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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable July 30, 2012)

July 24, 2012

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5
Ken Rosenberg (LSUC No. 21102H)
Massimo Starnino (LSUC No. 41048G)
Tel: 416.646.4300 / Fax: 416.646.4301
Email: ken.rosenberg@paliareroland.com
Email: max.starnino@paliareroland.com

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Kirk Baert
Jonathan Bida
Tel: 416.977.8353 / Fax: 416.977.3316
Email: kbaert@kmlaw.ca
Email: jbida@kmlaw.ca

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
A. Dimitri Lascaris
Charles M. Wright
Tel: 519.672.2121 / Fax: 519.672.6065
Email: dimitri.lascaris@siskinds.com
Email: charles.wright@siskinds.com

Lawyers for the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

INDEX

TAB

TAB 1

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Vancouver Sun, Re

The Vancouver Sun, Appellant v. Attorney General of Canada, Attorney General of British Columbia, "The Named Person", Ajaib Singh Bagri and Ripudaman Singh Malik, Respondents and Attorney General of Ontario, Intervener

Supreme Court of Canada

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

Heard: December 10, 2003
Judgment: June 23, 2004
Docket: 29878

Proceedings: reversing in part *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.)

Counsel: Robert S. Anderson, Ludmila B. Herbst for Appellant

George Dolhai, Bernard Laprade for Respondent, Attorney General of Canada

Dianne Wiedemann, Mary T. Ainslie for Respondent, Attorney General of British Columbia

Kenneth Westlake, Howard Rubin, Brian A. Crane, Q.C. for Respondent "Named Person"

William B. Smart, Q.C., Brock Martland for Respondent, Ripudaman Singh Malik

Michael A. Code, Jonathan Dawe for Respondent, Ajaib Singh Bagri

Michael Bernstein, Sandy Tse for Intervener

Subject: Criminal; Public; Family

Criminal law --- Offences — Terrorism — General

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Criminal law --- Victims' rights and third party remedies — Exclusion of the public

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

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

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Droit criminel --- Infractions — Terrorisme — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Droit criminel --- Droits des victimes et réparations pour les tiers — Exclusion du public

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou son contenue.

Droit criminel --- Procédure avant procès — Ordonnance interdisant la publicité ou publication — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Two accused were jointly charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301 in 1985. Shortly after the start of the trial, the Crown brought an ex parte application for an order that a Named Person, a potential Crown witness, attend a judicial investigative hearing for examination pursuant to s. 83.28 of the Criminal Code , which provides for investigative hearings in relation to terrorism offences as defined in s. 2. The applications judge granted the order, directing that the hearing be held in camera and that notice of the hearing not be given to the accused, the press or the public. Counsel for the accused

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

became aware of the order and sought to make submissions, while counsel for the Named Person sought to challenge the constitutional validity of s. 83.28. The applications judge directed that submissions should be made to the judge presiding over the investigative hearing.

Shortly after the investigative hearing began, a reporter for the appellant newspaper, who recognized lawyers from the Air India trial entering a closed courtroom, was denied access to the proceedings. The hearing judge refused to entertain a motion at that time for the proceedings to be opened to the public. The newspaper filed a notice of motion, seeking an order that the proceedings be opened to the public and that its counsel and a member of its editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials to date. Prior to hearing the motion, the hearing judge, in camera, concluded that the s. 83.28 order had been validly issued and that s. 83.28 was constitutionally sound. However, she varied the initial order to allow counsel for the accused to attend the investigative hearing with the right to cross-examine the Named Person, subject to certain restrictions. She ordered her judgment to be sealed until the conclusion of the investigative hearing or the making of any contrary court order.

When the courtroom was finally opened to the public, the hearing judge delivered, in open court, a synopsis of her reasons for judgment. She then stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal. The newspaper's motion was dismissed and the newspaper appealed.

Held: The appeal was allowed in part and the order of the hearing judge was varied.

Per Iacobucci and Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring): The unique judicial procedure provided for in s. 83.28 of the Criminal Code must be interpreted consistently with the preamble to the Anti-terrorism Act, which stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the Canadian Charter of Rights and Freedoms, and with the fundamental characteristics of a judicial process insofar as it contemplates the judicial proceeding.

The open court principle is a hallmark of democracy and a fundamental characteristic of all judicial proceedings, and it should not be presumptively displaced in favour of an in camera process. Public access to the courts guarantees the integrity of the judicial process and is integral to public confidence in the justice system and the public's understanding of the administration of justice. The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein, including the freedom of the press to report on judicial proceedings and the right of the public to receive information. The principle of openness of judicial proceedings extends to the pre-trial stage because the policy considerations upon which openness is predicated are the same as at the trial stage.

The Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by the press. The test was developed to balance freedom of expression and other important rights and interests, which are broader than simply the administration of justice and may include privacy and security interests. 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 or is authorized by statute or rules of court. The burden of displacing the general rule of openness lies on the party making the application.

Section 83.28(2) does not expressly provide for any part of the judicial investigative hearing to be in camera. One must distinguish between an application for a s. 83.28 judicial investigative hearing and the holding of that hearing. Section 83.28(2) provides that the application for an order that a investigative hearing be held, made by a peace officer with prior consent of the Attorney General, is ex parte. By its very nature, this application must be presented to a judge in camera. However, it does not necessarily follow that due to its investigative nature, the hearing itself must be presumptively held in secret. The proper balance between the investigative imperatives and the judicial assump-

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

tion of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the investigative hearing under s. 83.28(5)(e). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. Parliament chose to have investigative hearings of a judicial nature, and they must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand. One such guarantee is a presumption of openness, which should be displaced only upon proper consideration of the competing interests at every stage of the process. The existence of an order made under s. 83.28, and as much of its subject-matter as possible, should be made public unless, under the balancing exercise of the Dagenais/Mentuck test, secrecy is necessary.

In this case, the level of secrecy imposed was unnecessary. While the application for the order for the investigative hearing under s. 83.28(2) was properly heard ex parte and in camera, there was no reason for keeping the existence of the order or its subject-matter secret. In light of the position taken by the Named Person at that stage, the identity of that person was properly kept confidential, but that direction should have been subject to revision by the hearing judge. In the circumstances of this case, where a potential Crown witness in an ongoing trial became the subject of the investigative order, it was obvious that third party interests should have been considered. On a proper application of the principles in the Dagenais/Mentuck test, notice of the hearing should have been given to counsel for the accused at the outset.

When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge should not have been held in camera. Rather, the challenge and as much of the information about the case as could be revealed without jeopardizing the investigation should have been made public, subject, if need be, to a total or partial publication ban. Much of the constitutional challenge could have been properly argued without the details of the information submitted to the applications judge being revealed. It was clear under s. 83.28(5)(e) that the terms and conditions attached to the investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progressed. Accordingly, the name of the Named Person should be made public and the order of the hearing judge should be varied so that the investigative hearing was held in public, subject to any order of the hearing judge that the public be excluded and/or a publication ban regarding aspects of the anticipated evidence to be given by the Named Person. The hearing judge should also review the continuing need for any secrecy at the end of the judicial investigative hearing, and release publicly any gathered information that could be made public without unduly jeopardizing the interests of the Named Person, third parties, or the investigation.

Per LeBel J.: Subject to the comments in the companion appeal, Application Under s. 83.28 of the Criminal Code, Re, the reasons of the majority and their proposed disposition were agreed with.

Per Bastarache and Deschamps JJ. (dissenting in part): While openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(b) of the Canadian Charter of Rights and Freedoms guaranteeing freedom of the press, is the rule and covertness the exception, public access to judicial proceedings can be curtailed where there is a need to protect social values of superordinate importance. Where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit in camera. Such is normally the case for investigative proceedings under s. 83.28.

The Dagenais/Mentuck test is not an appropriate framework to guide a judge's discretion under s. 83.28 to order an in camera investigative hearing. A convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary under this test to rebut the presumption of open courts. However, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

The open court principle must yield to circumstances that would render the proper administration of justice unworkable. Public access to investigative hearings would normally defeat the purpose of the proceedings by rendering

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

them ineffective as an investigative tool. Police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. There is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, since the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole.

The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness. Without knowing what information will be revealed, it is not possible to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice. The fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings.

The challenge to the validity of s. 83.28 did not make the open court principle more compelling, since the constitutional challenge could not realistically be separated from the actual investigative hearing. The protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, nor would advance notice to the media of the s. 83.28 hearing serve any useful purpose. Until the witness testifies, it is inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

Different considerations apply after the completion of investigative procedures, when the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled. The information gathered by the Crown will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice.

In this case, there was no way of knowing prior to the investigative hearing whether the level of secrecy imposed was unnecessary because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, the hearing judge properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held in camera.

Les deux accusés ont été inculpés de plusieurs infractions relativement à l'explosion du vol 182 d'Air India et à l'explosion prévue du vol 301 d'Air India en 1985. Peu de temps après le début du procès, le ministère public a présenté une demande ex parte afin d'obtenir une ordonnance obligeant la personne désignée, un témoin éventuel du ministère public, à se présenter à une investigation judiciaire pour être interrogé conformément à l'art. 83.28 du Code criminel, qui prévoit la tenue d'une audition d'enquête relativement à des infractions de terrorisme telles que définies par l'art. 2. Le juge saisi de la demande a accordé l'ordonnance, a ordonné la tenue de l'audition à huis clos et qu'aucun avis de l'audition ne soit donné aux accusés, à la presse ou au public. Les avocats des accusés ont eu vent de l'ordonnance et ont demandé la permission de faire des soumissions, tandis que l'avocat de la personne désignée a demandé d'attaquer la validité constitutionnelle de l'art. 83.28. Le juge saisi des demandes a décidé que les soumissions devaient être faites devant le juge présidant l'investigation.

Peu de temps après le début de l'investigation, une journaliste travaillant pour le journal appelant s'est vu refuser l'accès à une salle d'audience fermée après avoir reconnu les avocats du procès Air India qui y entraient. La juge présidant l'audition a refusé d'entendre, à ce moment-là, une requête visant à autoriser que les débats se déroulent en public. Le journal a déposé un avis de requête dans laquelle il indiquait son intention de solliciter la publicité des débats en plus de demander que son avocat et un membre de son équipe éditoriale, après avoir signé une promesse de confidentialité, aient accès aux procédures écrites et aux documents déposés jusque-là. Avant d'entendre la re-

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

quête, la juge présidant l'audition a conclu, à huis clos, que l'ordonnance en vertu de l'art. 83.28 avait été validement rendue et que l'art. 83.28 était constitutionnel. Elle a cependant modifié l'ordonnance originale pour permettre aux avocats des accusés d'assister à l'investigation et de contre-interroger la personne désignée, avec quelques restrictions. Elle a ordonné que son jugement soit scellé en attendant la conclusion de l'investigation ou une ordonnance contraire.

Lorsque la salle d'audience a finalement été ouverte au public, la juge présidant l'audition a donné un résumé de ses motifs. Elle a ensuite indiqué que la procédure en vertu de l'art. 83.28 avait été ajournée afin que la personne désignée puisse interjeter appel. La requête du journal a été rejetée; le journal a interjeté appel.

Arrêt: Le pourvoi a été accueilli en partie et l'ordonnance de la juge présidant l'audition a été modifiée.

Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.): L'unique procédure judiciaire prévue par l'art. 83.28 du Code criminel doit être interprétée de manière compatible avec le préambule de la Loi antiterroriste, laquelle énonce les impératifs d'une réponse efficace au terrorisme, un engagement continu à l'égard des valeurs et des limites à la Charte canadienne des droits et libertés ainsi que les caractéristiques fondamentales du processus judiciaire, dans la mesure où l'on envisage des procédures judiciaires.

Le principe de la publicité des débats est un fondement de la démocratie ainsi qu'une caractéristique fondamentale de toutes les procédures judiciaires; il ne devrait pas être mis de côté, par présomption, en faveur d'un huis clos. L'accès du public aux tribunaux assure l'intégrité du processus judiciaire et fait partie intégrante de la confiance du public envers le système judiciaire et de la compréhension qu'à ce dernier de l'administration de la justice. Le principe de la publicité des débats est inextricablement lié à la liberté d'expression protégée par l'art. 2b) de la Charte et sert à promouvoir les valeurs fondamentales qu'elle véhicule, y compris la liberté de la presse de rapporter les procédures judiciaires et le droit du public de recevoir de l'information. Ce principe englobe le stade précédant le procès étant donné que les raisons sur lesquelles se fonde la publicité des débats sont les mêmes que pour le stade du procès.

Le critère des arrêts Dagenais et Mentuck devrait être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse. Le critère a été élaboré afin de concilier la liberté d'expression et d'autres droits importants qui sont plus larges que l'administration de la justice et qui peuvent inclure les droits à la vie privée et à la sécurité. Même si le critère a été élaboré dans le contexte des interdictions de publication, il s'applique tout autant aux décisions discrétionnaires d'un juge du procès qui limitent la liberté d'expression de la presse dans le cadre de procédures judiciaires. Ce pouvoir discrétionnaire doit être exercé de façon conforme à la Charte, peu importe s'il découle de la common law ou s'il est autorisé par la loi ou par les règles de la cour. C'est la partie qui fait la demande qui a le fardeau de prouver la nécessité d'une exception à la publicité des débats.

L'article 83.28(2) ne prévoit pas expressément le huis clos pour quelque portion de l'investigation judiciaire. Il faut faire une distinction entre une demande visant à obtenir une investigation judiciaire de l'art. 83.28 et la tenue même de cette audition. L'article 83.28 prévoit que la demande d'un officier de la paix, qui a préalablement obtenu le consentement du procureur général, visant à obtenir la tenue d'une investigation, doit être entendue ex parte. De par sa nature véritable, cette demande doit être présentée à huis clos devant un juge. Cependant, cela ne veut pas dire que, en raison de sa nature d'enquête, l'audition doit elle-même être tenue, par présomption, en secret. La meilleure façon de concilier les impératifs d'enquête et la présomption judiciaire de la publicité des débats se fait grâce à l'exercice approprié de la discrétion accordée au juge d'imposer les modalités du déroulement de l'investigation en vertu de l'art. 83.28(5)e). Lorsqu'ils exercent ce pouvoir discrétionnaire, les officiers de justice devraient rejeter la présomption d'auditions secrètes. Le Parlement a choisi la tenue d'investigations de nature judiciaire et ces dernières doivent inclure le plus possible des garanties et protections du processus judiciaire qui soient compatibles avec la démarche. Une de ces garanties est justement la présomption de la publicité des débats, laquelle ne devrait être mise de côté qu'après avoir examiné de façon approfondie les intérêts opposés à chaque stade du processus. L'existence d'une

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

ordonnance en vertu de l'art. 83.28, ainsi que le plus possible son contenu, doit être révélée au public à moins que le secret ne soit nécessaire en vertu du critère de conciliation Dagenais/Mentuck.

En l'espèce, le niveau de secret imposé n'était pas nécessaire. Même si la demande sollicitant une ordonnance pour obtenir une audition d'enquête en vertu de l'art. 83.28(2) a été à bon droit entendue ex parte et à huis clos, rien ne justifiait de continuer de taire l'existence de l'ordonnance ou le contenu de celle-ci. À la lumière de la position prise par la personne désignée à ce stade-là, l'identité de cette personne a été gardée confidentielle à bon droit, mais cet ordre aurait dû être assujetti à une révision par la juge présidant l'audition. Dans les circonstances de l'espèce, alors qu'un témoin éventuel du ministère public dans un procès en cours était devenu assujetti à une ordonnance d'investigation, il était clair que les intérêts des tiers auraient dû être pris en compte. Les principes du critère Dagenais/Mentuck auraient dû être appliqués et les avocats des accusés auraient dû recevoir dès le départ un avis d'audition.

Les impératifs du principe de la publicité des débats sont devenus encore plus importants à partir du moment où la personne désignée a indiqué son intention d'attaquer la constitutionnalité de l'ordonnance. La contestation constitutionnelle n'aurait pas dû être entendue à huis clos. En fait, on aurait dû rendre publiques la contestation ainsi que toutes les informations qui pouvaient être révélées sans mettre en danger l'enquête, assujetties par ailleurs à une interdiction totale ou partielle de publication, s'il y avait lieu. La plupart des soumissions pour la contestation constitutionnelle auraient pu être faites sans que soient révélées les détails de la dénonciation présentée au juge saisi de la demande. Il était clair, en vertu de l'art. 83.28, que les modalités de l'investigation doivent être modifiés et ajustés au fur et à mesure afin de concilier la confidentialité et la publicité. Par conséquent, le nom de la personne désignée doit être rendu public et l'ordonnance devrait être modifiée afin que l'investigation soit tenue en public, assujettie par ailleurs à toute ordonnance du juge excluant le public ou à une interdiction de publication relativement à la preuve anticipée fournie par la personne désignée. À la fin de l'investigation judiciaire, la juge présidant l'audition devrait réévaluer la nécessité du secret et dévoiler publiquement toute l'information recueillie qui peut être rendue publique sans mettre en danger les intérêts de la personne désignée, des tiers ou de l'enquête.

LeBel, J.: Sous réserve des commentaires faits dans l'arrêt connexe, Application Under s. 83.28 of the Criminal Code, Re, les motifs des juges majoritaires et le dispositif qu'ils proposent étaient partagés.

