissioner's narrow interpretation of s. 19 of Act would result in unreasonable outcome since it would deprive government institutions of privilege attached to settlement discussions available to all other litigants —

Commissioner's interpretation would also discourage third parties from engaging in settlement negotiations with government institutions.

Cases considered by *Carnwath J.*:

Bard v. Longevity Acrylics Inc. (2002), 2002 CarswellOnt 1279, 18 C.C.E.L. (3d) 256 (Ont. S.C.J.) — considered

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 SCC 39, *(*sub nom. *Blank v. Canada (Minister of Justice))* 352 N.R. 201, 270 D.L.R. (4th) 257, 51 C.P.R. (4th) 1, *(*sub nom. *Blank v. Canada (Minister of Justice))* [2006] 2 S.C.R. 319 (S.C.C.) — considered

Children's Lawyer for Ontario v. Goodis (2003), 2003 CarswellOnt 3426, 231 D.L.R. (4th) 727, 177 O.A.C. 1, 8 Admin. L.R. (4th) 251, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 66 O.R. (3d) 692, 45 R.F.L. (5th) 285 (Ont. Div. Ct.) — considered

Children's Lawyer for Ontario v. Goodis (2005), *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 253 D.L.R. (4th) 489, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 75 O.R. (3d) 309, 29 Admin. L.R. (4th) 86, 2005 CarswellOnt 1419, 196 O.A.C. 350, 17 R.F.L. (6th) 32 (Ont. C.A.) — referred to

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — considered

I. Waxman & Sons Ltd. v. Texaco Canada Ltd. (1968), 67 D.L.R. (2d) 295, [1968] 1 O.R. 642, 1968 CarswellOnt 258 (Ont. H.C.) — considered

I. Waxman & Sons Ltd. v. Texaco Canada Ltd. (1968), 69 D.L.R. (2d) 543, [1968] 2 O.R. 452, 1968 CarswellOnt 156 (Ont. C.A.) — considered

Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), *(*sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, *(*sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, *(*sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — considered

M. (A.) v. Ryan (1997), 143 D.L.R. (4th) 1, 34 C.C.L.T. (2d) 1, 1997 CarswellBC 99, 1997 CarswellBC 100, 85 B.C.A.C. 81, 138 W.A.C. 81, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 8 C.P.C. (4th) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37 (S.C.C.) — referred to

Middelkamp v. Fraser Valley Real Estate Board (1992), 1992 CarswellBC 267, 71 B.C.L.R. (2d) 276, 10 C.P.C. (3d) 109, 96 D.L.R. (4th) 227, 17 B.C.A.C. 134, 29 W.A.C. 134, 45 C.P.R. (3d) 213 (B.C. C.A.) — considered

Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2001), 2001 CarswellOnt 4335, *(*sub nom. *Ontario (Attorney General) v. Big Canoe)* 152 O.A.C. 145, *(*sub nom. *Ontario (Attorney General) v. Big Canoe)* 208 D.L.R. (4th) 327, *(*sub nom. *Ontario (Attorney General) v. Big Canoe)* 16 C.P.R. (4th) 1, 41 Admin. L.R. (3d) 117 (Ont. Div. Ct.) — considered

Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2002), 2002 CarswellOnt 4070, *(*sub nom. *Ontario (Attorney General) v. Big Canoe)* 167 O.A.C. 125, 48 Admin. L.R. (3d) 279, 220 D.L.R. (4th) 467, *(*sub nom. *Attorney General of Ontario v. Big Canoe et al)* 22 C.P.R. (4th) 169, 62 O.R. (3d) 167 (Ont. C.A.) — con-

sidered

Rogacki v. Belz (2003), 2003 CarswellOnt 3717, 232 D.L.R. (4th) 523, 177 O.A.C. 133, 67 O.R. (3d) 330, 41 C.P.C. (5th) 78 (Ont. C.A.) — considered

Rudd v. Trossacs Investments Inc. (2006), 2006 CarswellOnt 1417, 208 O.A.C. 95, 27 C.P.C. (6th) 147, 79 O.R. (3d) 687, 265 D.L.R. (4th) 718 (Ont. Div. Ct.) — referred to

Rush & Tompkins Ltd. v. Greater London Council (1988), [1988] 3 All E.R. 737, 104 N.R. 392, [1989] A.C. 1280, [1988] 3 W.L.R. 939 (U.K. H.L.) — considered

Slavutych v. Baker (1975), [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224, 1975 CarswellAlta 39, 1975 CarswellAlta 145F, [1976] 1 S.C.R. 254, *(*sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587 (S.C.C.) — followed

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered

2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool) (1996), 1996 CarswellQue 965, 1996 CarswellQue 966, *(*sub nom. *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool))* 140 D.L.R. (4th) 577, *(*sub nom. *2747-3174 Québec Inc. v. Régie des permis d'alcool du Québec)* 205 N.R. 1, [1996] 3 S.C.R. 919, 42 Admin. L.R. (2d) 1 (S.C.C.) — considered

Statutes considered:

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

s. 1 — considered

s. 1(a) — considered

s. 1(a)(ii) — considered

s. 19 — considered

s. 19(a) — considered

s. 19(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 24.1 — referred to

APPLICATION for judicial review of decision by Information and Privacy Commissioner with respect to disclosure of records of mediated settlement.

***Carnwath J.*:**

Overview

1 The Liquor Control Board of Ontario ("the LCBO") applies for judicial review of two decisions of the Information and Privacy Commissioner of Ontario ("the IPC/Commissioner"). The decisions relate to some of the mediation materials ("the disputed records") which were the subject of a confidentiality agreement prepared for the mediation of seven court proceedings between the LCBO and the respondent, Magnotta companies ("Magnotta"). The IPC held that the disputed records were not exempt from release under s. 19 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [*FIPPA*].

2 Section 19 of *FIPPA* provides an exemption which allows an institution to refuse to disclose certain records, as follows:

> **19.** A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

3 The first branch of s. 19 ("Branch 1") exempts from disclosure communications that fall within the solicitor-client privilege. The second branch ("Branch 2") exempts from disclosure records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

4 Many of the disputed records in question were prepared by the LCBO's counsel, whose qualification as "Crown counsel" is conceded for purposes of s. 19 exemption. The disputed records were prepared for a mediation and settlement, if possible, of a number of court proceedings which were then ongoing between the LCBO and Magnotta. The LCBO used the disputed records (which included its mediation briefs, legal opinions and unfiled affidavit materials) in mediating the court proceedings. Also in the possession of the LCBO were mediation materials prepared by Magnotta for use in the mediation. The LCBO alleges it intended to use its materials in future steps in the litigation if the mediation was unsuccessful. The LCBO also takes the position that those records, including the Magnotta material, were prepared by or for Crown counsel, for use in litigation, both at the mediation stage and at later stages in the litigation, if necessary.

5 Magnotta has supported the LCBO throughout the dealings with the IPC and adopts its submissions.

6 In two long and detailed orders, Order PO-2405 and Reconsideration Order PO-2538-R, the IPC ruled that common law settlement privilege did not attach to the disputed records nor did the second branch of s. 19 of *FIPPA* (prepared by or for Crown counsel...) exempt the records from disclosure.

7 The LCBO, Magnotta and the Attorney General for Ontario ("the Intervenor") all seek an order in the nature of *certiorari*, quashing or setting aside the IPC's Orders as they relate to the disputed records.

8 These applications raise two questions:

(a) Does common law settlement privilege exempt the disputed records from disclosure?

(b) Are records prepared by or for Crown counsel, in respect of the mediation and settlement of ongoing litigation,

exempt from disclosure under s. 19 of *FIPPA*?

My answer to each of these questions is "Yes".

Background Facts

9 Between 1996 and 2000, Magnotta commenced two judicial review applications and a defamation action against the LCBO, and the LCBO commenced four related defamation actions against Magnotta. Two of those defamation actions were subject to case management and mandatory mediation under the *Rules of Civil Procedure*, R.R.O. 1990. Regulation 194, as amended, s. 24.1 [*Rules*].

10 Between 1997 and 2000, the LCBO and Magnotta made several efforts to resolve all the litigation between them by means of mediation and a number of informal settlement attempts. Ultimately, the parties arranged for a further mediation before the Honourable Mr. George Adams with respect to all the applications and actions between the parties.

11 In order to participate in the mediation, all parties were required to execute a mediation agreement which included the following confidentiality provisions:

> Statements made and documents produced in the mediation session and not otherwise discoverable shall not be subject to disclosure through discovery or any other process; shall be confidential; and shall not be admissible into evidence for any purpose, including impeaching credibility;

12 Prior to the mediation sessions, both parties filed mediation materials. The LCBO filed two mediation briers (one with respect to the judicial reviews and the other with respect to the defamation actions) and a number of affidavits and legal opinions, all of which were prepared by external counsel for use in the litigation with Magnotta. Magnotta, in tarn, filed mediation materials which ultimately found their way into the LCBO's possession. The IPC found those Magnotta documents in the custody and control of the LCBO not to be exempt from disclosure to the Requester.

13 The LCBO and Magnotta succeeded in reaching a mediated settlement. External counsel for the parties corresponded after the mediation throughout the remainder of 2000 and most of 2001 for the purpose of drafting the Minutes of Settlement and finalizing and implementing the terms of the settlement The parties then executed Minutes of Settlement, which contained extensive confidentiality provisions. During that period, the litigation between the parties remained outstanding. None of the actions or judicial review applications was dismissed until January of 2002.

14 The LCBO subsequently received a request under *FIPPA* from an unidentified Requester, seeking access to "a copy of the complete record of the mediated settlement between Magnotta and the LCBO, including copies of all agreements pertaining to the mediated settlement, all Minutes of Settlement between the parties and all related documentation pertaining to the mediated settlement".

15 The LCBO granted partial access to the records sought but denied access to the remainder of the records pursuant to a number of exemptions under *FIPPA*, including s. 19. The LCBO notified Magnotta of the request, as an affected party, and Magnotta also opposed the release of the disputed records. The records to which the LCBO denied access and which are in issue in this application consist of:

> (a) the mediation briefs and other mediation materials (including affidavits and legal opinions) prepared by the LCBO's external counsel and used in the mediation of the litigation between the LCBO and Magnotta;
>
> (b) a chronology prepared by Magnotta's counsel, which was also used in the mediation;

(c) the Minutes of Settlement reached in that mediation; and

(d) the correspondence relating to finalizing and implementing the Minutes of Settlement.

16 The Requester appealed the LCBO's decision to the IPC. The IPC wrote to the LCBO and Magnotta (as an affected party), inviting them to make representations and enclosing materials explaining the IPC's procedures. Those materials indicated (among other things) that representations could include unsworn or sworn statements of fact and that "affidavits are optional, unless the adjudicator explicitly requires them". Both the LCBO and Magnotta made extensive submissions to the IPC, and provided supporting documents and jurisprudence. Neither Magnotta nor the LCBO filed affidavit materials.

17 The LCBO took the position that the disputed records in issue were exempt under the second branch of s. 19 of *FIPPA*, since they had been prepared by or for Crown counsel, for use in the litigation between the LCBO and Magnotta, both in order to pursue the possible settlement of the litigation through mediation and, if the mediation was unsuccessful, to use in later stages of the litigation. The IPC allowed the Requester's appeal and directed the CBO to release the disputed records in issue to the Requester (subject to a number of deletions based on other sections of *FIPPA*, which are not the subject of these judicial review applications).

18 The IPC ruled that a mediation of ongoing litigation is not part of the litigation process and that materials prepared by or for Crown counsel for use in mediation are not prepared for the dominant purpose of litigation and are not subject to the s. 19 exemption. The IPC also ruled that s. 19 does not encompass settlement privilege. With respect to the argument that the disputed records in issue were also prepared for use in later stages of the litigation, if necessary, the IPC ruled that "the only evidence I have before me to substantiate that intention is the LCBO's bare assertion to that effect".

19 The LCBO requested the IPC to reconsider its decision. In light of the IPC's comments about the lack of evidence concerning the attended use of the disputed records in issue, the LCBO supplied an affidavit from its Senior Vice-President and General Counsel, confirming that the disputed records were prepared both for use in the mediation and in later stages of the litigation. The Adjudicator reviewed the affidavit, rejected it on the basis that it was fresh evidence and ruled that he was *functus officio* and not in a position to reconsider his order in respect of most of the grounds raised. Nevertheless, he then proceeded to comment extensively on the affidavit and the LCBO's submissions in a lengthy reconsideration order. The IPC refused the LCBO's reconsideration request in relation to the disputed records in issue, by Reconsideration Order PO-2538-R.

20 By Notice of Application for Judicial Review dated February 5, 2007, the LCBO applied for judicial review of the IPC's Orders on the basis that the IPC had erred in law in interpreting s. 19 and common law settlement privilege, in ruling that a mediation of outstanding litigation is not part of the litigation process, in holding that materials prepared for use in such a mediation are not prepared for use in litigation, and in rejecting the LCBO's affidavit materials.

Order PO-2405

21 Order PO-2405 was issued on June 30, 2005, over the signature of Senior Adjudicator John Higgins ("the Adjudicator"). In analyzing s. 19 of the *Act*, as it then was, the Adjudicator began as follows:

Section 19 of the Act reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for

Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege

Branch 2 is based on the closing words of this section, which refer to 'a record ... that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation'. It contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

22 After reviewing the submissions of the LCBO and Magnotta, the Adjudicator found the submissions raised the following questions:

1. Does the modern principle of statutory interpretation favour the inclusion of settlement privilege within the scope of s. 19?

2. Does common law litigation privilege under branch 1 encompass settlement privilege?

3. If common law litigation privilege under branch 1 does not encompass settlement privilege, are the records nevertheless subject to common law litigation privilege under branch 1?

4. Do the words, "prepared by or for Crown counsel in contemplation of or for use in litigation" in branch 2 encompass records prepared for use in the mediation or settlement of litigation? If so, were the records prepared by or for Crown counsel for that purpose?

5. In the event that the settlement negotiations had failed, were the records prepared "by or for Crown counsel for use in litigation" within the meaning of branch 2?