Bastarache et Deschamps, JJ. (dissidents en partie): Même si la règle est la publicité des débats, en tant que principe de common law et aspect de l'art. 2b) de la Charte canadienne des droits et libertés garantissant la liberté de la presse, et que le secret est l'exception, l'accès du public aux procédures judiciaires peut être mis de côté lorsque cela est nécessaire pour protéger des valeurs sociales d'importance supérieure. Lorsqu'un préjudice serait causé aux droits des tiers et que l'administration de la justice serait rendue impossible par la présence du public, la cour peut alors siéger à huis clos. Cela est généralement le cas pour les procédures d'enquête en vertu de l'art. 83.28.

Le critère Dagenais/Mentuck ne constitue pas un cadre approprié pour guider le juge dans l'exercice de son pouvoir discrétionnaire en vertu de l'art. 83.28 d'ordonner que l'investigation soit tenue à huis clos. Selon ce test, il est généralement nécessaire, pour repousser la présomption de la publicité des débats, d'avoir suffisamment de preuve pour justifier de refuser l'accès aux procédures judiciaires. Cependant, le juge présidant l'audition ne sera capable d'exercer sa discrétion judiciaire qu'après avoir reçu les informations et la preuve recueillie par le ministère public. Agir autrement ne ferait que faire courir de graves risques à l'administration de la justice et à la sécurité, les intérêts et les droits des tiers.

Le principe de la publicité des débats doit céder le pas aux circonstances qui rendraient impossible la bonne administration de la justice. L'accès du public aux auditions d'enquête irait généralement à l'encontre de l'objet des procédures en les rendant inefficaces en tant qu'outil d'enquête. La police ne peut recueillir des renseignements et agir sur la base de ceux-ci en même temps s'ils sont dévoilés au public et aux médias. De plus, les renseignements obtenus lors d'une audition de l'art. 83.28 peuvent être utilisés dans le cadre de demandes subséquentes de mandats, d'écoute électronique et d'autres ordonnances de l'art. 83.28 à l'égard d'autres témoins. L'efficacité de ces outils d'en-

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

quête serait sérieusement compromise si les détails des procédures en vertu de l'art. 83.28 étaient révélés au public. L'application des lois a un intérêt légitime dans le maintien du caractère confidentiel de l'identité du témoin et des informations données, étant donné que la divulgation prématurée de renseignements sur une infraction de terrorisme pourrait compromettre et entraver l'enquête même sur les renseignements recueillis. Cela empêcherait une application efficace de la loi, laquelle est censée bénéficier à la société dans son ensemble.

Tout comme l'exécution d'un mandat de perquisition, le but premier de l'investigation est de recueillir des renseignements. Même si le but visé par ces outils d'enquête est semblable, le rôle du juge dans les procédures d'enquête en vertu de l'art. 83.28 se limite à s'assurer que l'information est recueillie de manière appropriée et à protéger l'intégrité de l'enquête et les intérêts du témoin. Si l'on ignore quelle information sera révélée, il est impossible d'évaluer la gravité du danger pour les droits des tiers et la bonne administration de la justice. Par conséquent, dans le cas d'investigations, la présomption de la publicité des débats doit céder le pas à d'autres considérations, de façon à préserver les droits des tiers et à assurer la bonne administration de la justice. Le fait qu'une audition d'enquête est tenue dans le cadre d'une enquête en cours appuie d'autant plus la nécessité que les procédures soient confidentielles.

La contestation de la validité de l'art. 83.28 ne rendait plus nécessaire la publicité des débats, puisque la contestation constitutionnelle ne pouvait pas, de façon réaliste, être séparée de l'audition d'enquête. La protection de l'intégrité du système judiciaire ne dépend pas de la connaissance par le public de renseignements possiblement préjudiciables; un avis aux médias de la tenue d'une audition en vertu de l'art. 83.28 ne servirait à rien non plus. Tant que le témoin n'a pas témoigné, il demeure difficile de savoir si permettre ou non l'accès au public peut compromettre les intérêts opposés en jeu.

Différentes considérations s'appliquent après la fin des procédures d'enquête, lorsque s'est dissipée l'incertitude quant à la preuve qui entourait les procédures d'enquête. Les renseignements recueillis par le ministère public fourniront un fondement qui peut être utilisé par le juge présidant l'audition pour concilier les intérêts opposés en jeu et pour mieux apprécier le danger que pose la divulgation des renseignements aux tiers et à la bonne administration de la justice.

Dans ce cas-ci, rien ne permettait de savoir avant l'audition d'enquête si le niveau de secret imposé n'était pas nécessaire, parce que, tant que le témoin n'a pas témoigné, les juges ne peuvent évaluer précisément dans quelle mesure la bonne administration de la justice et les droits des tiers pourraient être mis en danger. Par conséquent, la juge présidant l'investigation a bien exercé son pouvoir discrétionnaire et n'a commis aucune erreur en ordonnant que l'audition de l'art. 83.28 soit tenue à huis clos.

Annotation

The majority ruling on the openness of investigative hearings is a welcome relief from the majority positions in the companion case, which upheld the constitutionality of investigative hearings and held that they did not offend the independence of the judiciary. The application of the open court principle to investigative hearings is important because it prevents an already suspect process from becoming too Star Chamber-like. Time will tell, however, whether judges exercise their discretion in favour of *in camera* proceedings more in this context than in the usual criminal context. In making annual reports under section 83.31 of the *Criminal Code*, the Attorneys General should be obliged to outline the extent to which *in camera* hearings and publication bans are ordered in connection with investigative hearings. As well, when Parliament has an opportunity to re-visit investigative hearings in early 2007, this information should be considered by members of Parliament in deciding whether or not the provisions should continue in force.

Tim Quigley[FN*]

Cases considered by *Iacobucci, Arbour JJ.*:

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Ambard v. Attorney General for Trinidad & Tobago (1936), [1936] A.C. 322, [1936] 1 All E.R. 704 (Trinidad & Tobago P.C.) — considered

Application Under s. 83.28 of the Criminal Code, Re (2003), 2003 BCSC 1172, 2003 CarswellBC 1823 (B.C. S.C.) — considered

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

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

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 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — considered

Ford c. Québec (Procureur général) (1988), 90 N.R. 84, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, 36 C.R.R. 1, 10 C.H.R.R. D/5559, 1988 CarswellQue 155, 1988 CarswellQue 155F, (sub nom. *Ford v. Quebec (Attorney General))* [1988] 2 S.C.R. 712 (S.C.C.) — considered

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

R. v. B. (S.A.) (2003), 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, 14 C.R. (6th) 205, 178 C.C.C. (3d) 193, 231 D.L.R. (4th) 602, 311 N.R. 1, [2003] 2 S.C.R. 678, [2004] 2 W.W.R. 199, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1 (S.C.C.) — considered

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

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

R. v. Reyat (1991), 1991 CarswellBC 1245 (B.C. S.C.) — referred to

Ruby v. Canada (Solicitor General) (2002), [2002] 4 S.C.R. 3, 2002 SCC 75, 2002 CarswellNat 3225, 2002 CarswellNat 3226, 219 D.L.R. (4th) 385, 295 N.R. 353, 7 C.R. (6th) 88, 22 C.P.R. (4th) 289, 99 C.R.R. (2d) 324, 49 Admin. L.R. (3d) 1 (S.C.C.) — referred to

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Scott v. Scott (1913), [1913] A.C. 417, [1911-13] All E.R. Rep. 1, 82 L.J.P. 74, 109 L.T. 1, 29 L.T.R. 520, Sol. Jo. 498 (U.K. H.L.) — considered

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

Vancouver Sun, Re (2003), [2003] 2 S.C.R. xi (note) (S.C.C.) — referred to

Cases considered by *Bastarache J.*:

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

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

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 (S.C.C.) — considered

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

Michaud c. Québec (Procureur général) (1996), (sub nom. *Michaud v. Quebec (Attorney General))* 201 N.R. 241, (sub nom. *Michaud v. Quebec (Attorney General))* 109 C.C.C. (3d) 289, [1996] 3 S.C.R. 3, (sub nom. *Michaud v. Quebec (Attorney General))* 38 C.R.R. (2d) 230, 1 C.R. (5th) 1, (sub nom. *Michaud v. Quebec (Attorney General))* 138 D.L.R. (4th) 423, 1996 CarswellQue 908, 1996 CarswellQue 909 (S.C.C.) — considered

R. v. A (1990), 55 C.C.C. (3d) 570, [1990] 1 S.C.R. 992, 108 N.R. 214, 77 C.R. (3d) 232, 1990 CarswellQue 18, 1990 CarswellQue 113 (S.C.C.) — referred to

R. v. B. (S.A.) (2003), 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, 14 C.R. (6th) 205, 178 C.C.C. (3d) 193, 231 D.L.R. (4th) 602, 311 N.R. 1, [2003] 2 S.C.R. 678, [2004] 2 W.W.R. 199, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1 (S.C.C.) — considered

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.) — considered

Southam Inc. v. Ontario (1990), (sub nom. *Southam Inc. v. Coulter)* 75 O.R. (2d) 1, (sub nom. *Southam Inc. v. Coulter)* 40 O.A.C. 341, (sub nom. *Southam Inc. v. Coulter)* 60 C.C.C. (3d) 267, 1990 CarswellOnt 952 (Ont. C.A.) — considered

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Cases considered by *LeBel J.*:

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri*) 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri*) 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

Statutes considered by *Iacobucci, Arbour JJ.*:

Anti-terrorism Act, S.C. 2001, c. 41

Preamble — 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

s. 7 — referred to

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

Generally — referred to

s. 2 "terrorism offence" — referred to

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(2) [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4)(a) [en. 2001, c. 41, s. 4] — considered

s. 83.28(4)(b) [en. 2001, c. 41, s. 4] — considered

s. 83.28(5)(e) [en. 2001, c. 41, s. 4] — considered

s. 83.31 [en. 2001, c. 41, s. 4] — referred to

s. 83.32(1) [en. 2001, c. 41, s. 4] — referred to

s. 486(1) — considered

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Statutes considered by *Bastarache J.*:

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

s. 2(b) — considered

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

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4) [en. 2001, c. 41, s. 4] — referred to

Words and phrases considered

judicial investigative hearing

[Per Iacobucci, Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring):] The judicial investigative hearing provided for in s. 83.28 of the [*Criminal Code*, R.S.C. 1985, c. C-46] is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*.

Termes et locutions cités

investigation judiciaire

[Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.):] L'investigation judiciaire prévue à l'art. 83.28 du [*Code criminel*, L.R.C. 1985, c. C-46] est une procédure sans précédent dans l'histoire du droit canadien. Elle prévoit essentiellement qu'un agent de la paix, avec le consentement préalable du procureur général, peut demander à un juge, en l'absence de toute autre partie, de rendre une ordonnance autorisant « la recherche de renseignements ». La recherche de renseignements se rapporte à une infraction de terrorisme, définie à l'art. 2 du *Code*.

APPEAL by newspaper from judgment reported at *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), dismissing its motion for order that judicial investigative hearing under s. 83.28 of *Criminal Code* be open to public.

POURVOI du journal à l'encontre de l'arrêt publié à *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), qui a rejeté sa requête afin qu'il soit ordonné que l'investigation judiciaire en vertu de l'art. 83.23 soit ouverte au public.

***Iacobucci, Arbour JJ.*:**

I. Introduction

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

1 This appeal is a companion to *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.) (the "constitutional appeal"), released concurrently. For a comprehensive review of all of the issues on the constitutionality and application of s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41), the constitutional appeal should be read first.

2 The judicial investigative hearing provided for in s. 83.28 of the *Code* is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*. The information to be gathered relates both to the circumstances of the offence and the whereabouts of possible suspects. If satisfied that proper grounds have been established, the court may order the attendance of a person for examination under oath before a judge, and the person must remain in attendance and answer questions put to him or her by the Attorney General or his agent. Although the person who is the subject of the order cannot refuse to answer a question on the ground that it may incriminate him or her or subject him or her to any proceeding or penalty, his or her answers receive full direct and derivative use immunity. The person has the right to retain and instruct counsel, and the judge has a wide discretion to impose terms and conditions to protect the person named in the order, third parties, as well as the integrity of ongoing investigations.

3 In our view, this unique judicial procedure must be interpreted and applied in light of the two following principles:

> 1. The interpretation of s. 83.28 must be guided by the Preamble to the *Anti-terrorism Act*, which amended the *Criminal Code* to include s. 83.28. The Preamble stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the *Canadian Charter of Rights and Freedoms*;
>
> 2. Section 83.28 should be interpreted in a manner consistent with the fundamental characteristics of a judicial process insofar as the section contemplates a judicial proceeding.

4 The issue in this appeal deals with the level of secrecy with which the judicial investigative hearing was conducted. We have concluded that the open court principle is a fundamental characteristic of judicial proceedings, and that it should not be presumptively displaced in favour of an *in camera* process. The need to close the courtroom doors, for the whole or parts of the judicial investigative hearing is governed by the principles expressed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.).

II. The Facts

5 The judicial investigative hearing relates to two alleged acts of terrorism that occurred on June 23, 1985. An explosion caused the deaths of two baggage handlers and injured four others at the Narita Airport in Japan. A second explosion caused Air India Flight 182 to crash off the west coast of Ireland, causing the death of all 329 passengers and crew.

6 On February 4, 1988, the first accused, Inderjit Singh Reyat was arrested in England where he was living with his family. Mr. Reyat was extradited to Canada on December 13, 1989, to face a number of charges relating to the explosion at Narita Airport. On May 10, 1991, he was convicted on seven counts: *R. v. Reyat*, [1991] B.C.J. No. 2006 (B.C. S.C.).

7 On October 27, 2000, Ripudaman Singh Malik and Ajaib Singh Bagri were jointly charged with respect to both explosions and the intended explosion of Air India Flight 301. A few months later, on March 8, 2001, a direct

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

indictment was filed against the accused, Mr. Malik and Mr. Bagri, and on June 5, 2001, a new indictment was filed, adding a third accused, Mr. Reyat. Mr. Reyat plead guilty on February 10, 2003, to a new indictment that charged him with aiding or abetting the construction of the explosive device that was placed on Air India Flight 182. He was sentenced to 5 years imprisonment in addition to the time already spent in custody.

8 Following Mr. Reyat's guilty plea to a charge of manslaughter in February 2003, Mr. Malik and Mr. Bagri re-elected, before Josephson J. of the Supreme Court of British Columbia, to be tried by a judge alone. The trial of Mr. Malik and Mr. Bagri (the "Air India Trial") commenced on April 28, 2003 and continues to this date.

9 On May 6, 2003, the Crown applied to a judge *ex parte* for a s. 83.28 order to gather information regarding the Air India offences from the Named Person. Dohm A.C.J. of the British Columbia Supreme Court issued the s. 83.28 order for a judicial investigative hearing on the strength of an affidavit by a member of the RCMP's Air India Task Force. He directed the hearing to be held *in camera* and no notice was given to the accused in the Air India Trial, to the press, or to the public. He also prohibited The Named Person from disclosing any information or evidence obtained at the hearing.

10 Sometime prior to May 20, 2003, when the hearing was to be held, counsel for Mr. Malik and Mr. Bagri fortuitously became aware of the order and advised Dohm A.C.J. that they wished to make submissions. The Named Person retained counsel, and on June16, 2003, Dohm A.C.J. was advised that the Named Person wished to challenge the constitutional validity of s. 83.28. Dohm A.C.J. directed that, seven days later, all submissions be heard by Holmes J. The constitutional challenge to s. 83.28 and the application to have the hearing order of Dohm A.C.J. set aside commenced on June 23, 2003. Neither the public nor the press was informed.

11 On June 27, 2003, the Air India Trial adjourned for the summer. That same day, Ms. Bolan from the Vancouver Sun recognized lawyers from the Air India trial and attempted to follow them into a closed courtroom where *in camera* proceedings were taking place. The trial list disclosed that "*R v. I.**(conference)" was taking place before Holmes J. in Courtroom 33. Ms. Bolan contacted counsel for the Vancouver Sun who knocked on the door of Courtroom 33. Counsel was informed by a sheriff that the judge would not entertain a motion at that time for the proceedings to be opened to the public.

12 The Vancouver Sun then filed a Notice of Motion and a letter setting out the background with the Supreme Court of British Columbia and asked for an early date for its motion to be heard. The motion sought an order that counsel for the appellant and a member of the Vancouver Sun's editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date and for an order that the court proceedings be open to the public. The Vancouver Sun was informed, on July 3, 2003 that Holmes J. would hear its application on July 23, 2003.

13 The hearing before Holmes J. continued *in camera*, and on July 21, 2003, she issued her reasons dismissing the application to set aside the s. 83.28 judicial investigative hearing. She did, however, vary the order of Dohm A.C.J. to allow counsel for Malik and Bagri to attend the investigative hearing with the right to cross-examine the Named Person, subject to the restriction that any information received was to be kept confidential by counsel and was not to be shared with the two accused. The Named Person immediately applied to Holmes J., who, on July 22, 2003, stayed the investigative hearing to September 2, 2003, so that the Named Person could seek leave to appeal to this Court. None of this was known to the public or press.

14 On July 22, 2003, the Vancouver Sun received a call from the registry of the British Columbia Supreme Court indicating that the hearing of its application had been delayed to 10 a.m. the following day, apparently to allow the s. 83.28 proceedings to continue *in camera* earlier in the morning. When the courtroom was finally opened to the public, the Vancouver Sun made its application to be allowed further access to pleadings and proceedings on the filing of an undertaking of confidentiality and for a declaration s. 83.28 proceedings should not be *in camera*.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

The application was dismissed by Holmes J. on July 24, 2003: [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.).

15 Immediately prior to Vancouver Sun's application, Holmes J. delivered, in open court, a synopsis of her reasons for judgment dated July 21, 2003 in which she set out that the hearing before her had involved the constitutional validity of s. 83.28 and the validity of a s. 83.28 order for a judicial investigative hearing. Holmes J. gave a synopsis because the reasons for judgment were sealed. She also revealed that the questioning of the Named Person had not yet commenced. It was at this point that the appellant learned that the British Columbia Supreme Court had been involved in the first-ever application by the Crown under s. 83.28 of the *Criminal Code* for an order requiring a witness to attend a judicial investigative hearing. The appellant contends that but for serendipity and their persistence, no "synopsis" would have been released and the existence of proceedings under s. 83.28 would not have been made public.

16 The synopsis of reasons for judgment dated July 21, 2003, 2003 BCSC 1172 (B.C. S.C.), set out that "[t]he proceedings concerned the interpretation, application, and constitutionality of the new s. 83.28 of the *Criminal Code*, which provides for investigative hearings in relation to terrorism offences, as now defined in s. 2 of the *Code*" (para.1). Holmes J. then explained that an order had been issued under s. 83.28 for a judicial investigative hearing as part of the ongoing Air India Investigation but that the Named Person who was required to attend was neither a suspect nor an accused. She summarized her findings that the order was validly issued and constitutionally sound; that counsel for Mr. Malik and Mr. Bagri would participate in the investigative hearing because of the unusual circumstance that the Air India Trial was underway; the hearing might have an incidental effect on the Air India Trial but the predominant purpose of the hearing is to further the ongoing investigation; the hearing is subject to restrictions protecting the privacy and other rights and interests of the Named Person and the integrity of the investigation.

17 After delivering her synopsis, Holmes J. stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal to this Court. On July 25, 2003, LeBel J. ordered that the Supreme Court of Canada file be sealed and that the application for leave be expedited. Leave was granted on August 11, 2003, to appeal the order of Holmes J. of July 21, 2003.

18 On October 6, 2003, the Vancouver Sun was granted leave to appeal the July 24, 2003 order of Holmes J. dismissing its application for access to the materials in the courts below: [2003] 2 S.C.R. xi (note) (S.C.C.). The Vancouver Sun, the National Post, and Global Television Network Inc. were also given intervener standing in the constitutional appeal, limited to issues of media access. Submissions were also made at the October 6 hearing on whether all or part of the constitutional appeal could be opened to the public and the media.

19 At the October 6, 2003 leave hearing, the Named Person indicated the constitutional appeal could be conducted in public. The Attorney General of British Columbia took the position that parts of the appeal, constituting stand-alone issues, could be held in public: the constitutionality of s. 83.28 of the *Criminal Code*, the role of the judge, and retrospective application of the provision. Mr. Bagri submitted that grounds of appeal relating to self-incrimination and privacy under section 7 of the *Charter*, judicial independence, and retrospectivity could be heard in public.

20 This Court heard the constitutional appeal on December 10 and 11, 2003 in its entirety in open court subject to a number of restrictions specified at the start of the oral hearing by the Chief Justice. During the oral arguments, counsel refrained from mentioning the name and gender of the Named Person, any facts that could identify this person, and any material supporting the order for an investigative hearing. In addition, the hearing was not broadcast, contrary to the usual practice of the Court.

III. Analysis

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

21 The issue on appeal is the level of secrecy that should apply to the application for and conduct of a judicial investigative hearing under s. 83.28 of the *Criminal Code*.

A. The Parameters of the Open Court Principle

22 Section 83.28 of the *Criminal Code*, which provides for the judicial investigative hearing, will cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless its application is extended by resolution passed by both Houses of Parliament: *Criminal Code*, s. 83.32(1). Until that time, the Attorney General must make accessible to the public an annual report on its use: *Criminal Code*, s. 83.31. The sunset clause and annual reporting requirements underscore the unusual and serious nature of the judicial investigative hearing. It is therefore important to allow the public to scrutinize and discuss the reasoning and deliberations of a Court when it deals with a challenge to the constitutionality of that proceeding. It is also important to allow the legal profession and the public at large to observe how such a procedure is actually used, as long as this can be done, in full or in part, without undue injury to the administration of justice or without frustrating the purpose of s. 83.28.

23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.

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

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

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

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

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

28 This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais*, *supra*; *Mentuck*, *supra*; *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial: *Mentuck*, *supra*, at para. 33, and may include privacy and security interests.

29 From *Dagenais*, *supra*, and *Mentuck*, *supra*, this Court has stated that a publication ban should be ordered only 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.

(*Mentuck, supra*, at para. 32)

30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, *supra*, at para. 36.

31 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 (*Dagenais*, *supra*; *Mentuck*, *supra*); 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)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.)). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 71.

B. The Nature of the Judicial Investigative Hearing Under Section 83.28

32 We have reproduced the relevant statutory provisions of the *Criminal Code* as an Appendix to these reasons. From the perspective of the open court principle, the proceedings under s. 83.28 can be usefully broken down into three steps:

> (a) the *ex parte* application under s. 83.28(2) for an order for the gathering of information;
>
> (b) the hearing itself, under the terms and conditions contemplated in s. 83.28(5)(*e*); and
>
> (c) the post-hearing stage, at which non-public information may be released publicly, again subject to the terms and conditions in s. 83.28(5)(*e*).

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Section 83.28 does not expressly provide for any part of the judicial investigative hearing to be held *in camera.*

33 Competing views about the proper interpretation of the provision as a whole are as follows: on the one hand, the appellant argues that the open court principle applies to the entire process and should only be displaced in accordance with the *Dagenais/Mentuck* test. The respondents, on the other hand, submits that when Parliament enacted the section, it was entitled to rely on this Court's jurisprudence to the effect that investigative processes, even if they involve a judicial officer, are presumptively held *in camera* (referring, for example to an application for a search warrant: *MacIntyre*, *supra*).

34 The validity of the respondents' submission rests on the assumption that the s. 83.28 hearing is an investigative measure akin to the issuance of a search warrant. This assumption is only partly accurate because one must distinguish between an *application* for a s. 83.28 judicial investigative hearing and the *holding* of the judicial investigative hearing. The application for an order that a judicial investigative hearing be held is procedurally similar to the application for a search warrant or for a wiretap authorization. Section 83.28(2) provides that the application, made by a peace officer with prior consent of the Attorney General, 83.28(3), is *ex parte.* By its very nature, this application must be presented to a judge *in camera.*

35 In that *in camera* procedure, the judge is directed to determine, for a past offence under s. 83.28(4)(*a*), whether (1) there are reasonable grounds to believe that a terrorism offence has been committed; and (2) information about the offence, or about a suspect, is likely to be obtained by the holding of a judicial investigative hearing. The judge may also determine, for a future offence under s. 83.28(4)(*b*), whether (1) there are reasonable grounds to believe that a terrorism offence will be committed; (2) that the person has information about the offence or a third party who may commit that offence; and (3) reasonable attempts have already been made to obtain that information from the person.

36 This first step of the process is akin to the application for the issuance of a search warrant. Although that application is heard by a judge, the imperatives of the investigation require that it not be made public: *MacIntyre*, *supra*, at pp. 177-78. The same is true of a wiretap application, and, in most cases, of an application for a DNA warrant (although, in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.), we left open the discretion of a judge to hold a contested hearing on the appropriateness of issuing a DNA warrant). In any event, since that process must be held *ex parte*, it follows that in that context it could not be held in open court: see *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.).

37 The real issue is whether, because of the investigative nature of the judicial hearing, it too must, by necessity, be presumptively held in secret. In that respect, the analogy to the execution of search warrants, as opposed to their issuance, is not particularly helpful. It is true that search warrants are not only issued, but executed in secret. On the other hand, they are not executed by judges. The judicial role consists of ensuring that there are reasonable grounds to authorize a particular police action. In contrast, the judicial investigative hearing requires full judicial participation in the conduct of the hearing itself.

38 The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s. 83.28(5)(*e*). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. This conclusion is supported by the choice of Parliament to have investigative hearings of a judicial nature; these hearings must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand.

39 One such guarantee is a presumption of openness, which should only be displaced upon proper consideration of the competing interests at *every* stage of the process. In that spirit, the *existence* of an order made under s. 83.28, and as much of its subject-matter as possible should be made public unless, under the balancing exercise of the

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Dagenais/Mentuck test, secrecy becomes necessary. Similarly, once a search warrant has been executed and something has been found, the necessity for secrecy has abated and continued limits on public accessibility should only be "undertaken with the greatest reluctance": *MacIntyre*, *supra*, at p. 189.

40 If the existence of the order is made public, the issuing judge, acting under s. 83.28(5)(*e*), would determine, still under the guidance of the *Dagenais/Mentuck* test, whether any information ought to be withheld from the public. For example, even though there may be no reason to hide an order for a judicial investigative hearing in relation to an identified alleged terrorist act, it may not be appropriate to reveal the reasonable grounds upon which the police relied to obtain the order. Whether the name of the person who will be heard at the hearing needs to be kept confidential may largely dictate whether the time and place of the hearing will also be the subject of a non-disclosure order. Of course should the hearing proceed in a public forum, the Crown would be expected to request that parts of the hearing proceed *in camera* in light of the sensitive nature of the information sought.

41 It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case — to our knowledge — in which it has been used.

42 The parties on the present appeal seem to agree that this is a "unique" case, in the sense that this is not a "typical" set of circumstances in which such a hearing will be sought. This may be so. We cannot speculate as to what will be more "typical". Resort to "reasonable hypotheticals" is fraught with difficulties in an environment as unprecedented as this one. Applying this novel legislation to the fact situation before us, it becomes apparent that at least in this case, the level of secrecy imposed from the outset was unnecessary. It is therefore prudent to proceed with as little departure as possible from the basic tenets of judicial proceedings, all the while developing a discretionary framework that will reflect the unique investigative role of the judge acting under s. 83.28.

43 In applying the *Dagenais/Mentuck* approach to the decision to hold the investigative judicial hearing *in camera*, judges should expect to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by the witness. 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.

C. Application to This Case

44 At the outset, we must state that this judicial investigative hearing is the first to our knowledge, and our comments are not to be taken as critical of the judges below who dealt with these novel matters under great pressure and time constraints. Properly adapted to the circumstances of this case, the *Dagenais/Mentuck* test in our view leads to the following conclusions.

45 The application for the order for the judicial investigative hearing under s. 83.28(2) before Dohm A.C.J. on May 6, 2003, was properly heard *ex parte* and *in camera*.

46 On the other hand, there was no reason for keeping the existence of the order secret, nor the fact that the investigative hearing ordered by Dohm A.C.J. was in relation to the explosion that caused the crash of Air India Flight 182 in June 1985.

47 In light of the position taken by the Named Person at that stage, the identity of the person was properly kept confidential. That direction should have been made subject to revision by the judge presiding at the judicial investi-

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

gative hearing.

48 It is apparent on the facts that notice of the hearing should have been given to counsel for Mr. Malik and Mr. Bagri promptly. In the circumstances of this case where a potential Crown witness in an ongoing trial becomes the subject of the investigative order, it is obvious that third party interests have to be considered. Section 83.28(5)(*e*) specifically contemplates the imposition of terms and conditions that are "desirable ... for the protection of the interests of ... third parties". The subsequent participation of counsel for Mr. Malik and Mr. Bagri in the hearings before Holmes J., merely emphasizes that they should have received notice in the first instance. Instead, in light of the secrecy surrounding the very existence of the judicial investigative hearing ordered by Dohm A.C.J., counsel found out only accidentally of its existence. They then persuaded Holmes J. that the interests of their clients required their participation in the hearing. A proper application of the principles in *Dagenais/Mentuck* test reveals that there was no justification for the order that counsel for Mr. Malik and Mr. Bagri not be given notice of the hearing at the outset. It is particularly incumbent on the presiding judge to turn his or her mind to the *Dagenais/Mentuck* test in *ex parte* applications because the media is not present to represent its own rights and interests: *Mentuck*, *supra*.

49 It is not necessary in this appeal, given our conclusion that the hearing should have been held in open court, to decide whether an appropriate condition under s. 83.28(5)(*e*) could include an order that counsel be present but be prohibited from disclosing to their clients the content of the information revealed in the hearing. It is difficult to anticipate all the difficulties that such an order may pose. In the same way, we would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access to the materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court imposed conditions can properly consider ethical standards and best practices in the professions involved.

50 Keeping in mind our statements about the novelty of this case, the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course.

51 When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge, and as much of the information about the case as could be revealed without jeopardizing the investigation, should have been made public, subject, if need be, to a total or partial publication ban. When that matter resumed before Holmes J., it became apparent that the existence of a judicial investigative hearing related to the Air India case was already known to counsel for Mr. Malik and Mr. Bagri and later to the Vancouver Sun.

52 The unfolding of events in this case also illustrates how antithetical to judicial process secret court hearings are. Courthouses are public places. In the course of a public hearing a judge may order that part of the proceedings be held *in camera*, thus excluding the public for from that part of the hearing. But, of course, in such a case, the fact that an *in camera* hearing is taking place, as well as the overall context in which it was ordered, are in the public domain, subject to challenge, *inter alia* by the Press and to comments by interested parties and by the public. Whether better notice should be given to the Press, or to other possibly interested parties, of proceedings that are held *in camera* or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter by the legal profession, the media, and the courts.

53 In retrospect, the hearing of the constitutional challenge that was held in open court before us could and should have been held in the same manner before Holmes J. Although she may have felt bound by the secrecy order issued by Dohm A.C.J., it is clear under s. 83.28(5)(*e*) that the terms and conditions attached to the judicial investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progresses.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

54 Here, for instance, the Named Person now takes the position that the proceedings should be held in public and no longer wishes that his or her identity be protected. Although this is only one factor to consider and certainly not dispositive of the issue, it removes in part the concerns that the investigative judge may have had regarding the privacy interests of the named person. The only factors militating in favour of a degree of secrecy in this case are the factors related to the protection of an ongoing investigation or for other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to a judicial investigative hearing is sought in the midst of an ongoing non jury trial, the case for extensive secrecy is a difficult one to make and was not made out here.

55 We again emphasize that in the difficult circumstances of this unusual application of a novel criminal procedure, Holmes J. did excellent work in fleshing out the issues and addressing them as best she could. Any shortcomings in her decision become much easier to identify with hindsight, particularly since much of the ordered secrecy in this case has been lifted causing no apparent damage to the investigation. Furthermore, shortcomings in the original decision also become apparent when a hearing is truly adversarial, with all affected interests represented.

56 It is therefore clear that the constitutional challenge here should not have been conducted *in camera*. We would add that there would have been no need to give the Vancouver Sun (through some members of its editorial board or otherwise) preferential and confidential access to secret information in this case if much of the constitutional challenge had been conducted in open court, along the lines of the process followed in this court, with the helpful cooperation of all parties. Much of the constitutional case can be properly argued without the details of the information submitted to the application judge being revealed.

IV. Disposition

57 We would therefore order that:

The appeal be allowed in part and that the order made by Holmes J. be varied.

That the name of the Named Person be made public.

That the proposed judicial investigative hearing be held in public, subject to any order of the presiding judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person.

58 In any event, we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing the interests of the Named Person, of third parties, or of the investigation: *Criminal Code*, s. 83.28(5)(*e*). Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.

***Bastarache J.* (dissenting in part):**

I. Introduction

59 I agree with Iacobucci and Arbour JJ.'s discussion on the importance of openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* guaranteeing freedom of the press (paras. 23-36). However, I respectfully cannot agree with their analysis or dispo-

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

sition in this appeal.

60 While I do recognize that openness of judicial proceedings is the rule and covertness the exception, this Court has held that public access to judicial proceedings can be curtailed "where there is present the need to protect social values of superordinate importance": *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at 186-87. In my view, several considerations of superordinate importance, such as the proper administration of justice as well as the protection of the interests, rights and safety of third parties, warrant the curtailment of public access to investigative proceedings under s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, in most instances. As discussed below, I believe that public access to investigative hearings would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool.

II. Inapplicability of the *Dagenais/Mentuck* Framework

61 This Court developed, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), a framework to guide the exercise of judicial discretion in restricting access to judicial proceedings. Nevertheless, with respect, I do not believe that the *Dagenais/Mentuck* test can guide a judge's discretion in ordering that the investigative proceedings under s. 83.28 should be held *in camera*.

62 The first requirement of the *Dagenais/Mentuck* test is that a public ban should only be ordered when "such an order is necessary in order to prevent a serious risk to the proper administration of justice" (*Mentuck*, *supra*, at para. 32). This requirement was explained by our Court in *Mentuck*, at para. 34:

> One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, 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. [Emphasis added.]