6. Are the records subject to branch I solicitor-client communication privilege?

7. Were the records "prepared by or for Crown counsel for use in giving legal advice" within the meaning of branch 2?

23 The Adjudicator answered all of the seven questions with "No".

Reconsideration Order PO-2538-R

24 The list of records still in dispute between the LCBO and Magnotte, on the one hand, and IPC, on the other, are:

Record Number	*Description*	*Notes*
1	Chronology of [affected party] and LCBO Events	Reconsideration request relates to portions ordered disclosed
6	[Affected party] and LCBO and LLBO and [affected party] et al. and LCBO — Mediation Brief of the Respondent/Defendant LCBO	"
7	[Affected party] and LCBO - Mediation Brief	"

	of the LCBO (Defamation)	
8	[Affected party] and LCBO and LLBO — Affidavits for Mediation	"
16	Minutes of Settlement	"
54-58	Documents relating to implementation of mediated settlement (comprising various documents totaling 241 pages)	Reconsideration request relates to all pages ordered disclosed in full or in part except pages 1-2, 5-9, 12-15, 54-60, 127-130, 132-134, 171-176, 196-207, 209-210 and 211 of Records 54-58

25 After reviewing s. 18 of the IPC's *Code of Procedure* (the "*Code*"), the Adjudicator acknowledged an accidental error within the meaning of s. 18 and corrected it. Apart from that, he found he was *functus officio* and not in a position to reconsider the order. Nevertheless, he went on to review the arguments of the LCBO and Magnotta explaining his action by noting that they had gone to considerable effort to explain their basis for disagreeing with his decision. This discussion went on for nineteen pages of analysis involving solicitor-client privilege, litigation privilege and settlement privilege, all in their relation to s, 19 of *FIPPA*. He concluded that order PO-2405 should stand, subject to the minor correction.

Standard of Review

26 All parties submit that the standard of review of an adjudicator's decision under s. 19 of *FIPPA* is correctness. We agree.

Analysis

(a) Does common law settlement privilege exempt the disputed records from disclosure?

27 A discussion of settlement privilege requires a comparison of three privileges - solicitor-client privilege, litigation privilege and settlement privilege.

Solicitor-Client Privilege

28 Solicitor-client privilege protects the direct communications - both oral and documentary - prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. The communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law.

29 Solicitor-client privilege is no longer considered to be a rule of evidence, but a substantive rule that has evolved into a fundamental civil and constitutional right Solicitor-client privilege is not absolute, but it is a privilege that is as close to absolute as possible to ensure public confidence and retain relevance. It will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.

30 Solicitor-client privilege applies to government and in-house lawyers. The determination of whether there is a solicitor-client relationship in any given circumstance, and thus whether the communications arc subject to solicitor-client privilege, depends on the nature of the relationship, the subject-matter of the advice and the circumstances in which the advice was sought and rendered (excerpted from Robert W. Hubbard, Susan Magodaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, looseleaf (Aurora: Canada Law Book, 2006) at 11-3 [Hubbard]).

Litigation Privilege

31 Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.

32 Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.

33 Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

34 Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents includes communications by the lawyer, client or third party, created for the purpose of litigation, e.g., witness statements, expert opinions and other documents from third parties.

35 Litigation privilege allows a lawyer a "zone of privacy" to prepare draft questions and arguments, strategy or legal theories.

36 The elements required in order to claim work product or litigation privilege over documents or communications are as follows:

> (a) the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
>
> (b) the preparation must be done in a realistic anticipation of litigation;
>
> (c) if there is more man one purpose or use for the document, facts must reveal that the dominant purpose was for the anticipated litigation;
>
> (d) there must be no requirement under legal rules governing the proceeding to disclose the documents or facts; and,
>
> (e) there has been no prior waiver of documents or facts by disclosure to the opposing party.

(excerpted from Hubbard, above at 12-2 - 2.1-3.)

Settlement Privilege

The Public Policy Rationale

37 When parties share information in furtherance of settling disputes, that information is generally subject to privilege from disclosure. The documents containing me information are often, but not always, marked as being "without prejudice".

38 In Ontario, as early as 1968, Fraser J. analyzed the public policy considerations which supported non-disclosure

of information shared during the course of settlement discussions and negotiations. He concluded:

> In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect partes to negotiations for that purpose. It is in the public interest that it not be given a restrictive application.
>
> (*I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642 (Ont. H.C.) at 656.)

39 The Ontario Court of Appeal confirmed Fraser J.'s judgment:

> We find ourselves in agreement with the conclusions reached by Fraser J., and also with his analysis, in me main, of the very numerous decisions referred to in his reasons for judgment...
>
> (*I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 2 O.R. 452 (Ont. C.A.) at 453.)

40 In 1988, the House of Lords concluded:

> In ray view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other partes to the litigation. In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties.
>
> (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (U.K. H.L.) at 744 [*Rush*].)

41 In British Columbia, the Court of Appeal endorsed the public policy basis for nondisclosure of settlement discussions. McEachern C.J.B.C. said:

> ...I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket", prima facie common law, or "class" privilege because it arises from settlement negotiations and protects me class of communications exchanged in the course of that worthwhile endeavour.
>
> (*Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C. C.A.) at 232-33 [*Middelkamp*].)

42 Chief Justice McEachern went on to say:

> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.
>
> (*Middelkamp* at 233.)

43 Also in *Middelkamp* Locke J.A. agreed, although he concluded the issue had to be determined on a "case-by-case" analysis rather man the class privilege proposed by Chief Justice McEachern. At 250-51, he stated:

> With all respect I cannot in law see one reason why this province, alone in the Commonwealth, should not recognize

> the overriding importance of this protection from the eyes of a third party. To refuse is to inhibit and penalize one who wishes to settle. It is easy to envisage a building owner loath to compromise the minor claim of a small subcontractor because of concern an admission of fact would be held against him in another major subcontractors proceeding.
>
> All the cases emphasize that no bars should be placed in the way of one who wishes to compromise, and to allow the production. is by definition to inhibit. Such barriers to settlement should only be permitted if the other competing interest absolutely demands it.

44 In 1992, the Supreme Court of Canada also stressed the public policy aspect of settlement negotiations in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling* (1992), 97 D.L.R. (4th) 616 (S.C.C.) at 634 [*Kelvin*]. The Court quoted with approval the following statement from *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.) at 230 [*Sparling*]:

> ...The Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interest of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.

45 There is strong support for a public-policy based class privilege for settlement privilege. However, that support comes from cases where the court analyzes each claim in the context of its particular facts.

46 The case-by-case analysis is preferable. It is particularly important in the following instances:

> (a) where discussions have led to a settlement, the litigation has resolved, but an argument arises over the terms of the settlement;
>
> (b) where the interests of third parties in other litigation might be affected; and,
>
> (c) where there is a dispute over whether litigation was "in contemplation".

I conclude that any analysis undertaken to establish common law settlement privilege must be done on a case-by-case analysis.

47 I point out in the matter before us, there is no argument over the terms of the settlement There is no evidence of interests of third parties in other litigation which might be affected by the settlement There is no dispute over whether litigation was "in contemplation." Litigation had. begun with a vengeance.

48 Nevertheless, a case-by-case analysis must be undertaken, given that the development of settlement privilege continues as is so often the case with the common law. At its current stage, it is not yet a class or absolute privilege nor has it evolved into a substantive rule of law.

The Difference Between Solicitor-Client Privilege and Litigation Privilege

49 Solicitor-client privilege is a class privilege which never ends, unless waived or unless the communication is in furtherance of a crime. Litigation privilege ends with the litigation. As stated by Fish J. in *Blank v. Canada (Department of Justice)*, [2006] 2 S.C.R. 319 (S.C.C.) at para. 37 [*Blank*]:

> Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the lit-

igation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

50 Solicitor-client privilege requires a communication between a solicitor and a client Litigation privilege is available to parties whether represented by a solicitor or not:

> Unlike the solicitor-client privilege, the litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian (1999*), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
>
> (*Blank* at para. 32.)

The Difference Between Solicitor-Client Privilege and Settlement Privilege

51 Solicitor-client privilege is a class privilege which never ends unless waived or unless the communication is in furtherance of a crime. Settlement privilege is not a class privilege. Its existence must be established on a case-by-case analysis first applying the "Wigmore" test, as described in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.) at 260:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (3) The relationship must be one which, in the opinion of the community, ought to be 'sedulously fostered'.
>
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

52 The Supreme Court of Canada re-affirmed the approach in *Slavutych*. making it clear that privilege is to be determined on a case-by-case basis (see: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.) at para. 20; see also *Rudd v. Trossacs Investments Inc.* (2006), 79 O.R. (3d) 687 (Ont. Div. Ct.) at para. 26 [*Rudd*]).

The Difference Between Litigation Privilege and Settlement Privilege

53 Litigation privilege ends with the litigation. Settlement privilege continues past termination of the litigation, absent those circumstances noted in para. [45], above. Litigation privilege meets the need for a protected zone of privacy to help in the investigation and preparation of a case for trial - the adversary process. Settlement privilege is also a process-in the adversary system - one which permits the parties to focus on avoiding a trial, without jeopardizing the ability to return to a true adversarial position. Obviously, certain communications will be common to both should the attempts at settlement fail. While it is understandable that some authorities refer to settlement privilege as being part of litigation privilege, such is not the case. While both privileges started as rules of evidence, settlement privilege, in particular, has advanced to the point where it is now regarded as key in the promotion of settlements.

Application of the "Wigmore" Test to the Facts of This Case

54 The communications between the LCBO and Magnotta originated in confidence. They were the subject of a strong confidentiality agreement The first *Wigmore* condition has been satisfied.

55 In order for the parties to arrive at a settlement, they must be assured of confidentiality so that discussions can be free and frank. Confidentiality is essential to meaningful settlement discussions. The second *Wigmore* condition has been satisfied.

56 Starting with the House of Lords in *Rush*, above, and running through to the Supreme Court of Canada in *Kelvin*, above, courts in Canada have consistently favoured the settlement of lawsuits. In *Kelvin* at 634, the Supreme Court cited with approval the statement of Callaghan A.C.J.H.C. in *Sparling*, above at 230:

> In approaching this matter, I believe it should be observed at the outset that the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. *This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.*
>
> (*Sparling v. Southam Inc., supra*, at p. 28 (Emphasis added).)

(See also *Bard v. Longevity Acrylics Inc.* (2002), 18 C.C.E.L. (3d) 256 (Ont. S.C.J.) at para. 29 [*Bard*]; *Rudd*, above.)

57 In *Rudd*, the Divisional Court found at para. 33:

> The third Wigmore condition requires a determination whether the relationship in which the communication is given is one which should be "sedulously fostered". The Rules of Civil Procedure require mandatory mediation of many civil disputes in order to assist the parties in arriving at a settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.

58 I conclude the law is well-settled that there is a significant public interest in protecting the confidentiality of settlement discussions in order to make the process as effective as possible. Confidentiality of settlement discussions should be "sedulously fostered". The third *Wigmore* condition is satisfied.

59 The fourth stage of the *Wigmore* test requires a balancing of the public interest in disclosure of government records called for by *FIPPA* against the public interest in preserving the confidentiality of communications during settlement negotiations. It is to this balancing I now turn.

Transparency in Government Action vs. Settlement Privilege

60 The Requester in this matter is anonymous. We have no knowledge of why me Requester seeks the information in the disputed records. If there is a public policy reason that would support and explain why the Requester is entitled to obtain the otherwise privileged information vis-à-vis the Requester, we do not know what it is. Absent such an explanation, the competing public policy interests in this matter are simply those created by *FIPPA* versus the interest in promoting settlements of disputes through confidential settlement, negotiations.

61 The IPC's position on settlement privilege can be shortly put. The Commissioner submits that since the *Report of the Commission on Freedom of Information and Individual Privacy 1980* (the "Williams Commission Report") did not

specifically mention settlement privilege and since settlement privilege is not specifically referred to in s. 19 of *FIPPA*, settlement privilege is of no consequence in this matter. At p. 17 of order PO-2538-R:

> In my view, the issue of negotiations was canvassed by the Williams Commission and addressed in sections 17(1)(a) and 18(1)(e), and if the Legislature had intended to include settlement privilege in branch 1 of section 19, it would have said so.

62 What may have been true in 1980 is not necessarily true in 2009. Almost thirty years have passed. From *Rush* to *Kelvin*, above, the common law has expanded settlement privilege from a rule of evidence to an overriding public interest in favour of settlement.

63 In *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), the Court dealt with litigation privilege. Carthy J.A., writing for the majority at p. 332. found that litigation privilege had been narrowed in scope by succeeding amendments to the *Rules*:

> In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context.

64 To paraphrase, in a very real sense, settlement privilege is being defined by the *Rules* as they are amended from time to time. Settlement privilege has expanded in scope through changes to the *Rules*. These changes provide for various settlement mechanisms, such as pretrial conferences, settlement conferences, case management, and mediation, both voluntary and mandatory.

65 What follows from the IPC's view of the law regarding settlement negotiations? First, the details of negotiations and settlement of any dispute between a government institution and a third party will be available to the world at large, following a request. Apparently, a Requester need but ask anonymously and the IPC will undertake the heavy lifting, as in this case. There is a delicious irony in this matter whereby the IPC, in the name of transparency, labours for an anonymous Requester. Second, and perhaps more important, no third party would willingly entertain settlement discussions with a government institution, particularly where admissions are made and concessions offered that would enure to the detriment of the third party, if publicly disclosed. As this Court said in *Rudd*, above at para. 38:

> Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.

66 Government institutions are not strangers to litigation. They are entitled to have disclosure of their settlements considered on a case-by-case analysis of their common law entitlement to settlement privilege.

Section 1 of FIPPA Viewed in the Light of Statutory Interpretation

67 The purposes of *FIPPA* are set out in s. 1:

> **1.** The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,

> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government...

68 As noted earlier, the IPC views the meaning of "exceptions" in s. 1(a)(ii) as those exceptions specifically set out in *FIPPA*. Our Court of Appeal has found with respect to *FIPPA* "the broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns": *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2002), 62 O.R. (3d) 167 (Ont. C.A.) at para. 14 [*Big Canoe* (C.A.)]).

69 This view of our Court of Appeal is consistent with the modem approach to statutory interpretation, which requires that all relevant and admissible indicators of legislative meaning must be considered.

70 In *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.) at para. 164, L'Heureux-Dubé J. spoke in favour of what she termed the "modem approach" to the interpretation of statutes, citing a passage from Professor R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 131. The same passage from this text of Professor Sullivan was cited with approval in *Big Canoe* (C.A.) and in *Children's Lawyer for Ontario v. Goodis* (2003), 66 O.R. (3d) 692 (Ont. Div. Ct.); aff'd (2005), 75 O.R. (3d) 309 (Ont. C.A.) [*Children's Lawyer*].