63 Thus, in order to deny access to judicial proceedings, this test requires, at the outset, the existence of a serious risk that is well grounded in the evidence. But where the purpose of the investigative proceeding under review is to gather information and possibly evidence, it would be quite difficult if not impossible to present an application for denial of access that is well grounded in the evidence. The presumption of openness cannot operate in circumstances where it cannot in fact be rebutted. This is the case because there is no evidence before the hearing actually takes place. The very object of the hearing is to gather information and evidence.

64 In my opinion, the only evidence on which a judge presiding over an investigative hearing could assess the risk under the *Dagenais/Mentuck* test would be the information, if any, supporting the reasonable grounds presented by the peace officer to satisfy the judge hearing the application (s. 83.28(3) and (4)). However, I do not think that reasonable grounds to believe that a person has direct and material information that relates to a past or future terrorist offence, or that relates to the whereabouts of an individual suspected of having committed a terrorism offence, is sufficient evidence upon which a judge can assess the application and upon which he or she may exercise his or her judicial discretion. It is imperative to bear in mind that the information sought has not yet been obtained, and that neither the investigators, the Crown nor the presiding judge is able to predict what the witness will say during the hearing. Consequently, if the presumption of openness applies to investigative hearings, an applicant seeking a denial of public access for the s. 83.28 proceedings could never satisfy the *Dagenais/Mentuck* test. It is not possible for the presiding judge to assess, in an evidentiary vacuum, the degree of risk that would be created if the hearing were open to the public. In light of this inherent uncertainty with which presiding judges are confronted, public access to all investigative hearings under s. 83.28 must be very limited.

65 In sum, a convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

under the *Dagenais/Mentuck* test to rebut the presumption of open courts, a highly valued democratic principle of our society. However, because of the lack of information and evidence prior to an investigative hearing, this framework is not appropriate to determine denial of access. This situation is not unique.

66 In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), La Forest J. found that in situations where judges are confronted with an uncertain evidentiary record, the evidence should be received by way of a *voir dire*, from which the public is excluded (at para. 72):

> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard *in camera*. This may be done by way of a *voir dire*, from which the public is excluded.... The decision to hold a *voir dire* will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially. [Emphasis added.]

67 Thus, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

III. Risk to the Safety, Interests and Rights of Witnesses and Third Parties

68 The importance of protecting the innocent was considered by Dickson J. in *MacIntyre*, *supra*, at p. 187:

> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear. [Emphasis added.]

69 In s. 83.28 proceedings, which deal with acts of terrorism, the possibility that information may be disclosed which unfairly prejudices or tarnishes the reputation of innocent people clearly exists. Such proceedings run the risk that "unfounded, even outrageous, allegations of misconduct may be made against the absent target of the information": *Southam Inc. v. Ontario* (1990), 60 C.C.C. (3d) 267 (Ont. C.A.), at p. 275. This unreliable and possibly untruthful testimony could severely damage the reputation of innocent people, who may themselves lack adequate means to counter the effect of information they know to be erroneous or false. This consideration therefore warrants confidentiality in investigative proceedings.

70 With regards to safety, the disclosure of a witness's identity may place that person at serious risk of harm from suspects or their allies. The same can be said for third parties identified by the witness as having information to provide during the investigative hearing. This Court has acknowledged the potential jeopardy to the safety of the witness should it become known that he or she is about to be questioned: *R. v. A*, [1990] 1 S.C.R. 992 (S.C.C.).

71 As noted by the respondent Attorney General of Canada, for some witnesses, the likelihood that the persons against whom they can provide information will discover their identity or the content of their testimony may cause them to commit perjury or refuse to comply with the order. This would go against society's interest in encouraging the reporting of offences and the participation of witnesses in the investigative process. Given the nature of the threat posed by terrorism and terrorist organizations, confidentiality will likely encourage witnesses to come forward

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

and be honest in their recollection of facts, because they would not fear for their safety.

IV. Risk to the Proper Administration of Justice

72 This Court has held that "the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable": *Canadian Broadcasting Corp.*, *supra*, at para. 29. This confirmed the findings of our Court in *MacIntyre*, *supra*, at pp. 187-88:

> The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless. [Emphasis added.]

73 Although the investigative hearings under s. 83.28 are a new form of proceeding, the question of public access raises essentially the same issues that this Court has considered in the context of other investigative tools. The necessity of clandestine proceedings in relation to the application for and execution of investigative tools has been accepted by this Court in situations concerning search warrant applications and wiretap authorization proceedings.

74 For example, this Court recognized at para. 51 of *Michaud c. Québec (Procureur général)*, [1996] 3 S.C.R. 3 (S.C.C.), that "[t]he reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises." Speaking about electronic surveillance, Lamer C.J. went on to state at para. 52:

> The effectiveness of such surveillance would be dramatically undermined if the state was routinely required to disclose the application and affidavits filed in support of a surveillance authorization to every non-accused surveillance target. The wiretap application will often provide a crucial insight in the *modus operandi* of electronic surveillance, and regular disclosure would permit criminal organizations to adjust their activities accordingly.

75 Secrecy has therefore been recognized as paramount in the context of wiretaps, and public access has been limited to ensure the effectiveness of electronic surveillance as an investigative device. The same could be said of terrorist groups or organizations: if the police cannot investigate and collect information in a confidential environment, their investigation or attempt to prevent the terrorist offence would be undermined because suspects could be "tipped off".

76 The confidentiality of investigative tools was recently confirmed by this Court in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.). In her discussion of the constitutionality of DNA warrants, Arbour J. stated that "as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant" (para. 56).

77 I agree with the respondent Attorney General of British Columbia that police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Information gathered may lead to other

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

avenues of investigation and other potential witnesses. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. Corruption of witnesses' recollections, the potential fleeing of suspects and the risk of pressure being put on future witnesses to give false testimony are but a few examples.

78 Unlike other investigative proceedings, such as search warrants, where the evidence found and things seized are material, a witness's version of events may vary substantially, especially in response to threats or intimidation. This person could also flee. Thus, there is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, because the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole: *B. (S.A.), supra*, at para. 51.

79 The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, this should not be taken as saying that the role of the judge in investigatory proceedings is like that of an agent of the State charged with executing a search warrant. Rather, the companion reasons clearly state that the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness (2004 SCC 42 (S.C.C.), at paras. 86-87). However, the evidentiary uncertainty preceding both procedures is the same. Without knowing what information will be revealed, it is not possible, in my view, to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Judges simply do not have sufficient evidence on which to make an informed assessment. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice.

80 In my opinion, the fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings. For example, the respondent Bagri argues that the premature disclosure of investigative information from a s. 83.28 hearing could compromise the integrity of the ongoing investigations, which could in turn hamper his ability to make full answer and defence in the Air India trial.

81 Likewise, the fact that the hearing was in part about the constitutional validity of s. 83.28 did not make the imperatives of the open court principle more compelling in this case. To the contrary, the public disclosure of this challenge to the provision would ignore the fact that the Named Person's identity and any information that person may disclose should be kept confidential until the completion of the proceeding. An examination of the Record shows that the constitutional challenge could not realistically be separated from the actual investigative hearing — in fact, public disclosure of such a challenge would normally have the effect of publicizing the fact that an application has been made under s. 83.28 and that an investigative hearing may be taking place, though I would not rule out the possibility of isolating these proceedings and holding them in open court under the appropriate circumstances. In my view, the protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, especially in light of the fact that any information which is found to be non-prejudicial will be publicly disclosed after the end of the proceeding.

82 For the same reasons, like Holmes J. (*Vancouver Sun, Re*, [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.)), I see no merit in alerting the media to the fact that an *in camera* hearing is to take place. Advance notice of the s. 83.28 hearing would serve no useful purpose. The media's pursuit of a newsworthy event at that point would only undermine the proper administration of justice and could potentially damage third parties' rights and interests. The trouble is that until the witness testifies, is it inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

V. Completion of the Investigative Hearing

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

83 I agree with Holmes J. that different considerations apply after the completion of investigative procedures (para. 27). Much like the execution of a search warrant, the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled upon completion of the hearing and "the purposes of the policy of secrecy are largely, if not entirely, accomplished": *MacIntyre*, *supra*, at p. 188. The information gathered by the Crown at the s. 83.28 proceeding will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice. Consequently, all information which is deemed non-prejudicial can be released shortly after the hearing. Because openness is the presumption, the person who wishes to deny the right of public access has the burden of proof and must satisfy the *Dagenais/Mentuck* test.

VI. Conclusion

84 Although the rule is that of openness, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit *in camera*. Such is normally the case for investigative proceedings under s. 83.28.

85 Courts reviewing a trial judge's decision to deny public access must remember that a trial judge is usually in the best position to assess the demands of a given situation: *Canadian Broadcasting Corp.*, *supra*, at para. 77. A reviewing court may look at the facts of this case in hindsight and conclude that the level of secrecy imposed from the outset was unnecessary. Nonetheless, there is no way of knowing this prior to the investigative hearing, because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, I find that Holmes J. properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held *in camera*. For these reasons, I would dismiss the appeal.

***LeBel J.*:**

86 Subject to my comments in the companion case of *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.), I agree with the reasons of Justices Iacobucci and Arbour and with their proposed disposition in this appeal.

Appeal allowed in part.

Pourvoi accueilli en partie.

APPENDIX

APPENDIX

Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46, as amended by S.C. 2001, c. 41

Investigative Hearing

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(a) order the examination, on oath or not, of a person named in the order;

(b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(d) designate another judge as the judge before whom the examination is to take place; and

(e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [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, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

FN* College of Law, University of Saskatchewan.

END OF DOCUMENT

TAB 2

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Sierra Club of Canada v. Canada (Minister of Finance)

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

Supreme Court of Canada

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

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

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

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/

98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire —

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

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

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

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

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

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205

D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

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

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

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

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

II. Facts

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

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

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

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

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

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

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

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

III. Relevant Statutory Provisions

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

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

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

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

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

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

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

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

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

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

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents

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

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

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

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

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

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

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

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

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the in-

clusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

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

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

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

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

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

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

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

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

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

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

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

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

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

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in ac-

cordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

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

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

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

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

46 The Court emphasized that under the first branch of the test, three important elements were subsumed

under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be

viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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

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

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

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

> A confidentiality order under R. 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of pre-

serving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

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

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality

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

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

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

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

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

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries

alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

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

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

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

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

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

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

(b) Deleterious Effects of the Confidentiality Order

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

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

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

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

denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

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

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

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

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

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

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

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

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

84 This motion relates to an application for judicial review of a decision by the government to fund a nucle-

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

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

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

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

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

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

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

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for

some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

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

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

VII. Conclusion

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

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

Appeal allowed.

Pourvoi accueilli.

END OF DOCUMENT

TAB 3

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

MacIntyre v. Nova Scotia (Attorney General)

A.G.N.S. and GRAINGER v. MacINTYRE et al.

Supreme Court of Canada

Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Heard: February 3, 1981
Judgment: January 26, 1982

Counsel: *R.M. Endres* and *M. Gallagher*, for appellant.

R.C.D. Murrant and *G. Proudfoot*, for respondent.

J.A. Scollin, Q.C. and *S.R. Fainstein*, for A.G. Can.

S.C. Hill, for A.G. Ont.

R. Schacter, for A.G. Que.

E.D. Westhaver, for A.G. N.B.

E.R. Edwards, for A.G. B.C.

K.W. MacKay, for A.G. Sask.

Y. Roslak, Q.C., and *L.R. Nelson*, for A.G. Alta.

A.D. Gold, for Can. Civil Liberties Assn.

Subject: Criminal

Special procedure and powers — Power of search — Issue of search warrants — Information — Public access to sworn information to obtain search warrant — Information considered judicial record available for public inspection — Public record once warrant to search executed and things seized returned to justice — Public access prohibited to information supporting issue of warrant under which no seizure effected.

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

Special procedure and powers — Power of search — Issue of search warrants — Presentation of sworn information to justice — Hearing for issue to be conducted ex parte and in camera.

A journalist researching a story on political patronage and fund-raising in the province of Nova Scotia was refused access to a number of sworn informations to obtain search warrants filed at the Provincial Court offices in Halifax on the basis that the material was not available for inspection by the general public. Thereafter, the journalist obtained a declaration from the courts and upheld on appeal that the public could examine any information to obtain a search warrant once it had been sworn before a justice, whether or not the warrant issued pursuant thereto had as yet been executed, and the Court of Appeal held further that the application pursuant to s. 443 of the Criminal Code for the issuance of a search warrant was a proceeding to be held in open court with the right of public attendance. The Crown appealed the order granting access to the relevant sworn informations to obtain search warrants.

Held:

Appeal dismissed.

Per Dickson J. (Laskin C.J.C., McIntyre, Chouinard and Lamer JJ., concurring)

Sworn informations to obtain search warrants are documents to which a presumption of public access applies. No information to obtain a search warrant is to be made available by the custodian thereof to any member of the public until the warrant to search has been executed and a return of things seized made to a justice pursuant to s. 446(1) of the Criminal Code. Where the execution of the search warrant does not result in a seizure of the items sought by police, the sworn information in support of such a warrant is not to be publicly accessible.

In those instances where the information to obtain the search warrant is publicly accessible, the document is to be available to all members of the public, not merely to persons touched or interested in the search itself. The right in the member of the public is to inspect the warrant to search and the sworn information to obtain the search warrant.

The application pursuant to s. 443(1) of the Criminal Code, wherein a sworn information to obtain a search warrant is presented to a justice, is to be conducted ex parte and in camera without the right of public attendance in order to ensure the surprise and secrecy necessary to the effective execution of a warrant to search.

Every court has a supervisory and protecting power over its own records. Access can be denied thereto only when the ends of justice would be subverted by disclosure or the judicial documents, such as sworn informations to obtain search warrants, might be used for improper purposes. The presumption remains in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right of access.

Per Martland J. (dissenting) (Ritchie, Beetz and Estey JJ. concurring)

The individual citizen cannot assert a right to examine search warrants and related informations on the basis that the issuance of a search warrant constitutes a judicial act in open court with a right of public attendance. Applications by law enforcement officials for the issuance of search warrants are to be conducted by an ex parte, in camera proceeding.

A sworn information to obtain a search warrant ought to be available only to a person touched by the search or to a person who is able to demonstrate that the document sought in some way affects his interest. In this case the

journalist had no direct and tangible interest in the documents sought. The sworn informations were sought for an ulterior object, for the purpose of preparing a news story, and accordingly, the common law rule of interest entitled the justice to refuse the request for access to the relevant informations.

An interested party is not entitled to access to the relevant information to obtain a search warrant prior to the execution thereof. Disclosure of the contents of a sworn information to obtain a search warrant before trial could seriously affect the administration of justice through publication of facts prejudicial to the fair trial of a person suspected of having committed a crime, through the disclosure of the identity of a police informant, and, through the disclosure of facts related to the pattern of police activities in connection with searches to those engaged in criminal activities.

Cases considered:

Considered by majority:

Gazette Printing Co. v. Shallow (1909), 41 S.C.R. 339, 6 E.L.R. 348 — *considered*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 — *considered*

Nixon v. Warner Communications Inc. (1978), 435 U.S. 589, 98 S.Ct. 1306 — *considered*

Realty Renovations Ltd. v. A.G. Alta., [1979] 1 W.W.R. 74, 44 C.C.C. (2d) 249, 16 A.R. 1 — *not followed*

R. v. I.R.C.; Ex parte Rossminster, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 — *referred to*

R. v. Solloway Mills & Co., [1930] 3 D.L.R. 293 (Alta. S.C.) — *referred to*

R. v. Wright (1799), 8 Term Rep. 293, 101 E.R. 1396 (K.B.) — *considered*

Scott v. Scott, [1913] A.C. 417 — *considered*

Southam Publishing Co. v. Mack (1959), 2 Crim. L.Q. 119 (Alta. S.C.) — *referred to*

Considered in dissent:

A.G. v. Scully (1902), 4 O.L.R. 394, 6 C.C.C. 167, leave to appeal refused 33 S.C.R. 16, 6 C.C.C. 381 — *considered*

Caddy v. Barlow (1827), 1 Man. & Ry. 275 (K.B.) — *considered*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 — *considered*

R. v. Fisher (1811), 2 Camp. 563, 170 E.R. 1253 (N.P.) — *considered*

R. v. I.R.C.; Ex parte Rossminster, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 — *applied*

Scott v. Scott, [1913] A.C. 417 — *considered*

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34, ss. 443, 446.

46 Edw. III.

Rules considered:

English Rules of Court, R. 4, 0.63.

Forms considered:

Criminal Code, R.S.C. 1970, c. C-34, Form 1.

Authorities considered:

1 Hals. (4th) 116, para. 97.10 Hals. (4th) 316, para. 705.Taylor on Evidence, 11th ed. (1920), paras. 1492, 1493. Appeal by the Crown against declaration, 38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633, that sworn informations to obtain search warrants available for public inspection.

***Martland J.* (dissenting) (*Ritchie, Beetz* and *Estey JJ.* concurring):**

1 This appeal is from a judgment of the Appeal Division of the Supreme Court of Nova Scotia [38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633]. The facts which gave rise to the case are not in dispute.

2 The appellant, Ernest Harold Grainger, is chief clerk of the Provincial Magistrate's Court at Halifax and is also a justice of the peace. The respondent is a television journalist employed by the Canadian Broadcasting Corporation who, at the material time, was researching a story on political patronage and fund raising. He asked the appellant, Grainger, to show him certain search warrants and supporting material and was refused on the ground that such material was not available for inspection by the general public.

3 The respondent gave notice to the appellants of an intended application in the Supreme Court of Nova Scotia, Trial Division, for "an Order in the nature of mandamus and/or a declaratory judgment to the effect that the search warrants and Informations relating thereto issued pursuant to section 443 of the *Criminal Code* of Canada or other related or similar statutes are a matter of public record and may be inspected by a member of the public upon reasonable request".

4 The application was heard by Richard J. [reported 37 N.S.R. (2d) 199 at 207, 67 A.P.R. 199] who ordered that the respondent "is entitled to a declaration to the effect that search warrants which have been executed upon and which are in the custody and control of a Justice of the Peace or a court official are court records and are available for examination by members of the general public". It will be noted that this order was limited to search warrants which had been executed.

5 The appellants appealed unsuccessfully to the Appeal Division. The judgment dismissing the appeal contained the following declaration:

IT IS DECLARED that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the *Criminal Code* of Canada.

6 This declaration was broader in its scope than that made by Richard J. in that it was not limited to search warrants which had been executed. The basis for the court's decision is set forth in the following paragraph of the reasons for judgment [at p. 655]:

In my opinion any member of the public does have a right to inspect informations upon which search warrants are based, pursuant to s. 443 of the *Criminal Code*, since the issue of the search warrant is a judicial act performed in open court by a justice of the peace. The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant. The information has become part of the record of the court as revealed at a public hearing and must be available for inspection by members of the public.

7 Subsection (1) of s. 443 of the Criminal Code, R.S.C. 1970, c. C-34 provides:

443.(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

(*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

8 Section 446 of the Criminal Code provides that anything seized under a search warrant issued pursuant to s. 443 and brought before a justice shall be detained by him or he may order that it be detained until the conclusion of any investigation or until required to be produced for the purpose of a preliminary inquiry or trial.

9 Subsection (5) of s. 446 provides:

(5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

10 The appellants, by leave of this court, have appealed from the judgments of the Appeal Division. The two issues stated by the appellants are as follows:

(i) Are search warrants issued pursuant to Section 443 of the *Criminal Code* issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,

(ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

11 With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has given, that the broad declaration made by the Appeal Division cannot be sustained. That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

12 That brings us to the second issue defined by the appellants as to whether there is a general right to inspect search warrants and the informations pertaining thereto. This was the real basis of the submission of the respondent who did not seek to sustain the position taken by the Appeal Division. His position is that search warrants issued under s. 443 and the informations pertaining thereto are court documents which are open to general public inspection.

13 The respondent relies upon an ancient English statute enacted in 1372, 46 Edw. III. An English translation of this Act, which was enacted in law French, appears in a note at the end of the judgment of the Court of King's Bench in *Caddy v. Barlow* (1827), 1 Man. & Ry. 275 at 279. I will quote that part of the note which includes the statutory provision:

> It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, 'these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. Any yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an Act of Parliament in 46 Edw. 3, in these words: — Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification of any thing which can fall in evidence against the King, or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons (*fait as touts gentz*) of whatever record touches them in any manner, as well as that which falls against the King as other persons. *Le Roy le voet.*

14 The respondent cites this legislation in support of the proposition that a member of the public has access to all judicial records. However, the provisions of the statute did not go that far. It referred to "whatever record *touches* them in any manner". I take this as meaning that to obtain the benefit of the statute the person had to show that the document sought to be searched in some way affected his interests.

15 This view is supported by the portion of the footnote which precedes the quotation of the statute. Lord Coke states that any subject may have access to the records "for his necessary use and benefit".

16 The case of *Caddy v. Barlow* itself related to the admissibility, in an action for malicious prosecution, of a copy of an indictment against the plaintiff which had been granted to her brother, the co-accused.

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

17 The respondent refers to the judgment of the Court of Appeal for Ontario in *A.G. v. Scully* (1902), 4 O.L.R. 394, 6 C.C.C. 167, leave to appeal refused 33 S.C.R. 16, 6 C.C.C. 381 in which reference is made to *Caddy v. Barlow* and to the English statute. That case dealt with an application made to the clerk of the peace for a copy of the indictment in a criminal charge of theft against the applicant who had been acquitted. He obviously had an interest in obtaining the document.

18 The Appeal Division in the present case which, as previously noted, based its decision to permit the examination of the search warrants and informations upon its conclusion that these documents were produced at a judicial hearing in open court, did deal with the assertion of a general right to examine court documents in the following passage in its reasons [at p. 655]:

> In my opinion at common law courts have always exercised control over their process in open court and access to the records. Although the public have a right to any information they may glean from attendance at a public hearing of a process in open court, and to those parts of the record that are part of the public presentation of the judicial proceeding in open court, there have always been some parts of the court file that are available only to 'persons interested' and this 'interest' must be established to the satisfaction of the court. Parties to civil actions and the accused in criminal proceedings have always been held by the courts to be persons so interested. Other persons must establish their right to see particular documents before being entitled to do so.

19 The Appeal Division cited in its reasons paras. 1492 and 1493 of Taylor on Evidence, 11th ed. (1920) (the same paragraphs appear with the same numbers in the 12th edition):

> 1492. It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction, but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party, therefore, who wishes to examine any particular record of one of those Courts should first apply to that Court, showing that he has some interest in the document in question, and that he requires it for a proper purpose. If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification, or the latter Court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction and, the magistrate having refused to give him one, they granted a writ of certiorari, to procure a copy, and thus to enable the defendant to defeat the action. Where a party, who had been sued in a Court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the Judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.
>
> 1493. Indeed, it may be laid down as a general rule that the King's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of his Majesty's subjects can prove himself to be *interested.* Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves, without putting them to the expense and trouble of making a formal application for a mandamus. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bona fide* required on some special and public ground, or the court will not interfere in

his favour, and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.

20 The first edition of this work was published in 1848, and so these propositions may be taken as representing the author's views of the law of England on this subject.

21 In 1 Hals. (4th) 116, para. 97, a similar statement of the law appears:

The applicant's interest in the documents must be direct and tangible. Neither curiosity, even though rational, nor the ascertainment of facts which may be useful for furthering some ulterior object, constitutes a sufficient interest to bring an applicant within the rule on which the court acts in granting a mandamus for the inspection of public documents.

Although reasonable grounds must be shown for requiring inspection, it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein.

22 It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, i.e. for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

23 It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, inter alia, to search buildings, receptacles or places and seize documents or other things which may afford evidence with respect to the commission of a criminal offence. A justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed, anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

24 The function of the justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the justice should perform his function in court. The justice does not adjudicate, nor does he make any order. His power is to give authority to do certain things which are a part of pre-trial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the justice issued a search warrant.

25 As the function of the justice is not adjudicative and is not performed in open court, cases dealing with the requirement of court proceedings being carried on in public, such as *Scott v. Scott*, [1913] A.C. 417 and *McPherson v. McPherson*, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 are not, in my opinion,

relevant to the issue before the court. The documents which the respondent seeks to examine are not documents filed in court proceedings. They are the necessary requirements which enable the justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for criminal proceedings.

26 If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

27 The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Pt. XXV of the Criminal Code. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

28 The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

29 In *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253 (N.P.), a prosecution was instituted for criminal libel in consequence of the publication by the defendants of the preliminary examinations taken ex parte before a magistrate prior to the committal for trial of the plaintiff on a charge of assault with intent to rape. In his judgment, Lord Ellenborough said at p. 570:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? ... The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal.

30 Inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy. It was this kind of risk which led to the recognition in law of the right of the police to protect from disclosure the identity of police informants. That right exists even where a police officer is testifying at a trial. The same kind of risk arises in relation to persons who give information leading to the issuance of a search warrant. For the same reasons which justify the police in refusing to disclose the identity of an informant, public disclosure of documents from which the identity of the informant may be ascertained should not be compelled.

31 In his reasons, my brother Dickson has referred to the fact that in recent years the search warrant has become an increasingly important investigatory aid as crime and criminals become increasingly sophisticated and has pointed out that the effectiveness of a search pursuant to a search warrant depends, inter alia, on the degree

of confidentiality which attends the issuance of the warrant. To insure such confidentiality, it is essential that criminal organizations, such as those involved in the drug traffic, should be prevented, as far as possible, from obtaining the means to discover the identity of persons assisting the police.

32 Apart from the protection of the identity of the person furnishing the information upon which the issuance of a search warrant is founded, it is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities in connection with searches. In *R. v. I.R.C.; Ex parte Rossminster*, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 at 83, the House of Lords considered the validity of a search warrant procured pursuant to an English statute, the Taxes Management Act, 1970 (Eng.), c. 12. The warrant was obtained because of suspected tax frauds. When executed, the occupants of the premises were not told the offences alleged or the "reasonable ground" on which the judge issuing the warrant had acted. In his reasons for judgment, Lord Wilberforce said:

> But, on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search *premises* regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this stage, nor has he the right to be informed of the 'reasonable grounds' of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences. With reference to the police, Lord Reid stated this in *Conway v. Rimmer*, [1968] A.C. 910 at 953-54, [1968] 1 All E.R. 874 at 889, in these words:
>
> > The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities; and it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.

33 The release to the public of the contents of informations and search warrants may also be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence. The fact that his premises are the subject of a search warrant generates suspicion that he was in some way involved in the offence. Publication of the fact that such a warrant had been issued in respect of his premises would be highly prejudicial to him.

34 For these reasons, I am not satisfied that there is any valid reason for departing from the rule as stated in Halsbury so as to afford to the general public the right to inspect documents forming part of the search warrant procedure under s. 443.

35 In summary, my conclusion is that proceedings before a justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the docu-

ments which is direct and tangible. Clearly the respondent had no such interest.

36 I would allow the appeal and set aside the judgment of the Court of Appeal and of Richard J. In accordance with the submission of the appellants, there should be no order as to costs.

***Dickson J. (Laskin C.J.C., McIntyre, Chouinard* and *Lamer JJ.* concurring):**

37 The appellant, Ernest Harold Grainger, is chief clerk of the Provincial Magistrate's Court at Halifax and also a justice of the peace. In the latter capacity he had occasion to issue certain search warrants. The respondent, Linden MacIntyre, is a television journalist employed by the Canadian Broadcasting Corporation. At the material time Mr. MacIntyre was researching a story on political patronage and fund raising. Mr. MacIntyre asked Mr. Grainger to show him the search warrants and supporting material. Mr. Grainger refused, on the ground that such material was not available for inspection by the general public. Mr. MacIntyre commenced proceedings in the Supreme Court of Nova Scotia, Trial Division, for an order that search warrants and informations relating thereto, issued pursuant to s. 443 of the Criminal Code, R.S.C. 1970, c. C-34, or other related or similar statutes, are a matter of public record and may be inspected by a member of the public upon reasonable request.

I

38 Richard J. of the Trial Division of the Supreme Court of Nova Scotia delivered reasons approving Mr. MacIntyre's application [reported 37 N.S.R. (2d) 199, 67 A.P.R. 199]. He held that Mr. MacIntyre was entitled to a declaration to the effect that search warrants "which have been executed", and informations relating thereto, which are in the control of the justice of the peace or a court official are court records available for examination by members of the general public.

39 An appeal brought by the Attorney General of Nova Scotia and by Mr. Grainger to the Appeal Division of the Supreme Court of Nova Scotia was dismissed [38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633]. The Appeal Division proceeded on much broader grounds than Richard J. The order dismissing the appeal contained a declaration "that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to s. 443 of the *Criminal Code* of Canada". The court also declared that Mr. MacIntyre was entitled to be present in open court when the search warrants were issued. This right, the Appeal Division said, extended to any member of the public, including individuals who would be the subjects of the search warrants.

40 This court granted leave to appeal the judgment and order of the Appeal Division. The Attorney General of Canada and the Attorneys General of the provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta intervened to support the appellant Attorney General of Nova Scotia. The Canadian Civil Liberties Association intervened in support of Mr. MacIntyre.

41 Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

II

42 A search warrant may be broadly defined as an order issued by a justice under statutory powers, author-

izing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.

43 Search warrants are part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the Code, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.

44 The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.

45 As is often the case in a free society, there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

46 In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the Criminal Code.

III

47 The Criminal Code gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney General of Nova Scotia relied upon Taylor's Treatise on the Law of Evidence, 11th ed. (1920), upon a footnote to O. 63, R. 4 of the English Rules of Court, and upon *R. v. I.R.C.; Ex parte Rossminster*, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exerciseable when some direct and tangible interest or proprietary right in the documents can be demonstrated.

48 It does seem clear that an individual who is "directly interested" in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (*R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed. The point is discussed by MacDonald J. of the Alberta Supreme Court in *Realty Renovations Ltd. v. A.G. Alta.*, [1979] 1 W.W.R. 74, 44 C.C.C. (2d) 249 at

253-54, 16 A.R. 1:

> Since the issue of a search warrant is a judicial act and not an administrative act, it appears to me to be fundamental that in order to exercise the right to question the validity of a search warrant, the interested party or his counsel must be able to inspect the search warrant and the information on which it is based. Although there is no appeal from the issue of a search warrant, a superior Court has the right by prerogative writ to review the act of the Justice of the Peace in issuing the warrant. In order to launch a proper application, the applicant should know the reasons or grounds for his application, which reasons or grounds are most likely to be found in the form of the information or warrant. I am unable to conceive anything but a denial of Justice if the contents of the information and warrant, after the warrant is executed, are hidden until the police have completed the investigation or until the Crown prosecutor decides that access to the file containing the warrant is to be allowed. Such a restriction could effectively delay, if not prevent review of the judicial act of the Justice in the issue of the warrant. If a warrant is void then it should be set aside as soon as possible and the earlier the application to set it aside can be heard, the more the right of the individual is protected.

49 The appellant, the Attorney General of Nova Scotia, does not contest the right of an "interested party" to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore, is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed "interested parties" and those members of the public who are unable to show any special interest in the proceedings.

50 There would seem to be only two Canadian cases which have addressed the point. In (1959-60) 2 Crim. L. Q. 119 reference is made to an unreported decision of Greschuk J. in *Southam Publishing Co. v. Mack* in Supreme Court Chambers in Calgary, Alberta. Mandamus was granted required a magistrate to permit a reporter of the Calgary Herald to inspect the information and complaints which were in his possession relating to cases the magistrate had dealt with on a particular date.

51 In *Realty Renovations Ltd. v. A.G. Alta.*, supra, MacDonald J. concluded his judgment with these words [at p. 255]:

> I further declare that upon execution of the search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand.

It is only fair to observe, however, that in that case the person seeking access was an "interested party" and therefore the broad declaration, quoted above, strictly speaking went beyond what was required for the decision.

52 American courts have recognized a general right to inspect and copy public records and documents, including judicial records and documents. Such common law right has been recognized, for example, in courts of the District of Columbia (*Nixon v. Warner Communications Inc.* (1978), 435 U.S. 589, 55 L. Ed. (2d) 570, 98 S. Ct. 1306). In that case Powell J., delivering the opinion of the Supreme Court of the United States, observed at p. 1311:

> Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision.

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

Later, at p. 1312, Powell J. said:

> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e.g. *State ex rel. Colscott v. King* (1900), 154 Ind. 621 at 621-27, 57 N.E. 535 at 536-;38; *State ex rel. Ferry v. Williams* (1879), 41 N.J.L. 322 at 336-39, and in a newspaper publisher's intention to publish information concerning the operation of government, see, e.g. *State ex rel. Youmans v. Owens* (1965), 28 Wis. (2d) 672 at 677, 137 N.W. (2d) 470 at 472, modified on other grounds, 28 Wis. (2d) 685a, 139 N.W. (2d) 241. But see *Burton v. Reynolds* (1896), 110 Mich. 354, 68 N.W. 217.

53 By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice oper ate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

54 The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

55 In short, what should be sought 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.

IV

56 The appellant, the Attorney General of Nova Scotia, says in effect that the search warrants are none of Mr. MacIntyre's business. MacIntyre is not directly interested in the sense that his premises have been the object of a search. Why then should he be entitled to see them?

57 There are two principal arguments advanced in support of the position of the appellant. The first might be termed the "privacy" argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of "reasonable grounds" to believe that there is evidence with respect of the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to em-

barrassment and public suspicion through release of search warrants?

58 The second, independent, submission of the appellant might be termed the "administration of justice" argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purpose and intention of Parliament, embodied in s. 443 of the Criminal Code would be frustrated.

V

59 Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well-established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Lawrence J. in *R. v. Wright* (1799), 8 Term Rep. 293 at 298, 101 E.R. 1396 at 1399 (K.B.) are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at 359, 6 E.L.R. 348:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

60 The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177 at 200, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

61 It is, of course, true that *Scott v. Scott* and *McPherson v. McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Parliament has seen fit, and properly so, consider ing the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.

62 The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. Ex parte applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of 10 Hals. (4th) states [at p. 316, para. 705] the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera.

At every stage the rule should be one of public accessibility and concomitant judicial accountability, all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime, may, in some circumstances, raise issues of public importance.

63 In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

64 Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

VI

65 That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted in camera, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

66 None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open court by a justice of the peace with the public present. The respondent Mr. MacIntyre stated in para. 5 of his factum:

> One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision-making process ...