71 In *Children's Lawyer* the Divisional Court noted the Court of Appeal's decision in *Big Canoe* at paras. 75-76:

> [75] Under the modern approach to statutory interpretation, the language of the statute must be addressed in its context. In referring to the context, the Court of Appeal said (pp. 72-73 O.R.):
>
> > Finally, the 'modem' interpretation method was reformulated in Canada by Professor R. Sullivan: *Driedger on the Construction of Statutes* (3rd ed. 1994) at p. 131:
> >
> > > There is only one rule in modem interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. *After taking these into account, the court must then adopt an interpretation that is appropriate*. An. appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, mat is, the outcome is reasonable and just.
> >
> > [Emphasis added]
> >
> > Applying that test supports the plain meaning test. The broad intention of the Act is to offer transparency to government functioning with exceptions *where the interests of public knowledge are overbalanced by other concerns*. In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be

> less frank with prosecutors. It should be kept in mind that this is the *Freedom of Information Act* and docs not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request
>
> [Emphasis added]

[76] This passage is very important. It illustrates the concerns to be addressed. They include balancing the objective of transparency of government functioning and the interests of public knowledge against other concerns; and considering whether the purpose and function of FIPPA are impinged upon by one interpretation or the other. Having performed this analysis, the court found many disadvantages and no countervailing purpose or justification for an interpretation that would render the Crown brief in a criminal case available to the public upon simple request. In our view, this is the sort of analysis which we must perform.

72 In considering the purposes of *FIPPA*, as set out in s. 1(a), the language of the statute must be addressed in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. After considering all these indicators of legislative meaning, the court must adopt an interpretation of s. 1(a) that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just (see Professor R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1, 3-4 [Sullivan, *Sullivan on the Construction of Statutes*]).

A Statutory Interpretation of Section 1(a) of FIPPA

73 I conclude that the public policy interest in encouraging settlement as embodied in the common law concept of settlement privilege trumps the public policy interest in transparency of government action, in the circumstances of this case. I turn, then, to analyze this conclusion within the context of the indicators of legislative meaning proposed by Professor Sullivan.

74 This interpretation is plausible because it complies with the legislated text (s. 1(a) of *FIPPA*) which provides for "necessary exemptions" that are "specific and limited." The exemption is "necessary" to maintain confidentiality of negotiated settlements. The exemption is "specific" and "limited" in that it is specific to and limited by the circumstances of this case. A case-by-case analysis ensures settlement privilege will always be specific to and be limited by particular fact situations.

75 This interpretation is efficacious because it promotes the legislative purpose of creating exemptions where necessary, provided the exemptions are limited and specific.

76 This interpretation is acceptable because it leads to a conclusion that is both reasonable and just. As noted earlier in these reasons, no party would willingly entertain settlement discussions with a government institution if it knew its confidential settlement discussions would be made public. This is particularly so where admissions would be made and concessions offered that would be detrimental to that party. If required to discuss settlement by the *Rules*, those discussions would not, I suggest, be meaningful.

77 The disputed records must remain confidential according to the terms of the agreement and minutes of settlement and may not be released to the Requester.

(b) Are records prepared by or for Crown counsel in respect of the mediation and settlement of ongoing litigation, exempt from disclosure under s. 19 of FIPPA?

78 It will be recalled that Branch 2 of s. 19 of *FIPPA* exempts from disclosure records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

79 The IPC found the disputed records were not exempt because they were not prepared in contemplation of or for use in litigation. With respect, the IPC is wrong in law in its analysis of Branch 2 of s. 19 of *FIPPA*. The *Rules* have incorporated mediation into the litigation process by requiring parties in case-managed actions (and in all actions commenced in Toronto after January 4, 1999) to participate in a mandatory mediation.

80 The Ontario Court of Appeal has recognized that mediation is en integral part of the litigation process, particularly in actions which are subject to the mandatory mediation rules (as were two of the matters mediated in the present case). In *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (Ont. C.A.), Abella J.A. (in concurring reasons) described the role of mediation as part of the litigation process at paras. 44, 47:

> [44] It is true that the purpose of mandatory mediation is to settle disputes outside of the court's process, and, as in discovery, it is not conducted by a judge. But it is also true that aspects of mandatory mediation directly engage the court's process. First and foremost, the fact that mediation is mandated by the commencement of a proceeding under the rules, directly implicates the mediation in the court's process....
>
> . . . . .
>
> [47] Mandatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation. Wilful broaches of the confidentiality it relies on for its legitimacy, in my view, represent conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. It can significantly prejudice the administration of justice and, in particular, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of trial.

(See also Warren K. Winkler, C.J.O., "Access to Justice, Mediation: Panacea or Pariah?" (2007) 16 Canadian Arbitration and Mediation Journal 5.)

81 Various alternative dispute resolution ("ADR") methods (such as, for example, pre-trial conferences) have been incorporated into the litigation process for many years. There is no valid reason for distinguishing among different forms of ADR based on where they occur in ongoing court proceedings. It makes no sense to treat some forms of ADR as part of the litigation process and others as not. All forms of ADR, including both mandatory and consensual mediation, are part of the litigation process and are equally deserving of confidentiality and the protection of the Branch 2 exemption under s. 19 of *FIPPA*. As explained by Power J., in *Bard*, above at para. 31:

> In recent years, there has been a significant emphasis on the desirability of encouraging settlement of disputes whether in the courts or before administrative and other tribunals. This has resulted in the use of various forms of alternative dispute resolutions and, as well, changes to our rules of practice which encourage case management, mediation, and court supervised settlement conferences (or pre-trial conferences). In my opinion, the logic for treating settlement discussions as privileged is, therefore, more pressing than ever. It follows, therefore, that this privilege should not be limited except where there are strong and compelling reasons for doing so. I include in the term 'settlement discussions', pre-trials and settlement conferences as well as mediations. As aforesaid, I see no valid reason for distinguishing between pre-trials and settlement conferences. The privilege applies even in the absence of rule 50.03.

82 The LCBO asserted before the IPC that the mediation materials were intended for use in litigation should the mediation fail. The IPC refused to consider this because of a finding that there was no evidence to this effect. It is unnecessary for me to resolve this dispute, other than to say it is obvious that some materials used in any mediation will subsequently be used by counsel to prepare for trial and at the trial itself.

A Statutory Interpretation of the Branch 2 Exemption

83 Earlier in these reasons, an analysis of s. 1 of *FIPPA* used the so-called "modern approach" to statutory interpretation (see above at paras. [67] - [77]). To repeat, in interpreting Branch 2 of s. 19 of *FIPPA*, all relevant and admissible indicators of legislative meaning must be considered. The language of the statute must be addressed in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids (see Sullivan, *Sullivan on the Construction of Statutes*, above).

84 Following consideration of these indicators of legislative intention, the court must choose an interpretation of the Branch 2 exemption that is "appropriate." To repeal the earlier analysis, an appropriate interpretation is one that can be justified in terms of its (a) plausibility; (b) efficacy; and (c) acceptability, that is, the outcome is reasonable and just (see: Sullivan, *Sullivan on the Construction of Statutes* at pp. I, 3-4). In *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2001), 208 D.L.R. (4th) 327 (Ont. Div. Ct.) [*Big Canoe* (Div. Ct.)], this Court held that the language of the Branch 2 exemption is "clear and unambiguous." The wording of Branch 2 imposes no temporal limits on the protection provided nor limits it to particular types of litigation documents, nor specifies specific steps in the litigation. Nothing in the legislative text suggests that the term "litigation" should be given a different meaning than that adopted "by the courts and reflected in the *Rules*. Such an interpretation complies with the legislative text.

85 Such an interpretation of Branch 2 also promotes the purpose of *FIPPA* to provide transparency of government functioning "with exceptions where the interests of public knowledge are overbalanced by other concerns" (see *Big Canoe* (C. A.), above). To interpret Branch 2 in this manner recognizes mat in the case of records prepared by or for Crown counsel for use in any aspect of litigation, the interests of the public in transparency are trumped by a more compelling public interest in encouraging settlement of litigation.

86 The proposed interpretation of Branch 2 is acceptable because it arrives at an outcome that is reasonable and just. The IPC's narrow interpretation of Branch 2 would result in an unreasonable and unjust outcome, since it would deprive government institutions of the privilege attached to settlement discussions otherwise available to all other litigants. Moreover, the IPC's interpretation would discourage third parties from engaging in meaningful settlement negotiations with government institutions. In *Children's Lawyer*, above at para. 94, this Court said:

> [94] We should not adopt an interpretation of legislation that places a public servant in such a position of conflict of interest if there is a reasonable alternative. It would be absurd to suppose that the legislature intended such a result. The respondent put it succinctly in para. 63 of its factum.
>
> > To read Branch 2 so as to exclude the child from access would lead to absurd consequences. The presumption that legislation is not intended to produce absurd consequences is a fundamental rule of interpretation. Moreover, "[a]bsurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards..." The primary 'absurd' results of reading Branch 2 in such a manner would be to put the Children's Lawyer in violation of its fundamental duties to the client/requester.

R. Sullivan, *Driedger on the Construction of Statutes* (Markham: Butterworths, 1994), at 85-86.

87 To summarize, the following outcomes contribute to my conclusion that the IPC interpretation of Branch 2 of s. 19 would lead to an absurd result:

(a) where given a choice, private parties will avoid settlement discussions and mediation with government institutions;

(b) when faced with mandatory mediation, private parties will be inhibited from engaging in "full and frank" disclosure upon which the requirement for a successful resolution depends;

(c) the chances of a successful mediation will be remote;

(d) the legislative intentions in the *Rules* regarding mandatory mediation will be frustrated;

(e) confidentiality clauses negotiated between private parties and government institutions will be meaningless; and,

(f) the costs of litigation between private parties and government institutions will, by necessity, be greater than otherwise.

88 For the foregoing reasons, I conclude that the disputed records are exempted from production by Branch 2 of s. 19 of *FIPPA*.

The "Asymmetrical Protection" Submission

89 The IPC refused to apply the Branch 2 exemption to protect the LCBO's mediation materials because (in the IPC's view) it would result in material prepared by or for Crown counsel having more extensive protection than the mediation materials of private parties. The IPC described this "asymmetrical protection" issue as follows:

[I]t would only protect materials prepared *by or for Crown counsel*. This would mean that only the government party's settlement-oriented records would be protected, not those of the private litigant engaged in settlement discussions with the Crown.

90 I reject this interpretation for three reasons. First, the mediation and settlement materials of private parties are always subject to settlement privilege where the settlement privilege is granted pursuant to a case-by-case analysis as discussed above. It is only the introduction of a government institution into the equation that attracts the application of the second Branch of s. 19 to the settlement. The IPC appears to assume that if Branch 2 of s. 19 protects the Crown, nevertheless, a Requester would have access to the private party's documents used in the mediation and settlement process. Such is not the case. It would be open to the private party to establish settlement privilege on a case-by-case analysis.

91 Second, in the IPC's interpretation of the Branch 2 exemption any "asymmetry" created by the LCBO's interpretation of Branch 2 pales into insignificance in comparison with the asymmetry created by the IPC's interpretation of Branch 2. It denies to all government institutions the privilege available to private litigants otherwise found to be applicable to mediation and settlement materials. All private litigants can engage in settlement discussions confident that settlement materials will remain confidential. The IPC would have it that the Crown can not. That is true asymmetry.

92 Third, the IPC's interpretation is directly contrary to the interpretation given to the Branch 2 exemption by this Court in *Big Canoe* (Div. Ct.), above at para. 32, where it was held that:

> [32] A head may refuse to disclose a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation. The language is clear and unambiguous.... Thus, if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law to solicitor-client relationships (the Inquiry Officer found it was not), it was open to the Legislature to say so.

93 For the foregoing reasons, I conclude that the disputed records arc exempted from production by Branch 2 of s. 19 of *FIPPA*.

94 Whether by application of the common law doctrine of settlement privilege or by the application of Branch 2 of s. 19 of *FIPPA*, the disputed records arc exempt from disclosure.

95 An order will go setting aside the portions of the IPC's Order PO-2405 (as amended by Reconsideration Order PO-2538-R), which holds that Records 1, 6, 7, 8, 16 and certain pages of Records 54-58, specified in numbered para. 1 of those Orders, are not exempt from release.

96 A further order shall go upholding the LCBO's decision to withhold disclosure of those records.

97 As agreed upon by the parties, there shall be no order as to costs.

Application granted.

END OF DOCUMENT

TAB 4

2000 CarswellOnt 2655, 147 C.C.C. (3d) 128, 49 O.R. (3d) 756

R. v. CITY TV

In the Matter of a search of the business premises of City TV, a division of Chum Limited, on July 11, 2000, pursuant to a search warrant issued by Justice Dobney on July 11, 2000

In the Matter of an application for an order or an interim order sealing all material seized pursuant to said warrant

Her Majesty the Queen, Respondent and CITY TV, a division of Chum Limited, Applicant

Ontario Superior Court of Justice

A. Campbell J.

Judgment: July 27, 2000
Docket: M509/00

Counsel: *Michal Fairburn*, for Attorney General.

Marlys Edwardh, for Applicant.

Subject: Criminal

Criminal law --- Search and seizure — Detention of property seized — Miscellaneous issues

Cases considered by *Archie Campbell J.*:

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1 (S.C.C.) — referred to

Société Radio-Canada c. Lessard, (sub nom. *Canadian Broadcasting Corp. v. Lessard)* 67 C.C.C. (3d) 517, 9 C.R. (4th) 133, 130 N.R. 321, (sub nom. *Canadian Broadcasting Corp. v. Lessard)* [1991] 3 S.C.R. 421, 7 C.R.R. (2d) 244 (S.C.C.) — considered

143471 Canada Inc. c. Québec (Procureur général), (sub nom. *Québec (Sous-ministre du Revenue) c. 143471 Canada Inc.)* 31 C.R. (4th) 120, 2 G.T.C. 7112, 167 N.R. 321, (sub nom. *143471 Canada Inc. v. Quebec (Attorney General))* 61 Q.A.C. 81, 90 C.C.C. (3d) 1, [1994] 2 S.C.R. 339, (sub nom. *Quebec v. 143471 Canada Inc.)* 21 C.R.R. (2d) 245, [1995] 1 C.T.C. 27, [1995] R.D.F.Q. 1 (headnote only) (S.C.C.) — distinguished

MOTION by commercial television station for interim order to seal composite videotape.