It appeared clear during argument that the act of issuing the search warrant is, in practice, rarely, if ever, performed in open court. Search warrants are issued in private at all hours of the day or night, in the chambers of the justice by day or in his home by night. Section 443(1) of the Code seems to recognize the possibility of exigent situations in stating that a justice may "at any time" issue a warrant.

67 Although the rule is that of "open court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera. The issuance of a search warrant is such a case.

68 In my opinion, however, 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 appellant concedes that at this point individuals who are directly "interested" in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.

69 The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e. those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

70 Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

71 I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

VII

72 I conclude that the administration of justice argument does justify an in camera proceeding at the time of issuance of the warrant but, once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced. The general rule of public access must prevail, save in respect of those whom I have referred to as innocent persons.

73 I would dismiss the appeal and vary the declaration of the Appeal Division of the Supreme Court of Nova Scotia to read as follows:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a justice pursuant to s. 446 of the *Criminal Code*, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the *Code*
> .

74 There will be no costs in this court.

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

Appeal dismissed.

END OF DOCUMENT

TAB 4

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

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

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

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

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 investigative 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.

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

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 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 5

2009 CarswellQue 9963, 58 C.B.R. (5th) 49, EYB 2009-164655

Mecachrome Canada Inc., Re

In the Matter of the Plan of Compromise or Arrangement of

Mecachrome Canada Inc. and Mecachrome Montréal-Nord Inc. and Mecachrome Technologies Inc. and Mirabel-Mecachrome Inc. (Petitioners) and Ernst & Young Inc. and Samson Bélair Deloitte & Touche Inc. (Co-Monitors)

Quebec Superior Court

Clément Gascon, J.C.S.

Heard: July 14, 16, 2009
Judgment: July 16, 2009
Docket: C.S. Montréal 500-11-035041-082

Counsel: Me Sylvain Rigaud for Petitioners

Me Jean Fontaine for Co-Monitors

Me Sylvain Vauclair for "Fonds de Solidarité des travailleurs du Québec (F.T.Q.), FCRP Aerofund et FCRP Aerofund II, représentés par Société de gestion ACE Management), prêteurs temporaires"

Me Fred Myers, Me Brendan O'Neill, Me Jonathan Warin for "Comité ad hoc des détenteurs de billets"

Me Gordon Levine for Bank of New York Mellon (formerly "Bank of New York") and BNY Trust Company of Canada

Me Francis Meagher, Me Guillaume Hébert for General Electric Canada Equipment Finance G.P.

Me Kurt A. Johnson for Makino, Inc. et SST-Canada, ULC

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Debtor MII was worldwide manufacturer of high precision components for car and aeronautical industry and, especially, was sole supplier for several commercial customers — In December 2008, MII and its subsidiaries ap-

plied to Court for initial order under Companies' Creditors Arrangement Act for purpose of negotiating plan of arrangement with their creditors — Plan funding agreement was entered into between MII and DIP lenders, which lead to conclusion of proposed plan — Under proposed plan, DIP lenders would acquire all shares of MII and, in consideration, DIP lenders would undertake to pay MII approximately 55,000,000 euros — As result, unsecured creditors would recover about 12 per cent of their claims — Group of unsecured creditors contested plan because they were not involved in its negotiation and did not support it — MII and its subsidiaries brought motion asking Court to issue order approving plan funding agreement — Motion dismissed — Act is aimed at enabling debtor company, with support of its creditors, to weather its financial difficulties and continue to operate through conclusion of plan of arrangement on best possible conditions for creditors — Here, probabilities of achieving this fundamental goal appeared to be better served by refusing to approve plan funding agreement presented rather than by tying hands of debtors with respect to consideration of potentially available alternate solutions that could benefit affected creditors — Court considered that debtors and monitor failed to proceed in manner where transparency, integrity, credibility and fairness were beyond reproach — Given absence of open, transparent and flexible process, Court found that unsecured creditors' arguments should prevail — Therefore, while process may be going to dead end without plan, this was not reason for Court to give its blessings to plan resulting from such flawed process.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation du tribunal — Discrétion du tribunal

Débitrice MII était un fabricant mondial de composants de haute précision destinés à l'industrie de l'automobile et de l'aéronautique et, en particulier, était l'unique fournisseur de plusieurs clients commerciaux — En décembre 2008, MII et ses filiales ont demandé au tribunal d'émettre une ordonnance initiale en vertu de la Loi sur les arrangements avec les créanciers des compagnies dont l'objectif était de négocier un plan d'arrangement avec leurs créanciers — Entente sur le plan de financement a été conclue entre MII et des prêteurs de type débiteur en possession (« prêteurs DEP »), ce qui a mené à la conclusion du plan proposé — En vertu du plan proposé, les prêteurs DEP feraient l'acquisition de toutes les actions de MII et, en contrepartie, les prêteurs DEP s'engageraient à payer à MII environ 55 000 000 d'euros — Comme résultat, les créanciers chirographaires récupéreraient environ 12 pour cent de leurs réclamations — Groupe de créanciers chirographaires a contesté le plan parce qu'il n'avait pas été impliqué dans sa négociation et ne l'appuyait pas — MII et ses filiales ont déposé une requête demandant au tribunal d'émettre une ordonnance approuvant l'entente sur le plan de financement — Requête rejetée — Loi a pour objectif de permettre à la compagnie débitrice, avec l'appui de ses créanciers, de passer à travers des difficultés et de continuer ses opérations au moyen d'un plan d'arrangement conclu dans les meilleures conditions pour les créanciers — En l'espèce, il semblait préférable, pour que cet objectif fondamental soit atteint, de refuser d'approuver l'entente sur le plan de financement présenté plutôt que de lier les mains des débitrices en regard des solutions alternatives qu'il était possible de trouver au bénéfice des créanciers visés — Tribunal considérait que les débitrices et le contrôleur n'avaient pas procédé d'une manière qui soit sans reproche en ce qui concerne la transparence, l'intégrité, la crédibilité et l'équité — Considérant l'absence d'un processus ouvert, transparent et flexible, le tribunal a conclu que les arguments des créanciers chirographaires devraient l'emporter — Par conséquent, bien que le processus risquait de se retrouver au point mort sans le plan, ce n'était pas une raison pour que le tribunal donne sa bénédiction à un plan résultant d'un processus aussi défaillant.

Cases considered by *Clément Gascon, J.C.S.*:

Boutique Euphoria (Arrangement) (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.) — fol-

lowed

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Stelco Inc., Re (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — followed

Tiger Brand Knitting Co., Re (2005), 19 C.B.R. (5th) 53, 2005 CarswellOnt 8387 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

Motion by debtors asking Court to issue order approving plan funding agreement.

***Clément Gascon, J.C.S.*:**

The Motion at Issue

1 The Court renders judgment on a Motion to Approve a Plan Funding Agreement. The reasons are delivered in the English language as the Motion, the Exhibits, the Monitor's Report and the Contestation involved are all drafted in that language.

2 While the Court was ready to render judgment on July 15th, at the request of the parties' Counsel, the delivery of these reasons was postponed for 24 hours in view of their ongoing discussions.

3 By their Motion dated July 7, 2009, Mecachrome International Inc. (MII), Mecachrome Canada Inc., Mecachrome Montréal-Nord Inc., Mecachrome Technologies Inc. and Mirabel Mecachrome Inc. (collectively, the Canadian Debtors), ask the Court to issue an order approving a Plan Funding Agreement (the PFA) entered into between MII and FCPR Aerofund, FCPR Aerofund II, the Fonds de solidarité des travailleurs du Québec FTQ (together, the DIP Lenders) and Mecadev SAS, a newly formed entity to remain under the control of the DIP Lenders.

4 The original PFA at issue, dated July 4, 2009[FN1] , was amended during the second phase of oral arguments, namely on July 14, 2009, and replaced by another one, this time dated July 13, 2009[FN2] .

5 The Motion is filed pursuant to a restructuring process initiated on December 12, 2008, whereby the Canadian Debtors applied to the Court for the issuance of an initial order under Sections 4, 5 and 11 of the *CCAA* [FN3] .

6 The goal was to enable the restructuring of their affairs by preparing, negotiating and implementing a plan of arrangement with their creditors. The Canadian Debtors were then - and are still - operating at a deficit and facing serious liquidity problems.

7 On that same day, the subsidiaries of MII incorporated in France, that is, Mecachrome France SAS and Mecachrome SAS (the French Debtors), also applied for the commencement of a parallel safeguard procedure in France.

The PFA

8 The PFA referred to in the Motion sets out the terms and conditions on which the DIP Lenders propose to fund a plan of compromise or arrangement (the Proposed Plan), to be implemented pursuant to the *CCAA* in respect of the Canadian Debtors and their creditors.

9 In short, the PFA as amended provides for:

a) the execution and implementation of the restructuring transactions agreed upon in the Proposed Plan attached as Schedule A to the PFA;

b) the DIP Lenders to act as sponsors for the funding;

c) MII agreeing to undertake, upon request by the DIP Lenders, a corporate reorganization of the business, operations and assets of the company and its subsidiaries, but only after the vote of the creditors on the Proposed Plan and the sanction order of the Court;

d) the possibility for MII to consider, negotiate and ultimately accept a proposal which is a Superior Proposal, from a financial point of view, to the one provided in the PFA. In such a case, the DIP Lenders have the right to offer to amend the terms of the PFA to match the Superior Proposal within a five-day period. If they elect not to match such Superior Proposal, MII has the right to terminate the PFA, but will be required to pay a break fee;

e) other events giving rise to the right to receive a break fee, including breach of specified covenants and failure of the Board of Directors of MII to recommend approval of the Proposed Plan;

f) MII's obligation to pay to the DIP Lenders all fees and expenses incurred in connection with the DIP loan agreement and the transaction contemplated by the PFA and all transactions related thereto if the Proposed Plan is not approved by the creditors;

g) a number of conditions precedent to closing, including obtaining the required creditors' support and Canadian Court approval, all required appropriate regulatory approvals, consents from certain third parties under the company's contracts, renegotiation of certain agreements, and absence of material ad-

verse change.

10 Under the PFA and the Proposed Plan, the DIP Lenders will acquire all the shares of MII. In consideration, they undertake to pay to MII, through Mecadev, approximately Euros 55,000,000, of which some Euros 30,000,000 will serve for distribution purposes to the unsecured creditors of the Canadian Debtors. The other Euros 25,000,000 will essentially be used to repay the DIP loan advances, the Bank Syndicate's secured loan, the claims of a specific creditor and the fees and disbursements of the transaction.

11 For the DIP Lenders, the PFA is equivalent to an acquisition proposal of the business of MII, as the Monitor points out at paragraph 30 of his Fifth Report.

12 For the unsecured creditors of the Canadian Debtors, the Proposed Plan arising there from would entail a recovery of about 12% of their claims.

The Contestation

13 The record shows that MII issued Euros 200,000,000 of senior subordinated notes (the Notes) in May 2006, guaranteed by the Canadian Debtors and the French Debtors.

14 An Ad Hoc Committee of Holders of the Notes is actively involved in the restructuring process. It represents by far the largest group of unsecured creditors in the *CCAA* proceedings. The members of the Ad Hoc Committee hold approximately 70% of the Notes. The Noteholders are the unsecured creditors who will most significantly have to bear the losses arising from this *CCAA* restructuring.

15 The Ad Hoc Committee contests the Motion at issue. In a nutshell, they consider that the DIP Lenders:

a) have unilaterally put forward a pre-emptive PFA under which they propose to take ownership of 100% of MII;

b) have sought to do so in the absence of a Court-approved marketing process being conducted to confirm the fairness of the consideration they are offering;

c) rather than inviting negotiations and a fair process, seek to prevent MII from truly negotiating further any other reasonable arrangement;

d) seek a break fee and expense reimbursement despite the absence of a fair process and knowing that their Proposed Plan, as currently drafted, does not have the support of key stakeholders, that is, the Noteholders they represent.

16 While, so they say, open to achieve a consensual restructuring solution for the Canadian Debtors, the Ad Hoc Committee argues that the DIP Lenders have chosen to unilaterally put forward a PFA and Proposed Plan which do not have their support as key stakeholders and which are premised upon an untested offer.

17 Their clear and unambiguous intention, reiterated during oral argument, is to veto the Proposed Plan arising from the PFA.

18 The Canadian Debtors reply that under the special circumstances of this case:

a) time is of the essence and they need to proceed forthwith to a vote by the unsecured creditors on the Proposed Plan;

b) to that end, the PFA remains the best and, indeed, the only available funding arrangement received so far for the presentation of any kind of plan of arrangement to the unsecured creditors;

c) the matter should be put to a vote of the unsecured creditors, in the interest of all stakeholders involved;

d) the Monitor supports the PFA, even more so in its amended format.

19 Of course, the Monitor and the DIP Lenders support the argument of the Canadian Debtors.

Analysis and Discussion

20 For a restructuring process that has started barely six months ago, it is quite unfortunate to see that key stakeholders, such as the DIP Lenders and the Ad Hoc Committee of Noteholders, have chosen to crystallize their respective position and not to pursue more constructive dialogue together.

21 They both appear to have lost sight of the fact that neither one will be able to achieve any reasonable and acceptable solution to this restructuring without the cooperation of the other.

22 In his wisdom, the Monitor had warned both of these parties along these lines at paragraph 41 of his Fourth Report of June 26, 2009, apparently to no avail, or at the very least, with not much success. Neither the DIP Lenders nor the Ad Hoc Committee appear to have paid attention to his remarks.

23 On the one hand, the DIP Lenders' approach of presenting the initial PFA and the Proposed Plan as a "take it or leave it" proposal, not open to discussion or negotiation, certainly appears questionable. Even more so when one now realizes that, faced with the articulated contestation of the Ad Hoc Committee and their line of questions to the Monitor, the DIP Lenders have finally decided to amend their PFA during the second phase of oral arguments, so as to tone down what was said to be irrevocable.

24 No doubt such change of heart would have been far more beneficial to the whole process if done earlier rather than at the very last minute. Very precious days, if not weeks, have been lost as a result. This does not enhance the credibility of the process adopted towards the conclusion of the PFA.

25 On the other hand, the Ad Hoc Committee's Contestation seems to forget the high risks involved with their position. They consider that the PFA, even as amended, remains unacceptable. Yet, their Contestation may end up in an absence of any reasonable arrangement and thus, in a liquidation of the Canadian Debtors and an even smaller recovery for the Noteholders compared to the one contemplated in the PFA and the Proposed Plan.

26 The Ad Hoc Committee does raise legitimate objections, but they do not appear to bring much to the table in terms of concrete or reasonable solution at this stage.

27 Be that as it may, the parties and their learned Counsel and financial advisors have elected to rely on this Court's judgment to sort out what, in all due respect, they should have solved together through reasonable concessions and compromises.

28 In so doing, through their respective Motion and Contestation, they ask the Court to decide which of the two (2) conflicting positions should prevail. There is no in-between. Either the Motion is well founded or the Contestation is. The Court cannot change the terms of the PFA at the centre of this debate. This negotiation belongs to the parties, not to the Court.

29 To rule upon this issue, the Court must exercise the powers given in this respect by the relevant provisions of the *CCAA*. This includes notably the exercise of its judicial discretion and inherent jurisdiction, the whole in furtherance of the objectives of the Act.

30 As this Court already stated before, the fundamental goal of the *CCAA* is found in its very title, that is an Act to facilitate compromises and arrangements between companies and their creditors. It is aimed at enabling a debtor company, with the support of its creditors, to weather its financial difficulties and continue to operate in the interest of all interveners and society in general.

31 The manner in which the *CCAA* favours this objective is through the conclusion of a plan of arrangement approved by minimum levels of majority of creditors, in number and in value. Of course, this objective must be reached at the best cost and on the best possible conditions for the creditors who inevitably suffer the consequences.

32 In the Court's assessment of the situation as it stands today, the probabilities of achieving this fundamental goal of the *CCAA* appears to be better served by refusing to approve the PFA presented rather than by tying the hands of the Canadian Debtors in the manner entailed by such PFA.

33 In a situation like this one, where the Court is asked to approve and give its blessing to a PFA leading to a Proposed Plan pursuant to which the DIP Lenders will end up acquiring MII, a *CCAA* restructuring requires the Canadian Debtors and the Monitor to satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.

34 Notwithstanding the clear efforts of the Canadian Debtors and the Monitor, the Court considers that this not the case here. Too many factors militate against granting the Motion as sought and approving the PFA as it stands, even in its amended format.

35 In the Court's opinion, the cumulative effect of a) the absence of any legitimate and open process in order to obtain funding proposals beyond those of the DIP Lenders or the Ad Hoc Committee after May 15, 2009, b) the narrow definition of what constitutes a Superior Proposal under the PFA and the lack of flexibility, if any, given to the Board of Directors of MII in qualifying a proposal as a Superior Proposal or in considering or recommending such, and, c) the chilling effect of the rather high break fee contemplated in the PFA, forces the conclusion that the arguments of the Ad Hoc Committee's Contestation must prevail.

36 To rule otherwise would pay scant respect to the need for a sufficient, transparent and open process before a Court sanctions the potential acquisition of the whole business in the context of a *CCAA* restructuring.

37 As well, to allow the process contemplated by the PFA to move forward with no additional amendments will somehow usurp the key exercise of the right to vote belonging to the creditors under the *CCAA*. The Court is of the view that, as it stands now, the PFA unnecessarily ties up the hands of the Canadian Debtors with respect to the consideration of potentially available alternate solutions that, in the end, could benefit the affected creditors.

38 This is wrong and should not be condoned lightly. Some explanations are called for.

39 First, the Court agrees that the evidence does not establish that a proper maximizing value process has been undertaken so as to justify approving the PFA as it stands now.

40 In fact, short of the DIP Lenders and the Ad Hoc Committee, neither the Canadian Debtors, nor the Monitor or anyone else have apparently interested any other entity in funding an arrangement.

41 The lack of any steps taken towards that end appears to be linked to the short time frame allegedly available and the exclusivity clause of the DIP financing agreement that was extended to May 15, 2009. In the context of what is equivalent to an acquisition proposal of the business, this is hardly acceptable.

42 The evidence indicates that as recently as last December 2008, prior to agreeing to a DIP financing arrangement under very difficult circumstances, the Canadian Debtors still canvassed no less 23 potential parties before making a final choice.

43 While the interest shown then remained very sketchy, as only two (2) proposals were received, the following key changes however took place since that time:

a) a well-organized data room pertaining to the business and its financial information has been set up, after what appears to have been a lot of work by many;

b) there is a new CEO and a new CFO now in charge of the business;

c) significant downsizing of the business has taken place since the beginning of the *CCAA* process;

d) a new business plan has been prepared by MII in May 2009.

44 In view of this, it is hard to understand why no steps were taken in order to interest any other parties in funding a potential arrangement. The impression given by the evidence offered is that the focus was limited solely to the DIP Lenders and the Ad Hoc Committee, and nothing else. The Monitor's Fifth Report seems to confirm that, apparently, it would have been unworkable to proceed otherwise.

45 As stated, albeit in a different but still similar context, by the Ontario Court of Appeal in *Soundair*[FN4], by the Ontario Superior Court of Justice in *Tiger Brand Knitting*[FN5], by the Alberta Court of Queen's Bench in *Calpine Canada Energy Ltd., Re*[FN6], and by this Court in [FN7], in a process such as this one, there has to be some demonstration by the Canadian Debtors that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.

46 To that end, the PFA, which is aimed at acquiring all the shares of MII with a right to match any competing offer and a break fee should a Superior Proposal be accepted, closely resembles a stalking horse bid process with no real canvassing of the market at any point in time, be it prior to its finalization or after its approval.

47 The inclusion of an exclusivity clause of limited duration in the DIP financing agreement may have given a head start to the DIP Lenders in any acquisition proposal scenario. However, in the Court's opinion, it did not, and could not, have the impact of relieving the Canadian Debtors and the Monitor of their duty and obliga-

tions towards all the other stakeholders.

48 A *CCAA* process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.

49 The mere fact that, here, these obligations must be met and the results achieved, and rightly so, within a very tight time frame does not entail that these duties could or should be ignored.

50 From that standpoint, even though the DIP Lenders have finally decided, at the last hour, to withdraw their exclusivity clause requirements, it remains that the narrow definition of what constitutes a Superior Proposal seriously limits the possibility of even seeing other bidders involved once the PFA is approved. In other words, because of the content of the PFA as it stands now, once it is approved as sought, it appears unlikely that any kind of transparent and open process will follow.

51 The situation would no doubt have been worse with the exclusivity clause initially included in the PFA. The clause has now been removed. Yet, under the PFA, the conditions precedent to a Superior Proposal being qualified as such and the lack of flexibility of the Board of Directors of MII towards any proposal other than the PFA render quite unlikely the remote possibility of the Canadian Debtors seeing any other proposal once the PFA at issue is approved.

52 From that perspective, if the PFA is truly the best available funding arrangement under the circumstances, it is difficult to understand why the definition of Superior Proposal had to be so narrowly construed and why the MII Board of Directors' powers of recommendation so precisely limited, mostly when one sees that the DIP Lenders have the opportunity to match any Superior Proposal within five days.

53 At present, the terms of the PFA discourage rather than invite the coming forward of other potential bidders.

54 Contrary to what the Canadian Debtors argued, the issue is not whether the MII Board of Directors will likely consider or not a Superior Proposal received, even though their flexibility is very limited in that regard. The issue is rather whether or not the PFA as drafted does indeed favour any Superior Proposal coming forward because of its narrow and convoluted definition.

55 Second, while no doubt serious, the alleged urgency and need to proceed quickly to a vote of the unsecured creditors on the Proposed Plan on the basis of the PFA appears to be somewhat qualified. While no less than a few days ago, the PFA was being presented to the Court as a "take it or leave it" proposal, no terms of which could be modified, time has rather shown that even that initial PFA was not yet a fully matured and final proposal.

56 Faced with strong opposition by the Ad Hoc Committee of the Noteholders, the DIP Lenders first renounced to the rather unrealistic tight time frame they were insisting upon in their initial PFA. Then, they finally withdrew the gist of the exclusivity requirements that the Monitor himself had considered inappropriate for some time, to the knowledge of the DIP Lenders.

57 Furthermore, faced with the criticism regarding its level, they slightly reduced the amount of their break

fee. Finally, they clarified the ambiguities concerning the pre-acquisition proposal clauses and the application of the break fee and fee and expenses clauses.

58 Considering the position voiced initially by the DIP Lenders, it appears obvious that none of this would have taken place without the benefit of the Contestation of the Ad Hoc Committee. That Contestation was triggered by the Canadian Debtors' Motion and the corresponding need to satisfy the Court as to the reasonability of the PFA conditions, including the integrity and transparency of the process leading to it.

59 In this respect, the additional delays caused so far by the Contestation have enhanced rather than hurt the process by allowing at the very least some problematic clauses of the PFA to be withdrawn or qualified.

60 Third, turning to the break fee, the Court agrees with the Ad Hoc Committee's submission that the amount proposed appears disproportionate to the amount that the DIP Lenders are putting on the table for the Canadian Debtors' plan of arrangement.

61 Under the PFA, the DIP Lenders undertake to pay through Mecadev Euros 55,000,000 to MII. The proposed break fee, as reduced, is Euros 2,500,000, which is about 4.5% of the Euros 55,000,000 offered.

62 Based on the evidence presented to the Court, this appears excessive. In the chart of break fees attached to the Motion[FN8] , the average break fee, in a merger and acquisition scenario, is about 2.9%. Also, no precedent involving similar break fees in the context of a restructuring process has been offered to the Court.

63 Finally, according to the evidence, the amount of the break fee is at least twice the amount of real expenses incurred so far by the DIP Lenders under the PFA process. Accordingly, it does include some sort of a risk premium or effort premium of some magnitude.

64 The burden of showing that the break fee is reasonable rests upon the Canadian Debtors. The evidence in support thereof is sketchy at best. This is not an issue that one should consider lightly in the context of a *CCAA* restructuring supervised by a Court, whereby the unsecured creditors, who are already suffering the consequences of the restructuring as here, end up in reality paying the cost of such break fee.

65 Fourth, the Court considers that the other arguments that the Canadian Debtors insisted upon are not convincing under the circumstances.

66 On the one hand, while the approval and support of the Monitor remains an important factor, it is not decisive in and of itself.

67 Here, the Monitor is faced with nothing else and reasonably fears that the process may be going to a dead end without the PFA. Admittedly, this is not an easy situation. Yet, in the Court's view, it is no reason to close one's eyes towards a process that appears to be submitted as a "*fait accompli*" under the PFA.

68 On the other hand, the argument voiced often by the Canadian Debtors and the Monitor, to the effect of letting the matter go to a vote on the Proposed Plan by the unsecured creditors, does not answer the problem truly at issue here.

69 The Court is asked to approve and give its blessing to the PFA. Once the PFA is approved, there is no going back. The creditors will not be in a position to change its terms, if alone, with respect notably to the narrow definition of a Superior Proposal, the lack of flexibility given to the Board of Directors of MII in terms of

recommendations, and the applicability of the break fee. Letting the matter go to a vote on the Proposed Plan will not deal with these issues at any point in time.

70 In this regard, the *Stelco* decision[FN9] relied upon by the Canadian Debtors and the DIP Lenders is of no assistance. In that case, the decision to send the matter to a vote notwithstanding the opposition voiced was reached in a different context.

71 The process involved had been going on for twenty some months. Prior plans had been presented and had failed. No one had any formal or decisive veto like here. The Court was of the view that the plan was not doomed to fail and that the break fee was reasonable. The process was neither at issue.

72 In this case, this is not so.

73 The position voiced by the Ad Hoc Committee suffers no ambiguity. It should not be discarded lightly. No one has suggested that they have any other ulterior motive than to try to obtain the best possible value for their claims within the best available process and through the best efforts.

74 It is not with happiness that the Court concludes that it cannot approve the PFA as it stands today. No one knows if time or a more open process will lead to a better result. However, this uncertainty is insufficient to approve the process leading to the PFA and the PFA as it stands.

75 To paraphrase the Ad Hoc Committee's submission, approval of the PFA on the terms proposed would limit the flexibility and optionality of the process at a time when, given that the DIP Lenders' PFA has not been tested and is not supported by key stakeholders, the process does require flexibility, optionality and credibility.

76 All in all, the Court's assessment of the situation is that there is likely still margin to do better. The behaviour of the DIP Lenders and the amended PFA are silent testimony in support of that assertion.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

77 **DISMISSES** the Motion;

78 **COSTS TO FOLLOW.**

Motion dismissed.

FN1 Exhibit R-1.

FN2 Exhibit R-1A.

FN3 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

FN4 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at ¶16.

FN5 *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

FN6 2007 ABQB 49 (Alta. Q.B.)

FN7 *Boutique Euphoria (Arrangement)* (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.)

FN8 Exhibit R-2.

FN9 *Stelco Inc., Re* [2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])], 2005 CanLII 36272; (2005), 15 C.B.R. (5th) 288 (Ont. C.A.), 2005 CanLII 40140.

END OF DOCUMENT

TAB 6

2007 CarswellAlta 156, 2007 ABQB 49, [2007] A.W.L.D. 1172, 28 C.B.R. (5th) 185

Calpine Canada Energy Ltd., Re

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

Alberta Court of Queen's Bench

B.E. Romaine J.

Heard: January 22, 2007
Judgment: February 8, 2007
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean I. Collins, Fred Myers, Jay A. Carfagnini, Brian Empey for CCAA Debtors

Patrick McCarthy, Q.C., Josef A. Krueger for Monitor

A. Robert Anderson, Q.C., Kevin P. McElcheran (present by telephone) for Independent Trustees of Calpine Commercial Trust

John Finnigan, Robert Thornton for ULC2 Ad Hoc Committee of Bondholders

Sean Dunphy, Elizabeth Pillon for ULC2 Trustee

Frank Dearlove for HSBC Bank

Howard Gorman, Randal Van de Mosselaer for ULC1 Noteholders

Peter H. Griffin for Calpine Corporation and other U.S. Debtors

Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.

Richard Billington for Catalyst Capital Group Inc.

Glenn Solomon for certain creditors

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Corporation went into receivership — Corporation had closely intertwined relationship with commercial trust and income fund — Group representing corporation sought to sell various assets relating to such relationship between entities, including certain trust units — Group reached settlement agreement with fund and applied for order approving of such agreement — Receiver received offer from third party for trust units — Court directed monitor to prepare report comparing third party offer and settlement agreement — Monitor initially advised that settlement agreement be accepted — Following complaints by certain stakeholders and creditors, court directed monitor to create new report considering new offer put forth by third party — Monitor advised that third party's new offer be accepted — Group brought application for approval of third party's offer — Application granted — Best interests of all parties would not be served by continuation of process in search of better offers — Potential for increased consideration was outweighed by risks and potential delay that would follow — Final recommendation of monitor was sound and reasonable — Rejection of recommendations in any but most exceptional circumstances materially diminished and weakened role and functions of receiver — Such casual rejection would lead to conclusion that decision of receiver was of little weight and that real decision was always made by court upon application for approval — Third party's final offer was only route which assured avoidance of prolonged litigation.

Cases considered by *B.E. Romaine J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

APPLICATION by group for approval of third party's offer to purchase trust units.

***B.E. Romaine J.*:**

Introduction

1 These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

2 This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

3 On December 21, 2006, the Calpine Applicants filed a Notice of Motion, returnable on December 28, 2006, seeking authorization to market and sell the following assets (the "Fund-related Assets"):

> a) certain contracts, being a management agreement, an administration agreement and some operating agreements (collectively, the "MA&O Agreements") relating to the Fund, the Trust and Calpine Power L.P. ("CLP") and to the operation of two power plants owned by CLP; and
>
> b) the Class B Units in CLP.

4 An affidavit sworn on December 21, 2006 by Toby Austin, President and CEO of CCPL, includes at para. 10 a simplified diagram of the structure of CCPL's relationship with the Fund, the Trust and CLP.

5 Briefly, CLP is a limited partnership with Calpine Power L.P. Ltd. ("CLPGP") as its general partner and the Trust and CCPL as limited partners. CLPGP has assigned its rights and obligations as a general partner to CCPL. The Trust is an open-ended trust, the sole beneficiary of which is the trustee of the Fund. The Fund is a publicly held income fund listed on the TSX. Since CCPL and the other Canadian Calpine entities sought the protection of the CCAA, the Trust and the Fund have been governed by the independent trustees of the Trust and the independent directors of CLPGP (who are also trustees).

6 The Trust's principal asset is its interest in CLP. CLP indirectly owns two power plants, the Island Cogen Facility in British Columbia and the Calgary Energy Centre. CLP granted a participating unsecured loan to Calpine Canada Whitby Holdings Company, an entity that owns 50% of a joint venture that is developing a co-generation facility in Ontario.

7 The Trust owns A Units in the CLP limited partnership. CCPL owns B Units. The B Units, which represent 30% of the equity of CLP, are subordinate to the A Units. Further complicating this already intertwined relationship, the Trust purchased from CCPL in May 2004 a promissory note with a face value of approximately $53.5 million pursuant to a loan known as the Manager's Loan. As security for the Manager's Loan, CCPL granted to the Trust a pledge of the B Units.

8 CCPL administers the Fund and the related entities pursuant to the MA&O Agreements. The MA&O Agreements all provide that they may be assigned by CCPL only with the consent of either the Trust or CLP, which consent shall not be unreasonably withheld. In support of their motion for authorization to sell the Fund-related Assets, the Calpine Applicants advised that on December 19, 2006, Harbinger Capital Partners ("Harbinger") had announced its intention to launch a take-over bid for the publicly-traded trust units of the Fund and that the Calpine Applicants believed that this presented them with an opportunity to negotiate the sale

of the Fund-related Assets with bidders who might be interested in acquiring the Fund.

9 In response to the Calpine Applicants' motion, the Fund advised that it intended to bring a cross-application to terminate the MA&O Agreements. The Christmas break intervened and the application and proposed cross-application were adjourned to a date in January 2007. The Fund was to circulate materials with respect to its cross-application by Friday, January 12, 2007.

10 During the days leading up to and including Saturday, January 13, 2007, the Fund and the Calpine Applicants negotiated and entered into a settlement agreement (the "Settlement Agreement"). A notice of motion and supporting affidavit with respect to this Settlement Agreement was circulated to the service list on January 13 and 14, 2007. The Calpine Applicants applied for an order:

a) authorizing CCPL to enter into the Settlement Agreement;

b) approving the Settlement Agreement and the various transaction agreements that accompanied it;

c) terminating the MA&O Agreements upon the closing of the Settlement Agreement and lifting the stay of proceedings under the CCAA proceedings for that limited purpose;

d) directing that a confidential supplemental report on the Settlement Agreement that was to be prepared by Ernst & Young Inc. (the "Monitor") be sealed until closing of the Settlement Agreement; and

e) miscellaneous other relief.

11 The Fund prepared a Notice of Motion bearing the same date in which the independent trustees of the Trust and the directors of CLPGP applied to lift the stay imposed under the CCAA for the purpose of terminating the MA&O Agreements if the Settlement Agreement was not approved by the Court. The motion to approve the Settlement Agreement was to be heard on Wednesday, January 17, 2007.

12 On Monday, January 15, 2007, I heard from various stakeholders in this CCAA proceeding who were aggrieved about both the timing of the application and the stringent requirements of confidentiality that had been imposed by the Fund on information relating to the Settlement Agreement. That day was a holiday in the United States where a number of stakeholders are resident and several counsel had been unable to receive instructions from their clients on these issues. I directed that the application to approve the Settlement Agreement be set over to Monday, January 22, 2007 and that the issue of the terms of confidentiality be adjourned to Wednesday, January 17, 2007 so that counsel could obtain adequate instructions from their clients.

13 Late on January 16, 2007, the Monitor received an offer (the "Harbinger Offer") for the Fund-related Assets from HCP Acquisition Inc. ("HCP"), the subsidiary of Harbinger that is the vehicle for Harbinger's takeover bid for the public Trust units. The Monitor provided the Court with a copy of the offer, together with an application for advice and directions, shortly before Court opened to hear submissions on the confidentiality issue. The Harbinger Offer for the Fund-related Assets was publicly disclosed by press release, but most parties had only recently become aware of its terms. The Monitor, of course, was not in a position at that time to provide advice on the offer and how it compared to the terms of the Settlement Agreement. It became apparent during the course of the hearing that the stakeholders wanted the Monitor to prepare a comparison of the Settlement Agreement and the Harbinger Offer. Submissions from that point focussed on how much, if any, of the Monitor's report with respect to that comparison should be subject to confidentiality, and whether the confidentiality provi-

sions imposed by the Fund on the Settlement Agreement and on the Monitor's Supplemental Report (as defined below) should be lifted. Some stakeholders argued vigorously for a different process more akin to an open auction or tender for the assets.