Archie Campbell J. **(Orally):**

1 CITY TV, a commercial television company, moves for an interim order that the court now seal a composite videotape of the incident described as the June 15 Queen's Park Riot.

2 After preliminary discussions between the police and the company, a police officer phoned the chief assignment editor on July 11th and said he would be coming with a search warrant later that day. The officer attended with the search warrant for the tape and executed it later that day. The search warrant contained a provision entitled "Conditions for Media" which read in part as follows:

> In the event that anyone at the respective place to be searched, following upon voluntary production and seizure by the police, requests that the things subject to seizure be sealed, the police officer(s) executing this search shall:
>
> a. Without making copies of the said material, suitably seal the things seized in a package and identify the package;
>
> b. Record on the package the identity of the person requesting sealing of the things and any reason advanced for the said sealing;
>
> c. Place the package in the Office of the Sheriff at the Superior Court of Justice, 361 University Avenue, Toronto, Ontario

3 It should be noted that the conditions in subparagraphs a, b, and c are set out in the warrant in bold in a larger type-face than the rest of the document. They stand out prominently and immediately to anyone reading the document.

4 Before executing the warrant the officer gave the assignment editor a copy of the warrant, turned to the media conditions page, and asked the editor if he was providing the tape sealed or unsealed. The editor who acted at all times in good faith, very frankly and candidly agrees that the officer invited him to read the media condition portion of the warrant but the editor declined to do so and simply turned over the tape unsealed without seeking advice and without appreciating the import of the conditions, which he had declined to read although invited to do.

5 Since then various police investigators have viewed the 35 or 40 minute composite tape, have made copies of it, have made notes about it, have taken further investigative steps, and have made arrests.

6 City TV moves further for an order that the copies of the tape and notes about the tape made by the police during the course of their investigations since July 11 should somehow be sealed or impounded or in some manner quarantined pending the hearing in late September of motions by CITY TV and other television and newspaper companies to quash the warrants in question.

7 A number of similar warrants were executed at other media companies. Some of them chose to seal their tapes and some of them chose to hand them over unsealed in the same manner as CITY TV. This court earlier this week ordered the continued sealing, pending the final determination of the pending motions to quash the search warrants and return the materials, in respect of those media companies who chose to seal their tapes as in-

dicated in the media conditions in the search warrant.

8 Some days after the execution of the CITY TV warrant, the company on July 14 got in touch with the police and asked that the unsealed material be sealed. The police, having taken investigative steps on the basis of their viewing of the tape, said it was too late and declined to so do.

9 The editor in one affidavit swore that in-house legal counsel were consulted about the content of the warrant and media conditions on July 12 and in a second affidavit swore they were consulted on the 14th. Although the police as noted were asked on the 14th to seal the material, in house counsel took no legal steps. It was only on the afternoon of July 20th that Ms. Edwardh was retained and she immediately brought this motion in court the next morning. There is no explanation for the 6 or 8 day delay of the media company and its legal advisors in taking steps to bring this motion.

10 The merits of the motion to quash the warrants are not before the court on this motion today. The only thing in issue today is whether or not the court should make some retroactive sealing order with the purpose of putting CITY TV and the videotape back in the same position they would have been in had CITY TV decided, as did other media companies, to exercise their right to seal the tapes before handing them over to the police.

11 There is no evidence of any impropriety in the execution of the warrant which clearly set out the right to seal the tapes before handing them over to the police. The officer, as noted invited the editor to read the media conditions. The editor, as noted, acted in good faith.

12 The difficulty with CITY TV's position is that, in consequence of its failure to take advantage of the media conditions in the warrant, the seized material has been used during the course of investigations, copies and notes have been made, police investigators have used the footage during their investigations and arrests have been made. Even if the constitutional disclosure rights of those charged are not yet fully crystallized, the *Stinchcombe* clock has started to tick. It is now, in practical terms, too late to put the genie back into the bottle.

13 Even is one assumes there is a serious issue to be tried, the test of irreparable harm is somewhat difficult to establish at this late date now that the cat is already out of the bag and any harm, if indeed there is harm, has largely been done already.

14 The purpose of sealing is to preserve the unique privacy interest in the thing seized and to preserve it from the intrusive view of the state until the matter can be dealt with in court. That purpose is now impossible to attain because the unique privacy interest no longer exists now that the police have viewed the film and have used it in their investigations. Even if there is further investigative work to be done in relation to the footage, this is not a case like *143471 Canada Inc. c. Québec (Procureur général)* (1994), 21 C.R.R. (2d) 245 (S.C.C.) at p. 268 where the examination of the documents seized was far from being completed.

15 There is a public interest in protecting the privacy interests engaged in this case. As Cory J. said in *Société Radio — Canada c. Lessard* (1991), 67 C.C.C. (3d) 517 (S.C.C.) at p. 533:

> ... among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of its role in a democratic society.

16 This interest is reflected in the careful conditions set out in the warrant. Indeed these conditions were originally drafted in response to the Supreme Court of Canada's judgment in *Lessard* in order to protect the media interests identified in that judgment.. The search warrant conditions demonstrated full sensitivity to the special consideration due to the media, gave the television company full notice of its rights, and carefully constructed a series of procedures to minimize undue interference with the media along the general lines of the guidelines set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), at pp. 326-327.These privacy interests, secured by the search warrant media conditions and the machinery for sealing, must be balanced and weighed against other public interests

17 There is a public interest in the proper and thorough investigation of alleged criminal offences, an interest which includes the use of properly seized videotapes not only to charge individuals reasonably suspected of crime, but also to use the videotapes to screen out innocent people and to have the videotapes available through defence disclosure to assist the defence of those charged with offences.

18 This public interest, combined with the practical impossibility of turning back the clock as if the tapes had not been viewed and used for investigative purposes, outweighs the interest of the media company which, unlike other media companies, failed to exercise its right to have the videotapes sealed before turning them over to the police.

19 The motion is therefore dismissed.

Motion dismissed.

END OF DOCUMENT

2012 CarswellBC 379, 2012 BCSC 127, 211 A.C.W.S. (3d) 558, [2012] B.C.W.L.D. 2792

Sangha v. Reliance Investment Group Ltd.

Gurdial Singh Sangha, Plaintiff and Reliance Investment Group Ltd. Kharak Singh Sangha, Dalbir Singh Sangha, Kewal Singh Sangha, 396964 Alberta Inc. and Baldev Johal, Defendants

British Columbia Supreme Court

M. Allan J.

Heard: January 9, 2012
Judgment: January 26, 2012
Docket: Vancouver L053157

Counsel: Andrew I. Nathanson, for Applicant, Jaspal Kaur Sangha

Alex Bayley, for Plaintiff

Jan Christiansen, for Sangha Defendants, Baldev Johal (the Application Respondents)

Subject: Civil Practice and Procedure

Civil practice and procedure --- Trials — Conduct of trial — Restrictions or bans on publication — General principles

Reasons for judgment in action were delivered, and it was ordered that copies of reasons be served on JS and AS, former wives of defendant DS — Order stated that AS had clearly been defrauded of her right to claim against assets, and that purported sale of interest in construction company was fraud on JS, although it was not clear what value could be placed on shares — Order stated that both AS and JS could apply for declaration that settlement of their matrimonial proceedings was not binding on them with respect to any of fraudulent misrepresentations — JS brought application for order that she and her counsel be permitted to inspect and copy trial exhibits in action, subject to any reasonable terms imposed by court — It was determined that respondents to application failed to satisfy onus on them that disclosure of trial exhibits to JS would pose serious risk to administration of justice — Short answer to respondents' privacy concerns was that information was described in open court during trial and much of it was incorporated into reasons for judgment — There was no evidence to support fears that material sought would be used simply to seek to embarrass or threaten to embarrass respondents — In any event, embarrassment was not bar to access to court documents — After 86 days of trial and publication of written judgment on internet, it was far too late for any of parties to litigation to express concern that their affairs not be broadcast far and wide — Terms suggested by respondents were unrealistic and inappropriate

TAB 5

— There was no justification for any confidentiality order or terms in this case.

Cases considered by *M. Allan J.*:

Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership (2007), 2007 CarswellBC 2408, 2007 BCSC 1483, [2008] 5 W.W.R. 498, 78 B.C.L.R. (4th) 100 (B.C. S.C.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 B.H.R.C. 210, 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112 (S.C.C.) — followed

H. (M.E.) v. Williams (2012), 2012 ONCA 35, 108 O.R. (3d) 321, 2012 CarswellOnt 1100 (Ont. C.A.) — considered

R. c. Dufour (2011), 2011 CarswellQue 41, 2011 CarswellQue 42, 2011 SCC 3, *(*sub nom. *Canadian Broadcasting Corp. v. Canada)* 227 C.R.R. (2d) 121, *(*sub nom. *CBC v. THE QUEEN)* [2011] 1 S.C.R. 65, *(*sub nom. *Canadian Broadcasting Corp. v. Canada (Attorney General))* 411 N.R. 75, 328 D.L.R. (4th) 651, 264 C.C.C. (3d) 311 (S.C.C.) — considered

R. v. Fry (2010), 317 D.L.R. (4th) 661, 254 C.C.C. (3d) 394, [2010] 7 W.W.R. 24, 4 B.C.L.R. (5th) 22, *(*sub nom. *Global BC v. British Columbia)* 484 W.A.C. 86, *(*sub nom. *Global BC v. British Columbia)* 286 B.C.A.C. 86, 74 C.R. (6th) 319, 2010 CarswellBC 804, 2010 BCCA 169 (B.C. C.A.) — considered

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Sangha v. Reliance Investment Group Ltd. (2011), 2011 CarswellBC 2536, 2011 BCSC 1324 (B.C. S.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Ontario (2005), 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, 197 C.C.C. (3d) 1, [2005] 2 S.C.R. 188, 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 76 O.R. (3d) 320 (note), *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, 132 C.R.R. (2d) 178 (S.C.C.) — followed

APPLICATION for order for permission to inspect and copy trial exhibits.

***M. Allan J.*:**

1 The Applicant, Jaspal Sangha, applies for an order that she and her counsel be permitted to inspect and copy the trial exhibits in this action, subject to any reasonable terms imposed by the Court.

Background

2 Reasons for judgment in this action were delivered October 5, 2011 [2011 BCSC 1324 (B.C. S.C.)]. At para. 605, I ordered that copies of the Reasons be served on Jaspal Sangha and Amarjit Sangha, the former wives of the defendant Dalbir Sangha. I stated:

> On the admission of Dal, Amarjit has clearly been defrauded of her right to claim against his assets. I also consider Dal's purported sale of his half interest in Sangha Construction Ltd. to Sarwan Nagra to be a fraud on Jaspal, although it is not clear what value can be placed on those shares.

3 At para. 606, I stated:

> Both Amarjit and Jaspal may apply to this court ... for a declaration that the settlement of their matrimonial proceedings with Dal is not binding on them with respect to any fraudulent misrepresentations made by Dal.

4 Mr. Bayley, counsel for the plaintiff Gurdial Sangha, takes no position on this application. Mr. Christiansen, counsel for the Application Respondents, has provided the trial exhibit list to Mr. Nathanson. He consents to Jaspal Sangha inspecting and taking copies of Exhibit 10 which consists of a binder containing numerous properties owned by members of the Sangha family during and after the marriage of Jaspal and Dalbir. He has apparently provided copies of a few other exhibits. He agrees that Mr. Nathanson can obtain copies of the audiotapes of the trial evidence. Otherwise, he opposed the application.

5 The application is brought pursuant to the Court's Court Record Access Policy ("the Policy"). Mr. Nathanson submits:

> Jaspal Sangha seeks access to the exhibits to exercise her *Charter* right to free expression and to consider, formulate and prosecute an action against Dalbir and other members of the Sangha family for defrauding her of her rightful interest in family assets accumulated during her marriage to Dalbir, and tracing the proceeds of those assets, consistent with Justice Allan's Reasons for Judgment [in] the Sangha trial.

6 No exhibits were sealed at the trial and no request to do so was made at that time by Mr. Christiansen.

7 The Policy states, at page 7, that "[t]he court has jurisdiction over the court record, and the responsibility to make sure that access to the record respects the applicable laws, and the constitutional and other rights and interests that are involved." The Policy goes on to say that for this reason the Court has established general guidelines governing access to the court record and that judges of the court determine issues in individual cases where more specific direction is required. Court exhibits are included as part of the court record.

8 With regard to access to court exhibits in civil proceedings, the Policy states, at page 25, that:

> [a]ccess by the public to court exhibits in a civil proceeding must always be determined on application because of the need of the court to consider the competing interests in respect of public access, distribution and broadcast of court exhibits.

The Policy does not state what principles or considerations the Court should take into account when determining

whether or not to grant access to court exhibits.

9 In Canada, there is a presumption that court proceedings are "open": *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (S.C.C.) at para. 4, [2005] 2 S.C.R. 188 (S.C.C.). In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), Mr. Justice La Forest, writing for the Court, commented, at para. 22, that "[t]he open court principle, seen as 'the very soul of justice' and the 'security of securities', acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law."

10 Despite the open court principle, there are circumstances where public access to confidential or sensitive information related to court proceedings will not protect the integrity of the justice system. In some cases, temporary or permanent protection is warranted: *Toronto Star* at para. 3. However, in that case, at para. 4, Mr. Justice Fish, writing for the Court, stated that "[p]ublic access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*." [emphasis in the original]

11 The test to be applied in applications such as these is known as the *Dagenais/Mentuck* test, after the two Supreme Court of Canada cases that established and refined the governing principles (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, 2001 SCC 76 (S.C.C.)). This test, set out in *Toronto Star* at para. 26, provides that a Court should only exercise its discretion to limit access when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

12 In *Mentuck*, at para. 34, Mr. Justice Iacobucci, writing for the Court, stated that the first prong of the test "contains several important elements that can be collapsed in the concept of 'necessity'". He further noted that the risk referred to had to be a serious one which was grounded in the evidence and posed a serious threat to the administration of justice. Iacobucci J. then stated that "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained." Unless a serious risk to a public interest is established, the Court need not proceed to the second branch of the inquiry to balance competing interests.

13 The Supreme Court of Canada confirmed, in *Toronto Star* at para. 7, that "the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings". More recently, in *R. c. Dufour*, 2011 SCC 3 (S.C.C.) at para. 13, [2011] 1 S.C.R. 65 (S.C.C.), Madam Justice Deschamps, writing for the Court, stated that "[t]he analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions that affect the openness of proceedings."

14 In some circumstances, a balancing of the interests involved has required limitations on the access and dissemination of court exhibits. In *R. v. Fry*, 2010 BCCA 169, 4 B.C.L.R. (5th) 22 (B.C. C.A.), the Court applied the *Dagenais/Mentuck* test in the context of an appeal from the dismissal of an application made by members of the media. Following a criminal trial, the media had asked for an order that two court exhibits be made available to them for review and duplication. After applying the test, the majority of the Court allowed the appeal, but placed certain limitations on the order to protect the identity of certain RCMP officers.

15 In *Global*, Madam Justice Newbury, writing for the majority, concluded, at para. 78, that it was not necessary to deny access to the two exhibits in question "in order to prevent any serious risk to the proper administration of justice." She found that the salutary effects of denying access did not outweigh the strong presumption to the right of the public to access that kind of information. Newbury J.A. went on to state that the "presumption is especially strong given that the information in this case has already been publicized in the course of the trial."

16 In *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2007 BCSC 1483, 78 B.C.L.R. (4th) 100 (B.C. S.C.), members of the media applied for access to a videotape recording of a party participating in a media training session. The tape showed the individual answering practice questions that were put to him. At para. 37, Madam Justice Wedge considered the practicality of limiting the use of a videotape in the context of today's technology. She noted that there was simply no means by which to regulate the use or dissemination of the videotape once it had been released and broadcast; any restrictions imposed by the Court would be unenforceable by either the Court or the media.

17 Wedge J. held, at para. 48, that the open court principle did not necessarily include the right to disseminate information in the same form that it was presented in court. In the circumstances of the case, Wedge J. found that a balancing of competing interests would not "create a 'cloud of secrecy' under which justice [would] wither" and that the media could fully and accurately report the evidence, through viewing the videotape shown in court and being provided copies of a transcript of the videotape, without the individual in question having to relinquish his right to privacy for all time: paras. 49 and 52.

The Application Respondents' Position

18 Mr. Christiansen questions the merits of any claim by Jaspal Sangha against Dalbir. He submits that she settled her claims and cannot now establish the ingredients of misrepresentation and reliance which are necessary to prove fraud. He also submits that any action for tracing is premature. However, I do not consider those concerns relevant to the narrow issue on the application: whether Jaspal and her counsel are entitled to access to the trial exhibits.

19 Mr. Christiansen also frames his opposition to the application on grounds of relevance and privacy concerns. As examples, he notes that the exhibits include documents relating to the plaintiff's Will, the plaintiff's wife's financial information, the defendant Kewal Sangha's income tax returns, the defendant Kharak Sangha's medical records, and material relating to Dalbir's custody battle with Amarjit Sangha. He says that such documents can have no relevance to Jaspal Sangha's claims and they involve intimate details about the parties. The question of relevance goes to the merits of Jaspal Sangha's claim. The short answer to the Application Respondents' privacy concerns is that all of that information was described in open court during the trial and much of it is incorporated into the Reasons for Judgment.

20 Mr. Christiansen submits that the open court policy and the resolution of disputes on their merits do not override all other considerations:

> If Courts are to play a role in resolving sensitive or embarrassing disputes between parties, and if Courts benefit from candor, then those goals are enhanced if parties have some comfort that their affairs will not be broadcast far and wide.

21 He suggests that the Application Respondents are concerned that some of the material sought by Jaspal Sangha will be used simply to seek to embarrass or threaten to embarrass them. There is no evidence to support

those fears. I do not agree that the absence of any affidavit by Jaspal Sangha on this application fuels the Respondents' concern that she wishes to embarrass them. In any event, embarrassment is not a bar to access to court documents. In *H. (M.E.) v. Williams*, 2012 ONCA 35 (Ont. C.A.) at para. 25, the Ontario Court of Appeal considered the first branch of the test articulated in *Toronto Star*:

> Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at p.185; *Sierra Club of Canada*, at para. 55; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.

22 In any event, after 86 days of trial, and the publication of a written judgment on the internet, it is far too late for any of the parties to this litigation to express a concern that "their affairs will not be broadcast far and wide."

23 If Jaspal Sangha is to be given access to the trial exhibits, Mr. Christiansen suggests that the following terms be imposed:

- Jaspal's solicitors provide an undertaking that they will retain the copies and not provide them to Jaspal or anyone else;

- the solicitors promptly destroy any copies of documents not relevant to proving that Dalbir perpetrated a fraud in procuring the 1986 release; and

- the solicitors are to destroy all remaining copies when the original trial exhibits are returned to the parties.

24 The Application Respondents note that there is authority for imposing confidentiality requirements on disclosure of court documents. Although most of the cases dealing with the issue of public access to court documents arise from applications by the media, in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), the plaintiff environmental organization sought the production of confidential documents. The Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, resisted production on the basis that the documents sought had been obtained from the Chinese government on the condition that they be available only to the parties and the Court. The Supreme Court of Canada granted the confidentiality order sought by the AECL. In that case, the Court applied an adapted version of the *Dagenais/Mentuck* test to determine when a confidentiality order was appropriate. Iacobucci J. for the Court stated:

> [53] A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> [54] As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence,

and poses a serious threat to the commercial interest in question.

25 In the context of the applicable jurisprudence, I consider the terms suggested by the Application Respondents to be unrealistic and inappropriate. There is no justification for any confidentiality order or terms in this case.

Conclusion

26 The law is clear that while the Court has discretion to limit access to court records such as trial exhibits, such limits must be necessary to prevent a serious risk to the proper administration of justice. I conclude that the Application Respondents have failed to satisfy the onus on them that disclosure of the trial exhibits to Jaspal Sangha would pose a serious risk to the administration of justice. Jaspal Sangha is entitled to her costs of this application against the Application Respondents.

Order accordingly.

END OF DOCUMENT

TAB 6

2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

Toronto Star Newspapers Ltd. v. Ontario

Her Majesty The Queen (Appellant) v. Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation (Respondents) and Canadian Association of Journalists (Intervener)

Supreme Court of Canada

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: February 9, 2005
Judgment: June 29, 2005
Docket: 30113

Proceedings: affirming *Toronto Star Newspapers Ltd. v. Ontario* (2003), 2003 CarswellOnt 3986, 178 C.C.C. (3d) 349, 232 D.L.R. (4th) 217, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 178 O.A.C. 60, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 110 C.R.R. (2d) 288, 17 C.R. (6th) 392, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 67 O.R. (3d) 577 (Ont. C.A.); reversing in part (2003), 2003 CarswellOnt 4020 (Ont. S.C.J.)

Counsel: Scott C. Hutchison, Melissa Ragsdale for Appellant

Paul B. Schabas, Ryder Gilliland for Respondents

Written submissions only by John Norris for Intervener

Subject: Criminal; Constitutional

Criminal law --- Pre-trial procedure — Public or publication ban order — General

Order sealing information to obtain search warrant prima facie unconstitutional — Police investigation was founded on information obtained from confidential informant — Police brought application for warrant, and Crown brought application for order sealing Information to Obtain warrant to protect informant — Application was granted — Media brought application for judicial review of sealing order — Application was granted save for information which identified informant, Crown's appeal was allowed in part and further identifying information was sealed and Crown appealed — Appeal dismissed — Open-courts rule may only be overridden when open information could in fact endanger administration of justice — Public access to Information to Obtain was covered by Dagenais/Mentuck test — In present case, Information to Obtain did not have to be wholly sealed in

order to protect informant and Information was accordingly properly opened to public scrutiny.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression

Order sealing information to obtain search warrant prima facie unconstitutional — Police investigation was founded on information obtained from confidential informant — Police brought application for warrant, and Crown brought application for order sealing Information to Obtain warrant to protect informant — Application was granted — Media brought application for judicial review of sealing order — Application was granted save for information which identified informant, Crown's appeal was allowed in part and further identifying information was sealed and Crown appealed — Appeal dismissed — Open-courts rule may only be overridden when open information could in fact endanger administration of justice — Public access to Information to Obtain was covered by Dagenais/Mentuck test — In present case, Information to Obtain did not have to be wholly sealed in order to protect informant and Information was accordingly properly opened to public scrutiny.

Police commenced an investigation into possible violations of provincial health and related regulatory legislation by a meat packing plant in Ontario. The investigation was preceded by the receipt of "whistle-blowing" information from a confidential informant. Police brought an application for a search warrant, and the Crown brought an ex parte application for an order sealing the Information to Obtain the warrant and the terms of the warrant itself in order to protect the identity of the confidential informant. Members of the media brought various applications for judicial review of the sealing order. Applications for relief in the nature of *certiorari* and *mandamus* were granted and the Information to Obtain was ordered unsealed, subject to redaction of information which could identify the informant. The Crown's appeal to the Court of Appeal was allowed in part and further redaction was ordered to better protect the informant's identity. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Fish J. for the Court: The constitutional guarantee of freedom of expression as contained in *Canadian Charter of Rights and Freedoms* subsection 2(b) leads to a presumptive rule that court proceedings, including documents in support of those proceedings, be open and subject to public scrutiny. The purpose of the guarantee is to safeguard the essence of our free society, and as such interference with the rule should not be lightly undertaken. However, there are times in which access to sensitive information in court proceedings will actually "endanger and not protect the integrity of our system of justice". Courts have a residual discretion to restrict access in order to prevent such danger, and that discretion is properly exercised in accordance with the so-called *Dagenais/Mentuck* test. The *Dagenais/Mentuck* test applies to attempts to seal search warrants in the same manner as it does to other court proceedings. The test should be applied in accordance with the context of the material sought to be sealed or secured against disclosure, and accordingly must be flexible, particularly where the rights or safety of specific individuals may be put at risk by public access to court information.

In the present case, the applications judge and Court of Appeal properly held that by application of the *Dagenais/Mentuck* test, the sealing order was properly set aside save and except for personal information which could identify the confidential informant. The Crown's position was founded on investigative convenience, which is not in itself reasonable grounds to seal an Information to Obtain a search warrant. Where the Crown alleges that prima facie public court information be sealed in order to secure an investigative advantage, it must at least show that failing to seal the materials in question would result in real and serious harm to the investigation. The Crown did not meet that burden in the present case, and the sealing order was accordingly properly set

aside.

Cases considered by *Fish J.*:

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168, 1994 SCC 102 (S.C.C.) — followed

MacDonell c. Flahiff (1998), *(*sub nom. *R. v. Flahiff)* 157 D.L.R. (4th) 485, *(*sub nom. *R. v. Flahiff)* 123 C.C.C. (3d) 79, 1998 CarswellQue 19, *(*sub nom. *Flahiff c. MacDonell)* [1998] R.J.Q. 327, 17 C.R. (5th) 94 (Que. C.A.) — referred to

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, *(*sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — considered

National Post Co. v. Ontario (2003), 176 C.C.C. (3d) 432, 107 C.R.R. (2d) 89, 2003 CarswellOnt 2134 (Ont. S.C.J.) — referred to

R. v. Eurocopter Canada Ltd. (2001), 2001 CarswellOnt 1406, [2001] O.T.C. 310 (Ont. S.C.J.) — referred to

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Toronto Star Newspapers Ltd. v. Ontario (2000), 2000 CarswellOnt 2199 (Ont. S.C.J.) — referred to

Vancouver Sun, Re (2004), [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, *(*sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, *(*sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, *(*sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, *(*sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 487.3 [en. 1997, c. 23, s. 14] — considered

s. 487.3(2) [en. 1997, c. 23, s. 14] — considered

Provincial Offences Act, R.S.O. 1990, c. P.33

Generally — referred to

APPEAL by Crown from judgment reported at *Toronto Star Newspapers Ltd. v. Ontario* (2003), 2003 CarswellOnt 3986, 178 C.C.C. (3d) 349, 232 D.L.R. (4th) 217, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 178 O.A.C. 60, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 110 C.R.R. (2d) 288, 17 C.R. (6th) 392, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 67 O.R. (3d) 577 (Ont. C.A.), allowing in part Crown's appeal from judgment granting media application to quash order sealing contents of information to obtain search warrant.

***Fish J.*:**

I

1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.

2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the in-

vestigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

10 In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal.

II

11 The relevant facts were fully and accurately set out in these terms by Doherty J.A. in the Court of Appeal for Ontario ((2003), 67 O.R. (3d) 577 (Ont. C.A.)):

> On August 20, 2003, a justice of the peace issued six search warrants for various locations linked to the business of Aylmer Meat Packers Inc. ("Aylmer"). The informations sworn to obtain the warrants were identical. The warrants were obtained under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and related to alleged violations of provincial legislation regulating the slaughter of cattle. The informations were sworn by Roger Weber, an agricultural investigator with the Ministry of Natural Resources. The warrants were executed on August 21 and 22, 2003.
>
> On about August 26, 2003, the investigation by the Ministry of Natural Resources into the operation of Aylmer became the subject of widespread media reports. The suitability for human consumption of meat slaughtered and processed by Aylmer became a matter of public concern.
>
> On about August 27, 2003, the Ontario Provincial Police commenced a fraud investigation into the business affairs of Aylmer. The officers involved in that investigation were advised that Inspector Weber had applied for and obtained the search warrants described above.
>
> On September 2, 2003, the Crown brought an *ex parte* application in open court in the Ontario Court of Justice for an order sealing the search warrants, the informations used to obtain the warrants and related documents. The Crown claimed that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation.
>
> Justice Livingstone made an order directing that the warrants and informations were to be sealed along with the affidavit of Detective Sergeant Andre Clelland, dated August 30, 2003 filed in support of the application for a sealing order and a letter, dated September 2, 2003, from Roger Weber indicating that the Ministry of Natural Resources took no objection to the application. The sealing order was to expire December 2, 2003. The Clelland affidavit and Inspector Weber's letter were subsequently made part of the public record on the consent of the Crown.

> The Toronto Star Newspapers Limited and other media outlets (respondents) brought a motion for *certiorari* and *mandamus* in the Superior Court. That application proceeded before McGarry J. on September 15 and 16, 2003. On September 24, 2003, McGarry J. released reasons quashing the sealing order and directing that the documents should be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. McGarry J. edited one of the informations to delete references to material that could identify the confidential informant and told counsel that the edited version would be made available to the respondents unless the Crown appealed within two days.... [paras. 1-6]

12 The Crown did, indeed, appeal — but with marginal success.

13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This amounted, in his view, to a denial of natural justice and resulted in a loss of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), particularly at pp. 868-69 and 890-91.

14 Doherty J.A. next addressed the merits of the request for a sealing order. Applying this Court's decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), he concluded that the Crown had not displaced the presumption that judicial proceedings are open and public. Like McGarry J., Doherty J.A. recognized that the materials had to be edited to exclude information that could reveal the identity of the confidential informant and the editing he found appropriate was "somewhat more extensive than that done by McGarry J." (para. 28).

15 The order of the Court of Appeal has now become final and the factual basis for a sealing order has evaporated with the passage of time. In the absence of a stay, the edited material was released on October 29, 2003, and the proceedings have to that extent become moot.

16 The Crown nonetheless pursues its appeal to this Court with respect to the underlying question of law: What is the governing test on an application to delay public access to search warrant materials that would otherwise become accessible upon execution of the search warrant?

17 Essentially, the Crown contends that the Court of Appeal erred in law in applying the "stringent" *Dagenais/Mentuck* test without taking into account the particular characteristics and circumstances of the pre-charge, investigative phase of the proceedings.

III

18 Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.). "[W]hat should be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime" (Dickson J., as he then was, speaking for the majority, at p. 184).

19 *MacIntyre* was not decided under the *Charter*. The Court was nonetheless alert in that case to the principles of openness and accountability in judicial proceedings that are now subsumed under the *Charter*'s guarantee of freedom of expression and of the press.

20 Search warrants are obtained *ex parte* and in *camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search warrant was executed — but not thereafter. In the words of Dickson J.:

> ...the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears.... The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]

21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 of Ontario. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

24 Since the advent of the *Charter*, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts. The governing principles were first set out in *Dagenais*.

25 In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance — but strikingly similar in fact — to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had

used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real, substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

28 The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to *all* discretionary actions which have that limiting effect:

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban...; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (, [2002] 2 S.C.R. 522, 2002 SCC 41). (*Vancouver Sun, Re* (2004), [2004] 2 S.C.R. 332, 2004 SCC 43 (S.C.C.), at para. 31)

29 Finally, in *Vancouver Sun, Re*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle," it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein." It therefore applies at every stage of proceedings (paras. 23-27).

30 The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

31 It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

32 In *Vancouver Sun, Re*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. [para. 43]

33 Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process.

IV

34 The Crown has not demonstrated, on this appeal, that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice. The respondents, on the other hand, have drawn our attention to several cases in which the test was effectively and reasonably applied. Sealing orders or partial sealing orders were in fact granted, for example, in *National Post Co. v. Ontario*, (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (Ont. S.C.J.); *MacDonell c. Flahiff* (1998), 157 D.L.R. (4th) 485 (Que. C.A.); and *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (Ont. S.C.J.).

35 Nor has the Crown satisfied us that Doherty J.A. failed to adopt a "contextual" approach to the order sought in this case.

36 In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, p. 72).

37 Doherty J.A. rejected these broad assertions for two reasons.

38 First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,

> ...the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]

39 Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the

2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

very least allege a *serious and specific risk to the integrity of the criminal investigation*.

40 Finally, the Crown submits that Doherty J.A. applied a "stringent" standard — presumably, an *excessively* stringent standard — in assessing the merits of the sealing application. This complaint is unfounded.

41 Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

42 At no point in his reasons did Doherty J.A. demand or require a high degree of predictive certainty in the Crown's evidence of necessity.

V

43 For all of these reasons, I propose that we dismiss the appeal, with costs to the respondents, on a party-and-party basis.

Appeal dismissed.

END OF DOCUMENT

TAB 7

2013 CarswellOnt 11949, 2013 ONSC 5490, 232 A.C.W.S. (3d) 319, 44 C.P.C. (7th) 178

Zaniewicz v. Zungui Haixi Corp.

Jerzy Robert Zaniewicz and Edward C. Clarke, Plaintiffs and Zungui Haixi Corporation, E &Y, Fengyi Cai, Jixu Cai, Yanda Cai, Michelle Gobin, Michael W. Manley, Patrick A. Ryan, Elliott Wahle, Margaret Cornish, CIBC World Markets Inc., Canaccord Genuity Corp. (f.k.a. Canaccord Financial Ltd)., Gmp Securities LP and Mackie Research Capital Corporation (f.k.a. Research Capital Corporation), Defendants

Ontario Superior Court of Justice

Perell J.

Heard: August 27, 2013
Judgment: August 27, 2013
Docket: 11-CV-436360-00CP

Counsel: Charles M. Wright, Douglas M. Worndl, for Plaintiffs

Deborah Berlach, for Defendant, Zungui Haizi Corporation

Margaret L. Waddell, for Defendant, Michelle Gobin

Michael A. Eizenga, for Defendant, Michael W. Manley

James S.F. Wilson, for Defendants, Patrick A. Ryan, Elliott Wahle, and Margaret Cornish

Linda L. Fuerst, for Defendant, Ernst &Young LLP

Kent Thomson, Derek Ricci, for Defendants, CIBC World Markets Inc., Canaccord Genuity Corp. (f.k.a. Canaccord Financial Ltd.) and Mackie Research Capital Corporation (f.k.a. Research Capital Corporation) and GMP Securities LP

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General principles

Investors had acquired common shares of company that had raised about $40 million through initial public offering in Ontario in December 2009 — Investors had either purchased their shares in primary or secondary markets

or had exchanged shares in subsidiary of company for shares in company — Company's shares lost 77 percent of their value in August 2011, after company's auditor suspended audit — Company's shares became subject of cease trade orders starting that day and ultimately became worthless — Investors commenced action against, inter alia, four underwriters for damages for common law tort claims and statutory claims — Action had previously been certified as class proceeding as against company and auditor for purposes of settlement — Investors reached settlements with company, auditor, and underwriters — Company agreed to pay $8.1 million, auditor agreed to pay $2 million, and underwriters agreed to pay $750,000 — Motion made by investors for certification of action as class proceeding as against four underwriters for purposes of settlement, for approval of three settlements, and for ancillary relief — Motion granted on terms — All requested relief was granted with exception that investors' plan of allocation was modified — Three settlement agreements taken together were fair, reasonable, and in best interests of class members — Class members would recover net amount of 33 percent of their losses — No objections to quantum of settlements had been received — Investors had instructed class counsel to seek approval of settlements — Proposed plan of allocation was not fair and reasonable and in best interests of class — Proposed plan would have denied recovery to class members who had purchased shares after company's auditor suspended audit — These class members had taken risk but could not have foreseen that shares would cease trading later that day — Fairer outcome when pro-rating settlement amount was to allow purchasers in primary market to claim 100 percent of their losses, to allow purchasers in secondary market up to time of suspended audit to claim 92 percent of their losses, to allow share exchange acquirers to claim 60 percent of their losses, and to allow purchasers on last day of trading to claim 20 percent of their losses.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — General principles

Class counsel took on securities case for investors in company on contingency basis — Retainer agreement provided for class counsel to receive up to 30 percent of recovery — Investors commenced proposed class proceeding against, inter alia, company, auditor, and four underwriters for damages for common law tort claims and statutory claims — Company agreed to pay $8.1 million, auditor agreed to pay $2 million, and underwriters agreed to pay $750,000 — Class counsel were seeking total of $2.8 million, including $2.25 million for fees — Motion by class counsel for order approving class counsel fees — Motion granted — Three settlement agreements taken together had been fair, reasonable, and in best interests of class members — Class counsel fee amounted to only 20.75 percent of recovery when retainer agreement had provided for fee of up to 30 percent of recovery — Class counsel fee was fair and reasonable having regard to usual factors.

Cases considered by *Perell J.*:

Corless v. KPMG LLP (2008), 2008 CarswellOnt 4708 (Ont. S.C.J.) — referred to

Eidoo v. Infineon Technologies AG (2012), 2012 CarswellOnt 16498, 2012 ONSC 7299 (Ont. S.C.J.) — referred to

Fantl v. Transamerica Life Canada (2009), 2009 CarswellOnt 4710 (Ont. S.C.J.) — referred to

Farkas v. Sunnybrook & Women's College Health Sciences Centre (2009), 82 C.P.C. (6th) 222, 2009 CarswellOnt 4962 (Ont. S.C.J.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 9 C.P.C. (7th) 444, 2010 ONSC 7147, 2010 CarswellOnt 9886 (Ont. S.C.J.) — referred to

Kidd v. Canada Life Assurance Co. (2013), 2013 ONSC 1868, 2013 CarswellOnt 3640, 3 C.C.P.B. (2nd) 169, 2013 C.E.B. & P.G.R. 8029, 115 O.R. (3d) 256 (Ont. S.C.J.) — referred to

Nutech Brands Inc. v. Air Canada (2008), 2008 CarswellOnt 1494, 59 C.P.C. (6th) 166 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — referred to

Smith Estate v. National Money Mart Co. (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.) — referred to

Zaniewicz v. Zungui Haixi Corp. (2012), 2012 CarswellOnt 10310, 2012 ONSC 4842 (Ont. S.C.J.) — referred to

Zaniewicz v. Zungui Haixi Corp. (2012), 2012 CarswellOnt 10522, 2012 ONSC 4904 (Ont. S.C.J.) — referred to

Zaniewicz v. Zungui Haixi Corp. (2012), 2012 ONSC 6061, 2012 CarswellOnt 13175 (Ont. S.C.J.) — referred to

Zaniewicz v. Zungui Haixi Corp. (2013), 2013 ONSC 2959, 2013 CarswellOnt 6689, 116 O.R. (3d) 37 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 26 — considered

s. 26(1) — considered

s. 29(2) — considered

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

MOTION by investors for certification of action as class proceeding as against four underwriters for purposes of settlement, for approval of three settlements, and for ancillary relief; MOTION by class counsel for order approving class counsel fees.

***Perell J.*:**

A. Introduction and Overview

1 This is a securities class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The Plaintiffs Jerzy Robert Zaniewicz and Edward C. Clarke advance common law tort claims and also statutory claims with respect to the sale of the shares of Zungui Haizi Corporation in the primary and secondary markets.

2 The Plaintiffs bring this motion for: (a) certification for settlement purposes as against the Defendants CIBC World Markets Inc., Canaccord Genuity Corp., GMP Securities LP, and Mackie Research Capital Corporation (the "Underwriting Syndicate"); (b) approval of three settlements; (c) ancillary orders, including the appointment of an administrator; (d) approval of the notice program; and (e) approval of the plan of distribution (the "Plan of Allocation") for the settlement funds.

3 Class Counsel also bring a motion for approval of its counsel fees and disbursements. Class Counsel seeks $2,250,000.00, plus disbursements, interest on disbursements, and applicable taxes. The total request is for $2,807,037.56.

4 For the reasons that follow, I certify the action as against the Underwriting Syndicate for settlement purposes. I approve the three settlements and Class Counsel's request for counsel fees. I approve the requests for ancillary orders. However, I do not approve the proposed Plan of Allocation, and, rather, I have varied the plan and approved a modified Plan of Allocation.

5 As I will explain, in this case, the court has the jurisdiction to approve the settlement agreements and then establish a plan of distribution that is different than the plan of distribution proposed by the parties.

B. Factual Background to the Class Action

6 See *Zaniewicz v. Zungui Haixi Corp.*, 2013 ONSC 2959 (Ont. S.C.J.), which sets out most of the factual background and the procedural history. See also: *Zaniewicz v. Zungui Haixi Corp.*, *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 4842 (Ont. S.C.J.), *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 4904 (Ont. S.C.J.), and *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 6061 (Ont. S.C.J.).

7 In December 2009, Zungui made an initial public offering ("IPO"), and it raised approximately $40 million in Ontario's capital markets.

8 Zungui and its directors and officers had a statutory obligation under the Ontario *Securities Act* to provide Zungui's investors with timely and accurate disclosure regarding the business of Zungui, including disclosure in Zungui's interim and annual financial statements.

9 In its interim and annual financial statements, Zungui and the Defendants Yanda, Fengyi, and Zungui Cai (the "Cai Brothers") assured investors that Zungui's financial statements presented fairly, in all material respects, the financial position of Zungui in accordance with GAAP. They represented that the Zungui's offering documents contained full true and plain disclosure of all material facts relating to the offering of securities.

10 The Plaintiffs are residents of Ontario. Each purchased common shares of Zungui in the primary market. Mr. Clarke also purchased common shares of Zungui in the secondary market.

11 On August 22, 2011, Zungui issued a press release announcing that its auditor, Ernst & Young LLP ("E&Y"), had suspended its audit of Zungui's financial statements for the year ended June 30, 2011. With that announcement, Zungui's shares immediately lost 77% of their value. Subsequently, Zungui's shares became the

subject of various temporary and permanent cease trade orders, and they are now worthless.

12 On September 22, 2011, Zungui's Chief Financial Officer and all independent members of the Board resigned, in part, because the special committee formed to investigate E&Y's concerns had been prevented from fulfilling its mandate.

13 On September 23, 2011, E&Y resigned as Zungui's auditor. E&Y withdrew its opinions that Zungui's financial statements were GAAP compliant.

14 On February 2, 2012, the Ontario Securities Commission ("OSC") ruled that Yanda, Fengyi, and Zungui Cai had engaged in conduct contrary to the public interest, and on August 28, 2012, the OSC ordered, among other things, that Yanda and Fengyi resign as directors or officers of Zungui and be permanently prohibited from acting as directors or officers of any issuer.

15 The OSC investigation revealed that when E&Y resigned, it advised that all of its audit opinions that formed part of the IPO Prospectus, as well as Zungui's June 2010 financial statements could no longer be relied upon.

16 On October 3, 2011, Mr. Zaniewicz, commenced the action by the issuance of a Notice of Action. On November 2, 2011, he filed his Statement of Claim. On February 7, 2012 and February 10, 2012, I made orders granting leave to amend the Statement of Claim to add Mr. Clarke as a plaintiff and to correct the description of two of the Underwriters incorrectly described in the style of cause.

17 On February 8, 2012, the Plaintiffs filed their Fresh as Amended Statement of Claim.

18 In the action, the Plaintiffs sue not only Zungui and the Cai Brothers, but others allegedly responsible for ensuring that Zungui's public disclosure to primary and secondary market investors was timely and accurate in accordance with securities law. The Plaintiffs allege various statutory claims under the Ontario *Securities Act* and also common law claims.

19 The Plaintiffs allege that Zungui's IPO Prospectus was misleading as it contained material misrepresentations. The Plaintiffs allege that the representations were materially false, and Zungui's financial statements contained in the prospectus, and other financial statements later prepared and disseminated in the secondary securities market, were neither accurate nor reliable in respect of reported revenues, net income, assets, and shareholders' equity. Moreover, the Plaintiffs allege that the financial statements did not fairly present, in all material respects, the financial condition, results of operations and cash flows of Zungui for the reporting periods presented.

20 Alan Mak, who is a chartered accountant, a member of the Institute of Chartered Accountants of Ontario, and a member of the Association of Certified Fraud Examiners opined that the audits conducted by Ernst & Young were not in accordance with GAAP and that Ernst & Young's unqualified audit opinions should not have been given for the 2006 through 2010 reporting periods. E&Y does not admit that it was negligent.

21 In the class action, the Class Definition is as follows:

> All persons or entities wherever they may reside or be domiciled, other than Excluded Persons and Opt-Out Parties, who acquired Eligible Shares.

Eligible Shares means the Shares acquired by a Class Member or Opt-Out Party during the Class Period.

Class Period means the period from and including August 11, 2009 to and including August 22, 2011.

Excluded Persons means each Defendant, the past or present subsidiaries or affiliates, officers, directors, partners, legal representatives, consultants, agents, successors and assigns of Zungui and any member of each Defendant's families, their heirs, successors or assigns, and includes any Southern Zungui Acquirers who acted as a consultant or provided other professional services to Zungui or its subsidiaries in connection with the IPO.

22 The Class is comprised of three (3) types of acquirers of Zungui common shares: (1) primary market purchasers; (2) secondary market purchasers; and (3) share exchange acquirors (i.e. anyone who was a shareholder of Zungui's subsidiary, Southern Trends International Holding Company (BVI), who entered into an agreement with Zungui, before its IPO, to exchange their Southern Trends shares for Zungui common shares on a basis of 1:5,000.

23 Paul Mulholland, a US based certified forensic accountant, was retained by the Plaintiffs, to among other things, calculate the damages of class members. Mr. Mulholland's estimate of damages was $23.76 million comprised of: (a) $10.1 million in damage to primary market purchasers; $12.9 million in damage to secondary market Purchasers; and $0.7 million in damage to share exchange acquirors. (The original Statement of Claim sought damages of $30 million.)

24 The Defendants, of course, do not admit liability or the amount of the Class Member's alleged losses.

C. Certification for Settlement Purposes

25 I have already certified this action for settlement purposes as against Zungui, Michelle Gobin, Michael W. Manley, Patrick A. Ryan, Elliott Wahle, and Margaret Cornish (the "Zungui Defendants") and against Ernst & Young LLP and the Cai Brothers.

26 I am satisfied that that action should now be certified for settlement purposes as against the Underwriting Syndicate, and an Order should issue accordingly.

D. Settlement Approval

27 The Plaintiffs have concluded three settlements: (1) the Auditor Settlement; (2) the Zungui Settlement; and (3) Underwriter Settlement.

28 The Auditor Settlement is for $2 million. The Zungui Settlement is for $8 million, and the Underwriter Settlement is for $750,000.00.

29 The Zungui Defendants have agreed to contribute an additional $100,000.00 if the Plaintiffs: (a) settled their claims against the Underwriting Syndicate before the scheduled settlement approval hearings for the Auditor Settlement and the Zungui Settlement; and (b) obtained the Court's approval of a settlement with the Underwriting Syndicate. Thus, if all the settlements are approved, the settlement funds will total $10,850,000.00 plus interest before deductions for counsel fee and administrative expenses.

30 The settlement funds under the Auditor Settlement were received on May 17, 2013, and have been accru-

ing interest since that date. The settlement funds under the Zungui Settlement were received on May 24, 2013, and have been accruing interest since February 22, 2013. The settlement funds under the Underwriter Settlement will be paid within fourteen days of execution of the Underwriter Agreement (i.e., by September 2, 2013).

31 The Settlement Amounts that have been received are currently invested at RBC in interest bearing accounts. Each settlement amount is held in a separate escrow account.

32 Class Counsel has been informed that, as of August 16, 2013, the escrow accounts contain: (1) Zungui Escrow Account, $7,984,781.20; and (2) Auditor Escrow Account, $1,995,373.52. These accounts reflect the payment of $48,931.32 for the publication of the First Notice (allocated, $39,145.07 from the Zungui Escrow Account and $9,786.25 from the Auditor Escrow Account) and the accrual of $ in interest on the Zungui Settlement Amount and $. 23,926.275,159.68 in interest on the Auditor Settlement Amount

33 Notice of the certification of the action as against the Zungui Defendants, Ernst & Young LLP, and the Cai Brothers has been given to the Class Members. There were no opt-outs. The notice also provided notice of the Auditor Settlement and the Zungui Settlement.

34 Notice of the proposed Underwriter Settlement has recently been given to the Class Members pursuant to a recent court order made at a case conference. Having already had a right to opt-out, class members do not have a right to opt-out with respect to the certification of the action as against the Underwriting Syndicate. When there are partial or progressive certifications of a class action, provided that there was adequate notice, the right to opt-out is a procedural right that may only be exercised once: *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.) at paras. 29-32; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (Ont. S.C.J.).

35 Under the settlements, the Plaintiffs and the Class will provide releases to all of the Defendants. The Cai Brothers will be released as part of the Zungui Settlement. The settlements, if approved, would complete the class action.

36 The key terms of the settlement agreements are as follows:

- The settlement will be administered by an Administrator;
- the Defendants will pay their respective settlement amounts for the benefit of the Class;
- the settlement funds will be distributed, after payment of any administration expenses and Class Counsel fees, disbursements, and taxes as awarded by the Court;
- the settlement funds will be distributed in accordance with a Plan of Allocation that is in a form satisfactory to the Defendants or as fixed by the Court;
- if the settlement is approved by the court, the Notices of the Settlement will provide Class Members with information concerning their right to participate by filing a Claim Form;
- the settlement funds will be distributed among all Class Members who timely submit valid Claim Forms to the Administrator;
- there are no rights of reversion;

- the Plan of Allocation provides for the possibility of a *cy près* distribution to the Small Investor Protection Association Canada in the event that less than $25,000.00 remains 180 days from the date on which the Administrator distributes the net settlement amount; and

- the Plaintiffs and the Class Members will release the Defendants and certain identified associated entities.

37 Under the Plan of Notice, the Short Form Notice of Settlement will be published: (a) in the English language, in the business/legal section of the national weekend editions of the *National Post* and the *Globe and Mail*; (b) in the French language, in the business section of *La Presse*; and (c) in the French and English languages across *Marketwire*, a major business newswire in Canada.

38 Under the Plan of Notice, the Long Form Notice of Settlement will be: (a) posted in both the French and English languages on *www.classaction.ca*; (b) posted in both the French and English languages on the Administrator's website; and (c) mailed or emailed, along with the Claim Form and the Opt-Out Form, directly to persons that have contacted Class Counsel and have provided their contact information.

39 Also in accordance with the Plan of Notice, the Long Form Notice of Settlement and the Claim Form will be sent by the Administrator: (a) directly to persons identified as Class Members by way of a computer-generated list provided by Zungui's litigation receiver to Class Counsel and the Administrator; and (b) to the brokerage firms in the Administrator's proprietary databases, requesting that these firms either send a copy of these materials to all individuals and entities identified as Class Members, or to send the names and addresses of all such individuals and entities to the Administrator, who will mail these materials to the individuals and entities so identified.

40 The estimated cost of implementing the Plan of Notice, excluding the First Notice that has already been published and paid for, will be approximately $140,000.00 (before tax). Of that amount, approximately $85,000.00 is attributable to the cost of effecting direct notice.

41 David Weir, the President of NPT RicePoint Class Action Services, the proposed Administrator, deposes that the broker outreach portion of the notice plan is likely to bring the settlement to the attention of the Class Members in a manner consistent with other notice programs in securities class actions.

42 Class Counsel believes that the Approval Notices, disseminated in accordance with the Plan of Notice, will come to the attention of a substantial portion of the Class.

43 Class Counsel recommends that the court approve the settlements. Class Counsel is of the view that the settlement terms and conditions are fair and reasonable, and represent a significant recovery for Class Members in a securities class action.

44 Based on the expert opinion of Paul Mulholland, CFA, Class Counsel believes that the combined settlement amounts represent close to 50% of the damages allegedly suffered by the Class Members as calculated by Mr. Muhlholland. I would calculate the class's gross recovery as 46% of the damages allegedly suffered and the class's net recovery after the payment of administrative expenses and legal fees, as claimed, as approximately 33%.

45 The Plaintiffs have instructed Class Counsel to seek approval of the settlements.

46 No objections to the quantum of the Settlements have been received to date. However, Class Counsel has

received: (a) one objection to the release provisions in the Zungui Agreement insofar as they apply to the Cai Brothers; and (b) one written objection to the proposed Plan of Allocation, discussed below, concerning the proposed ineligibility for any payment to Class Members for shares purchased in the secondary market after the alleged corrective press release on August 22, 2011.

47 Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para 57; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

48 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), at para. 38; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

49 In my opinion - independent of the matter of the Plan of Allocation (the plan of distribution) - having regard to the various criteria set out above, the three settlement agreements taken together are fair, reasonable, and in the best interests of the Class Members.

50 Therefore, independent of the matter of the Plan of Allocation, which I will discuss next, I approve the three settlements.

E. Distribution Plan

1. The Court's Jurisdiction to Approve the Distribution Plan

51 In the case at bar, the court's authority to approve the plan of distribution, the Plan of Allocation, comes from the settlement agreements, where the plan of distribution is referred to as a Plan of Allocation.

52 The settlement agreements define the "Plan of Allocation" as follows:

> Plan of Allocation means the distribution plan distributing the proposed settlement in a form satisfactory to the Settling Defendants or as fixed by the Court.

53 As I interpret the settlement agreements, and as confirmed by the Plaintiffs during argument, I can approve the settlements independent of approving the Plan of Allocation, which is what I have done. In other words, I have approved the settlements, which are now binding on the parties and on the Class Members, and I shall determine or fix the Plan of Allocation.

54 For reasons that I will set out below, I do not approve of the Plan of Allocation proposed by the parties,

but I shall vary it, and I shall approve a different plan of distribution.

55 Had the settlement agreements in the case at bar not left it to the court to ultimately determine what is an appropriate plan of distribution, I would not have approved the settlements, because I do not think the proposed Plan of Allocation is fair and reasonable and in the best interests of the class. I also would not have approved Class Counsel's fees because the settlements would not have been approved.

2. The Test for Approving a Distribution Plan

56 In the situation where there is a judgment in a certified class action, the court's authority to determine or approve a plan of distribution comes from s. 26 of the *Class Proceedings Act, 1992,* which states:

> **Judgment distribution**
>
> 26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.
>
> **Idem**
>
> (2) In giving directions under subsection (1), the court may order that,
>
> (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
>
> (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
>
> (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.
>
> **Idem**
>
> (3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.
>
> **Idem**
>
> (4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
>
> **Idem**
>
> (5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

57 It may be noted that under s. 26(1) of the *Class Proceedings Act, 1992*, the court may direct any means of distribution of amounts awarded that it considers appropriate. I am not aware of any caselaw actually applying s. 26(1), although numerous cases have suggested that the court has ample discretion and ample scope for creativity in employing s. 26.

58 In the case at bar, as noted above, the court's authority to approve the plan of distribution comes from the settlement agreements, where the plan of distribution is referred to as a Plan of Allocation, and, as noted above, as I interpret the settlement agreements, I can determine or fix the Plan of Allocation as I think appropriate.

59 In determining what is appropriate, I intend to apply the same test or standard that the court applies when deciding whether to approve a settlement. Thus, a plan of distribution will be appropriate if in all the circumstances, the plan of distribution is fair, reasonable, and in the best interests of the class.

3. The Proposed Plan of Allocation

60 For reasons that I will set out below, I do not approve of the Plan of Allocation proposed by the parties, but I shall vary it and approve a different plan of distribution.

61 Class Counsel, with Mr. Mulholland's assistance, developed the Plan of Allocation. This plan was structured to reflect Mr. Mulholland's opinion that Zungui suffered two share price falls that were statistically significant, net of external market factors. These events occurred on: (1) June 2, 2011, when Muddy Waters LLC issued a report about Sino-Forest Corporation in which a fraud was alleged; and (2) August 22, 2011, when Zungui issued the press release announcing the suspension of 2011 audit procedures by Ernst & Young LLP.

62 The Plaintiffs' damages theory is that the value of Zungui's common shares was at all times artificially inflated by misrepresentation and that the artificial inflation, equivalent to $1.52 per share, was removed from the share value by the close of TSX-V trading on August 22, 2011. The Plaintiff's theory is that the artificial inflation was removed: in part, on June 2, 2011, in an amount of $0.26; and in balance, on August 22, 2011, in an amount of $1.26.

63 The amount of each Class Member's compensation will depend upon: whether the Class Member is a Primary Market Purchaser and/or a Secondary Market Purchaser and/or Share Exchange Acquiror; the number and price of Zungui common shares purchased by the Class Member during the Class Period; whether and when the Class Member sold Zungui common shares purchased during the Class Period, and the price at which these common shares were sold; whether the Class Member continues to hold some or all of the Zungui common shares purchased during the Class Period; and the total number and value of all claims for compensation filed with the Administrator.

64 The Plan of Allocation provides that no compensation shall be paid for any shares disposed of before June 2, 2011, which is consistent with Mr. Mulholland's opinion that June 2, 2011 was the first time that Zungui's common shares were subject to a statistically significant event, net of external market factors.

65 The Plan of Allocation provides that no compensation shall be paid for any shares purchased after the time of the making of the alleged corrective disclosure on August 22, 2011. The main rationale for the disqualification of these shares is that they purchased when it was publicly known that audit issues existed. I note, however, that it was not until another month later that E&Y disavowed that Zungui's financial statements were GAAP compliant.

66 In any event, although a purchaser of Zungai shares on Aug 22, 2011 is a Class Member, under the proposed Plan of Allocation, he or she is not entitled to receive compensation.

67 These background circumstances bring me to the written objection to the Plan of Allocation delivered by Dr. Christopher Lane, which I set out below:

> My name is Dr. Christopher Lane (psychologist) and I would like to register an objection to the terms of the proposed "Plan of Allocation," particularly under the heading "Secondary Market Purchasers," and under "VII" which states: "No Nominal Entitlement shall be recognized for any Eligible Shares purchased after the time of the making of the alleged corrective disclosure on August 22, 2011." This statement appears to eliminate the right of anyone who purchased shares of ZUN on August 22, 2011 to receive any compensation whatsoever and to thereby lose 100% of their investment. I happen to be one of those individuals who purchased shares on that fateful August 22, 2011 day, as did my brother, Brian Lane. Indeed, I bought a total of 117,000 shares of ZUN that day at a "book value" (according to my bank statements) of $47,735.83

(average cost per share of 40.8 cents). As one might expect, I am very upset by the wording of the proposed "Plan of Allocation" and would like to offer a suggestion of a fairer settlement, as the one proposed is, in my mind, overly punitive and leaves investors in my position with a feeling of defeat and lack of justice.

.... While it is true that the announcement indicated that Ernst & Young suspended procedures until Zungui "clarifies and substantiates its position with respect to issues pertaining to the current and prior year" this does not clearly foreshadow the events that followed, which turned out to be devastating to the investors who held the stock and represented a "worst case scenario" with the stock never trading again after August 22, 2011. Clearly this was bad news and sent the stock tumbling from approximately 1.50 down to trading around 40 cents per share for most of the day on August 22, 2011 and ending the day around 34 cents per share. Of course, in hindsight it is easy to suggest that one shouldn't have bought stock in ZUN that day, but at that time there were also many who felt the negative reaction was entirely overblow and that clarification of the issues could logically prevail and substantiate the position of the company. In short, there was no way of knowing that the worst possible outcome would come to pass, with investors unable to trade their shares ever again.

I submit that eliminating shareholders who bought ZUN stock on August 22, 2011 from any form of compensation is overly harsh and punitive. It was clear that an important issue existed at that time but issues emerge with Venture Exchange listed stocks quite frequently but without these catastrophic consequences. And it is important to note that investors such as myself have suffered considerably due to this loss of capital. In my case, I lost all of my RRSP, almost all of my cash trading account holdings and a good part of my TFSA. With children entering university I am hard-pressed to pay my part of the costs as well as funding home and business expenses. Indeed, these losses have had a significant negative effect on my quality of life and that of my family and have led to me working long hours to pay for our needs, thereby creating significant hardship.

Hence, I ask that the court consider changing the section dealing with ZUN purchasers of August 22, 2011 to include them in providing some compensation in the class action lawsuit. Of course, I believe that to be fair, the compensation for purchasers on August 22, 2011 should be much less than for those who purchased earlier at prices of $1.52 per share or higher. I would suggest that a discount of 80% of the amount often quoted in the "Plan of Allocation" ($1.52) would be appropriate, which would amount to payment of 30.4 cents per share for individuals who bought shares of ZUN on August 22, 2011. I ask that the court consider this proposal to be fair to all shareholders of ZUN without singling out any in a harsh or punitive manner. We all lost money in this investment and have suffered as a result and it's unfair to single out a subsection of individuals for exclusion of all compensation.

68 The Plan of Allocation contemplates that for some Class Member's eentitlements, a notional amount of damage based on the application of the calculations in the Plan of Allocation before distribution proration, will be discounted to reflect the risks facing the claimants. Class Counsel considered that the question of whether a discount to a Nominal Entitlement ought to apply for a particular type of acquisition should be determined by considering the particular strengths and weaknesses of the common law and statutory claims are common to all groups

69 With a view to ensuring that any discount was arrived at in a manner that was objective and fair, a formal mediation session was held on April 29, 2013. Joel Wiesenfeld was the mediator. Mr. Wiesenfeld practiced law as a broker/dealer litigation and securities regulatory counsel for 31 years.

70 At the mediation, the claimant groups were represented by Class Members holding Eligible Shares as follows: (a) the Plaintiffs, who bought substantially all of their shares in Zungui's IPO, represented Primary Market Purchasers; (b) Nick Angellotti CA, IFA and President and Managing Director of Williams & Partners Forensic Accountants Inc., the representative of a partnership that purchased Zungui's shares in the secondary market, represented Secondary Market Purchasers; and (c) Avi Grewal, President and Chief Executive Officer of Cinaport Capital Inc., a private investment firm which acts as advisor for the Cinaport China Opportunity Fund, a fund with investments in private and public PRC based companies, represented Share Exchange Acquirors.

71 The representatives were represented by counsel; namely: Charles Wright and Nicholas Baker of Siskinds LLP for the Plaintiffs; Kirk Baert of Koskie Minsky LLP for Mr. Angellotti; and John J. Longo of Aird & Berlis LLP for Mr. Grewal.

72 I pause here to note that nobody represented the interests of secondary market purchasers who, like Dr. Lane, purchased shares on August 22, 2011.

73 The negotiations were all conducted at arm's length and the position of each claimant group was advanced by their counsel. The full-day mediation session concluded with the Primary Market Purchasers and Secondary Market Purchasers reaching agreement that the proposed Plan of Allocation should provide for the Nominal Entitlements of primary market purchasers to be undiscounted and the Nominal Entitlements of secondary market purchasers should be discounted by 8%.

74 The representatives were unable to agree on a discount to be applied to the claims of Share Exchange Acquirors at the mediation, and so the Plaintiffs proposed (and posted on Class Counsel's website) a draft Plan of Allocation with a discount of 60% for Share Exchange Acquiror claims. Subsequently, Class Counsel agreed, to amend the Share Exchange Acquiror Discount to 40 %.

75 Class Counsel submits that an 8% discount for secondary market purchasers is fair and reflects that: (a) the secondary market purchasers were required to obtain leave under Part XXIII.1 of the Ontario *Securities Act* before asserting the right of action for misrepresentation in Zungui's secondary market disclosure documents, and such leave would be contested; (b) Part XXIII.1 provides defendants with a number of defences to liability for secondary market misrepresentation, and in this case, the secondary market purchasers could expect to face the "reasonable investigation" defence, an expert reliance defence, and a due diligence; and (c) the secondary market purchasers may not be able to recover the full estimated damages they have suffered, due to liability limits.

76 Class Counsel submits that no discount for primary market purchasers is fair because it reflects that: (a) these purchasers did not need to obtain leave of the Court to assert their claim; (b) damages are not limited for primary market purchasers in the same way as they are limited for secondary market purchasers; (c) if a prospectus is found to have contained a misrepresentation, then the issuer is strictly liable, (d) certain defendants, such as the issuer's directors and officers, are generally liable, unless they demonstrate on a balance of probabilities that they exercised reasonable diligence prior to issuance of the prospectus; and (e) liability is joint and several and damages can be recovered from any defendant with the means to pay.

77 Class Counsel initially considered that a 60% discount for Share Exchange Acquirors was fair. However, the Significant Shareholder Group through their counsel at Aird and Berlis LLP, and certain members of the Significant Shareholder Group indicated that they had higher expectations than a settlement with the Underwriting Syndicate at $750,000.00, in part, based on the fact that the Underwriting Syndicate had earned fees of approx-

imately $2.75 million for underwriting the IPO.

78 However, the Significant Shareholder Group were prepared to support the proposed settlement with the Underwriting Syndicate if two (2) conditions were met: (1) Class Counsel would limit their request for Class Counsel Fees to an agreed amount; and (2) the discount applicable to Share Exchange Acquirors under the proposed Plan of Allocation would be amended from 60% to 40%.

79 Class Counsel estimates that the impact on the combined settlement fund of the amendment to the discount applicable to Share Exchange Acquirors under the proposed Plan of Allocation will be at most $262,200.00 and more likely the impact will be less, because the maximum impact assumes no proration, which is unlikely to be the case.

80 Class Counsel communicated with each Class Member who participated in the mediation relating to the Plan of Allocation, and they have instructed that the proposed amended discount applicable to Share Exchange Acquirors is acceptable.

81 The Plan of Allocation provides for the possibility of a *cy près* distribution to the Small Investor Protection Association Canada in the event that less than $25,000.00 remains in the Allocation Pool 180 days from the date on which the Administrator distributes the Net Settlement Amount to Authorized Claimants.

82 Notwithstanding the objection to the Plan of Distribution, Class Counsel is of the view that the Plan of Allocation was carefully considered and promotes the interests of the class as a whole, and that it is fair and reasonable and ought to be approved.

83 At the argument of the fairness hearing, Class Counsel argued that should the court consider it appropriate to have purchasers like Dr. Lane participants in the Plan of Allocation, their claims should be discounted by 98.5%.

4. Discussion and Analysis of the Proposed Plan of Allocation

84 I do not regard the Proposed Plan of Allocation as appropriate, fair, reasonable, or in the best interests of the class.

85 In my opinion, Dr. Lane's objection to the Plan of Allocation and his suggestion as to how the plan should be revised has considerable merit.

86 Although perhaps unlikely to occur, it seems inappropriate and unfair to me that the proposed Plan of Allocation provides for a *cy près* distribution to a small investor association and does not provide any compensation for an investor like Dr. Lane, who is a member of the class. More to the point, in my opinion, it is inappropriate and unfair to include August 22, 2011 purchasers as Class Members and then exclude them from the Plan of Allocation.

87 Notwithstanding that it was the Defendants who urged that these purchasers be included as Class Members as part of the bargaining for the settlements, once Class Counsel and the Representative Plaintiffs agreed to the joinder of these Class Members, it was unfair and inappropriate for Class Counsel and the Representative Plaintiffs to advocate a theory of the case that August 22, 2011 purchasers were not eligible for any compensation at all.

88 If Dr. Lane, his brother, and other August 22, 2011 purchasers had appreciated that the parties had included them in the class as a bargaining chip but had excluded them from the theory of the claim and would exclude them from the Plan of Allocation, these putative class members sensibly should have opted-out of the class action rather than add the unrequited value of their releases to the consideration or *quid quo pro* that the Defendants will be receiving for the settlement payments. As it stands, Dr. Lane and those similarly situated are bound by the settlement but receive nothing themselves for being a Class Member.

89 In my opinion, the appropriate Plan of Allocation is the one proposed by Dr. Lane.

90 Accordingly, I shall revise the Plan of Allocation in accord with Dr. Lane's suggestion, which I regard as fair and reasonable, and I approve the Plan of Allocation as revised.

F. Administation of the Settlement

91 Class Counsel proposes the appointment of NPT RicePoint Class Action Services as the Administrator. NPT has already served as the Notice Advisor in the Action. NPT has also been administering bilingual class action settlements for over 9 years. In Class Counsel's opinion, NPT has the experience and resources that make them capable of administering the Settlements.

92 NPT's administration proposal provides for a minimum administration fee of $35,000, and a maximum administration fee cap of $195,000.00, before taxes.

93 I approve the appointment of NPT RicePoint Class Action Services as the Administrator.

G. Fee Approval

94 Turning to the matter of Class Counsel's fee request of $2,807,037.56.

95 The Retainer Agreements with the Plaintiffs provide that Class Counsel may seek a fee of up to 30% of the recovery. Class Counsel are seeking a recovery of 20.75% (a 3.3 multiplier).

96 As at August 12, 2013, Class Counsel had docketed time of $648,386.00, excluding applicable taxes, disbursements of $226,670.44, exclusive of applicable taxes.

97 Class Counsel is not seeking to recover, and will not return to request payment of the time and disbursements required to complete the administration of the settlement, which is estimated to be at least $50,000.00.

98 Class Counsel has agreed to pay, from Class Counsel's fee award the accounts of Aird & Berlis LLP rendered to the Significant Shareholder Group in the amount of $105,796.50, taxes in the amount of $13,896.73 and disbursements in the amount of $1,101.36.

99 Class Counsel proposes to pay Wolf Popper LLP $105,689.00 (US$) in fees, and (US$) $1,466.73 in disbursements from the Class Counsel's fee award. Mr. Clarke, a representative plaintiff, initially contacted this U.S. law firm to investigate his potential claim. Ms. Patricia Avery, of Wolf Popper LLP, has been a member of the Class Counsel team prosecuting the Action, and Wolf Popper LLP undertook certain tasks that were within the competence of the firm, such as researching risk disclosure practices in North American securities offering documents for issuers with substantial operations in the People's Republic of China.

100 The disbursements included $40,465.42 in agent fees for investigations in the People's Republic of China, location of the Cai Brothers, translation of correspondence and pleadings, Hague Convention service on the Cai Brothers and the cost of paying for independent counsel to attend at the Plan of Allocation mediation.

101 The disbursements include $156,842.05 in expert fees and mediation fees for Mr. Mulholland, Mr. Mak, William H. Purcell, a U.S. investment banking expert, in relation to underwriting due diligence practices for companies with substantially all operations in the People's Republic of China, and Mr. Wisenfeld.

102 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (Ont. S.C.J.), at para. 13; *Smith Estate v. National Money Mart Co.*, [2010] O.J. No. 873 (Ont. S.C.J.), at paras. 19-20; *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.), at para 25.

103 Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith Estate v. National Money Mart Co.*, *supra*, at paras. 19-20; *Fischer v. IG Investment Management Ltd.*, *supra*, at para 28.

104 Having regard to these various factors, I approve Class Counsel's request for approval of its legal fees.

H. Conclusion

105 Orders accordingly.

Order accordingly.

END OF DOCUMENT

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C., 1985, C. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION		Court File No. CV-12-9667-00CL
THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al.	v. SINO-FOREST CORPORATION et al.	Court File No. CV-11-431153-00CP
Plaintiffs	Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

AUTHORITIES OF THE UNDERWRITERS AND INITIAL PURCHASERS
(Motion for Approval Of Claims And Distribution Protocol)

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

John Fabello (LSUC #: 35449W)
Tel: 416.865.8228

Andrew Gray (LSUC #: 46626V)
Tel: 416.865.7630

Rebecca Wise (LSUC #: 60005W)
Tel: 416.865.7321

Lawyers for the Underwriters
and Initial Purchasers