14 At this point, the Monitor had prepared two reports, a Sixteenth Report that discussed the Settlement Agreement in general terms, without disclosing its specific financial terms, which was disclosed without restriction to the service list, and a Supplemental Report to the Sixteenth Report (the "Supplemental Report") that disclosed those financial terms, together with the Monitor's comments on the value of the MA&O Agreements and the B Units. These latter comments included a review of CCPL's discounted cash flow financial model of the B Units. The Supplemental Report was made available only to stakeholders who entered into confidentiality agreements as required by the Settlement Agreement.

15 The Calpine Applicants and the Fund submitted that the Settlement Agreement and the Supplemental Report were confidential and commercially sensitive to both parties. The Calpine Applicants were concerned that pricing and valuation information contained in the Supplemental Report would have a negative impact on any subsequent marketing process if the Settlement Agreement was not approved. The Fund had concerns relating to its response to the Harbinger take-over bid of the publicly-traded trust units and submitted that disclosure of the pricing and financial terms could be used by Harbinger to the disadvantage of the Fund. The Fund also asserted strenuously that it did not want to be placed in the position of a stalking horse for the Fund-related Assets and that, if it was put in that position, it would withdraw its offer.

16 The parties who sought access to the terms of the Settlement Agreement and the Supplemental Report were offered certain choices of confidentiality agreements, but it is clear that the Fund sought to ensure that such parties would be precluded from using the information for any purpose other than evaluating the Settlement Agreement, and particularly from making any kind of competing bid for the Fund's public trust units. One version of confidentiality agreement proffered by the Fund allowed stakeholders to establish an internal confidential screen that would remain in effect for two years in order to evaluate the information without requiring confidentiality to be imposed on the stakeholder's entire organization. Another allowed legal advisors to review the material without allowing them to disclose confidential terms to their clients. Although an attempt to impose this degree of restriction on access to information is exceptional in litigation generally, it is not without precedent in cases involving CCAA proceedings and receivers where assets of a business are sought to be sold: See In the matter of a Plan of Compromise and Arrangement of Air Canada, *et al.*, under the CCAA, R.S.C. 1985, c. C-36, as amended; see also In the matter of the CCAA, R.S.C. 1985, c. C-36, as amended, and In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as amended and In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines, *et al.* (all unreported).

17 I concluded that, although the Settlement Agreement was negotiated under stringent terms of confidentiality and the Supplemental Report was prepared pursuant to an assumption of confidentiality and on the assumption that the likelihood of CCPL receiving any offers whose benefits to CCPL exceeded those of the Settlement Agreement was remote, the situation had changed with the introduction of the Harbinger Offer. I was concerned, however, that it could be prejudicial to the primary goal of maximizing value to stakeholders if I ordered unrestricted disclosure of the Settlement Agreement or of the Supplemental Report during the short period of time between January 17 and January 22, 2007, when the Monitor's new report comparing the offers became available, particularly if I determined after hearing full submissions on January 22, 2007 that a different process should be followed.

18 I therefore declined either to endorse the confidentiality provisions imposed by the Fund to that date or to order greater disclosure, on the basis that the fairness of the process that led to the Settlement Agreement and the confidentiality requirements that had been imposed by it were live issues for submissions on January 22, 2007 and would be factors in any decision on whether or not to approve the Settlement Agreement. I directed the Monitor to prepare its comparison report with the analysis of the Settlement Agreement remaining subject to restricted disclosure, but with the Monitor's conclusions and recommendations being available on an unrestricted basis to stakeholders. I asked the Monitor to address the issue of whether a broader auction or marketing process should be undertaken.

19 The Monitor's Seventeenth Report was prepared and circulated on Friday, January 19, 2007. The Monitor concluded that, taking into account the material variables affecting the comparison between the Harbinger Offer and the Settlement Agreement, the completion of the Settlement Agreement proposal was the prudent approach. The Monitor stipulated, however, that the Calpine stakeholders should have the benefit of the Seventeenth Report and that the Monitor and the Court "should consider the stakeholders' tolerance for increased risk and potentially incremental realizations for the Fund-related Assets when considering the motion to approve the [Settlement Agreement] on January 22, 2007."

20 The Monitor considered two broad options, the completion of the Settlement Agreement and an auction marketing process. The Monitor noted that the Fund had advised the Court that it would not participate in an auction process and had indicated that, if the Settlement Agreement was not approved on January 22, 2007, it would proceed on January 26, 2007 with its motion to terminate the MA&O Agreements. If the Fund removed itself from the auction process, there would be no competitive tension with the Harbinger Offer unless other parties came forward. The Monitor believed that a limited number of new parties would be available to participate in an auction process because parties who might otherwise be interested might have become restricted in submitting an offer because of participation in the Fund's efforts to find a "white knight" with respect to the Harbinger take-over bid for the Fund public trust units. The Monitor pointed out that the B Units are an illiquid, subordinated minority position in a private entity, attractive primarily to parties who may be interested acquiring the Fund. He also noted that the Harbinger Offer could be terminated at any point prior to acceptance. Given all of these factors, the Monitor believed there was substantial risk in pursuing an auction process.

21 On the morning of January 22, 2007, shortly before the motion to approve the Settlement Agreement was heard, Harbinger submitted a revised offer for the Fund-related Assets (the "Harbinger Revised Offer") that increased the price offered from the greater of $100 million or the value of the Settlement Agreement transaction price plus $2 million, as set out in the Harbinger Offer, to the greater of $110 million and 110% of the value of the Settlement Agreement transaction price. The Harbinger Revised Offer also removed Harbinger's ability to withdraw the offer without the Monitor's permission before the earlier of:

a) February 16, 2007;

b) Court approval of an alternate proposal; and

c) Harbinger making a replacement offer that the Monitor concludes is superior to the Harbinger Revised Offer.

22 At the hearing, the Ad Hoc Committee of ULC II Bondholders, which includes Harbinger as a member, and the ULC II Indenture Trustee were in vehement opposition to the motion to approve the Settlement Agreement, suggesting that the process that led to the Settlement Agreement and the restrictions on access to financial

information imposed by the Fund had resulted in a "fatally flawed secret marketing process" that placed the stakeholders and the Court in an untenable position. In answer to the Monitor's suggestion that the Court hear from the stakeholders regarding their tolerance for increased risk and potentially incremental realizations for the Fund-related Assets, the Ad Hoc Committee advised that its members, absent Harbinger, had conferred and that "they are prepared to forego the secret benefits of the Settlement Agreement and either take their chances with a properly supervised process, or if need be, revert to the status quo where the marketing of this asset had not yet been commenced." Counsel for the ULC II Bondholders and Trustee submitted that an expedited sales process should be conducted, and that there was still time, given the status of the Harbinger take-over bid, for there to be an auction between the two existing bidders.

23 The Ad Hoc Committee of the ULC II Bondholders and the ULC II Indenture Trustee were the only major creditor group who had not entered into a form of confidentiality agreement with CCPL and the Trust so as to obtain access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's reports. As noted by counsel, the ULC II Bondholders are in the business of trading in distressed bonds, and the possession of non-public information relating to the B Units would preclude them from trading in any Calpine securities until the information became public. While the alternatives offered by CCPL and the Trust would allow counsel to the Bondholders to evaluate the Settlement Agreement with a view to the interests of their clients, it would not allow them direct access to information without the unpalatable result to their business of restricting their freedom to trade in Calpine securities. Thus, for this group of stakeholders, anything less than full public disclosure of information about the B Units would be problematic. This placed these creditors in direct conflict with the Trust and the Fund in their efforts to maintain confidentiality of commercially-sensitive information and to avoid becoming a "stalking-horse" for higher offers. While neither of these private commercial interests is of primary significance to this Court in the context of CCAA proceedings, which have as a primary goal the maximization of value of the debtors' assets for the benefit of stakeholders as a whole, they are factors to be weighed in a determination of the fairness and integrity of the sale process.

24 Counsel for the Ad Hoc ULC I Noteholders Committee, who had access to all information relating to the Settlement Agreement through a "counsel's eyes only" confidentiality agreement, noted that his clients were in favour of a short auction between the Fund and Harbinger, with the Fund publicly releasing the details of the Settlement Agreement.

25 Harbinger submitted that the Harbinger Revised Offer addressed a number of the Monitor's concerns, including the elimination of the right to withdraw the offer at any time prior to acceptance, and called for an open auction/marketing process for the assets.

26 The Fund pointed out that eighteen creditors or creditor groups had signed a form of confidentiality agreement, leaving only the ULC II Bondholders and the ULC II Indenture Trustee among the major creditors who had not had access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's Reports. It "strongly objected" to the marketing of the MA&O Agreements and set out the requirements it indicated it would insist that an assignee of those agreements and a purchaser of the B Units must fulfill if the Settlement Agreement was not approved.

27 When it became apparent that the Settlement Agreement likely would not be approved on the day of hearing, counsel for the Fund noted that the Settlement Agreement expired at midnight on January 23, 2007 and he could not indicate if the independent trustees and directors would extend the deadline or would let the Settlement Agreement lapse. He stated that the Fund would not participate if the process became an auction. Counsel

for the Fund suggested that the terms of the Settlement Agreement be disclosed to all parties other than Harbinger for a very brief period of two hours that day, after which the Monitor would prepare a supplemental report on any additional offers that this disclosure would generate overnight, with the hearing continuing the next day. The Calpine Applicants pointed out that they were bound to support the Settlement Agreement and that they, too, were reluctant to prolong the process beyond the time the Settlement Agreement would expire, as they feared losing the benefits of that agreement.

28 This one-day proposal, which excluded Harbinger, was characterized by the ULC II Bondholders group and the ULC I Noteholders group as being unworkable and wholly ineffective in maximizing value. Harbinger, through its counsel, suggested that the process required at least 10 days, the creation of a data room and a general invitation to bidders.

29 The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.) at para. 16 as follows:

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

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 (Alta. C.A.), where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

30 I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

31 There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court

and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing on January 22, 2007, particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.

32 In addition, the fact of the Harbinger Offer necessitated closer consideration of the Monitor's assumption, reasonable as it may have been at the time it was made, that the likelihood that the Calpine Applicants would receive any offers that would exceed the benefits to CCPL of the Settlement Agreement was remote.

33 I concluded that circumstances had conspired to produce a situation that was neither fish nor fowl, a kind of lop-sided auction where different bidders were privy to different information and bound by different constraints. What had already occurred could not be changed, but a different process was required from that point forward. While there were differences of opinion as to how much time was available to conduct a sales process with an acceptable degree of integrity, it was necessary that such process be conducted quickly, given the circumstances affecting the two interested bidders. It appeared clear that it would be to the benefit of all stakeholders if the process were accelerated. I decided that an abbreviated sales process was necessary in order to balance the competing requirements of fairness, speed imposed by external circumstances and protection of *bona fide* proprietary or commercially-sensitive information.

34 While not dismissing the application to approve the Settlement Agreement, I directed that:

a) the Monitor issue its Eighteenth Report which would disclose the financial terms of the Settlement Agreement to all stakeholders, including HCP, by noon on January 23, 2007;

b) offers for the Fund-related Assets were to be submitted to the Monitor by noon on Thursday, January 25, 2007;

c) the Monitor would issue its Nineteenth Report comparing offers received by 2:00 p.m. on Friday, January 26, 2007; and

d) the hearing would resume on Tuesday, January 30, 2007.

35 These time limits were later changed by agreement of affected parties so that final offers were to be received by noon on Friday, January 26, 2007 and the Monitor would issue its Nineteenth Report by noon on Saturday, January 27, 2007.

36 I directed that HCP would be able to meet and discuss issues relating to its offer with the Monitor and/or, if the Fund decided not to extend the Settlement Agreement, the Calpine Applicants.

37 I did not release the Supplemental Report generally, on the basis that it had been prepared in the scenario of a single offer and on the assumption of confidentiality. Nor did I release the confidential portion of the Monitor's Seventeenth Report, which had been superceded by events.

38 The Monitor issued its Nineteenth Report providing a summary and analysis of offers received for the Fund-related Assets by noon on January 26, 2007. However, immediately prior to releasing the report, the Mon-

itor was contacted by HCP and the Fund, acting jointly, requesting a delay of two hours to allow time for the submission of a revised offer. The Monitor advised me of the receipt of such revised offer when it delivered the Nineteenth Report to me on January 26, 2007 and provided a copy of the newly-revised offer (the "Harbinger Final Offer"). The Monitor indicated that it would be canvassing major stakeholders to receive their input on the offers and would issue a supplemental report to the Nineteenth Report prior to the court hearing on January 30, 2007. On Monday, January 29, 2007, I asked the Monitor to include in such report an analysis of the Harbinger Final Offer and any other offers it might receive prior to the release of this supplemental report.

39 The Monitor issued its Twentieth Report late in the day on January 29, 2007. In addition to the Harbinger Final Offer, the Monitor had received a letter from Catalyst Capital Group Inc. ("Catalyst") varying certain of the terms of an offer it had submitted by Friday's deadline in view of the press release issued by HCP relating to the Harbinger Final Offer. These revised terms were incorporated into the Monitor's analysis of the Catalyst offer.

40 Four offers were presented to the Court on Tuesday, January 30, 2007. One was a revised offer from the Fund. One was a revised offer from HCP received by the Monitor on January 26, 2007 (the "Second Revised HCP Offer"). One was an offer from Catalyst as revised on January 29, 2007 (the "Revised Catalyst Offer"). One was the Harbinger Final Offer. The Monitor recommended the Harbinger Final Offer.

41 The Harbinger Final Offer provides certainty of price and certainty of closing. It eliminates risks associated with the splitting and realization of certain claims CLP has made against the Calpine Applicants, and it facilitates the capture of value for creditors with respect to the Whitby cogeneration project by allowing the prepayment of a loan related to the project and the sale by CCPL of its interest in the project. It has no material conditions, and eliminates the uncertainty of future litigation with the Fund as the Fund has undertaken to support the offer and to provide the necessary consents.

42 This certainty, of course, comes with a price, which is that between approximately $10 million and $34 million of additional potential consideration would be forgone compared to the Second Revised HCP Offer, the Revised Catalyst Offer or a new Catalyst offer briefly described by counsel during the hearing (the "New Catalyst Offer").

43 As the Monitor points out, there is substantial closing risk associated with the Second Revised HCP Offer and the Revised Catalyst Offer, risks that likely would erode the potential financial upside of those offers. The Second Revised HCP Offer, which carries the least risk, could not guarantee the consent of the Fund to either the transfer of the MA&O Agreements and the B Units or the outcome of an application to hold in abeyance the Fund's application to terminate the MA&O Agreements for a reasonable time following closing. Nor could it guarantee the outcome of an application for a permanent stay of any claim by the Trust or the Fund to terminate the MA&O Agreements for default due to the CCAA proceedings. These are risks not only of outcome but of time, as litigation would be required not only in this Court, but also might be prolonged by appeal.

44 The Revised Catalyst Offer and the New Catalyst Offer carry the same risks and more. Although the Fund may be constrained in rationalizing a refusal of consent with respect to the Second Revised HCP Offer by reason of its support of the Harbinger Final Offer, it would not be so constrained in refusing consent with respect to Catalyst. The Revised Catalyst Offer (and presumably the New Catalyst Offer, although this was not made clear) were subject to due diligence, regulatory approval, and, with respect to its higher range of value, the ability of Catalyst to come to an agreement with CCPL and perhaps the Fund to achieve value from the Whitby

project. Originally, the Revised Catalyst Offer could be terminated at any time before acceptance. While Catalyst, in its submissions during the hearing, stated that it was prepared to abandon this condition, it was not clear how long it was prepared to leave its offers open.

45 The Ad Hoc ULC I Noteholders Committee expressed the wish to continue the process to see if greater value could be achieved. While the temptation to continue the process is understandable, given the carrot of higher offers and the suggestion of late-breaking developments in the take-over bid for the Fund's public trust units, prolonging the process would not allow Catalyst or any other new bidder the opportunity to overcome the serious contract transfer and contract termination risks that shadow their offers, given that the Fund is now bound to support the Harbinger Final Offer. Only the Harbinger Final Offer can provide the assurance that prolonged litigation with the Fund will be avoided, at least in the time frame imposed on this process by the take-over bid.

46 In addition, given my decision on January 22, 2007 to allow an abbreviated process, and not the more leisurely time-frame requested by some of the bidders, it would be unfair to extend the process on the basis of Catalyst's last-minute, in-Court efforts to improve its bid.

47 I also considered the objection raised by the Ad Hoc ULC I Noteholders Committee to the transfer of value to the public unitholders arising from the Harbinger Final Offer. It is true that value that potentially existed under the Second Revised HCP Offer has been transferred from the Calpine creditors to the public unitholders of the Fund under the Harbinger Final Offer through the sweetening of the HCP take-over bid, but this did not occur without the significant advantage of greater certainty. It is noteworthy that the Monitor in his Seventeenth Report was prepared to recommend the Settlement Agreement with its lower consideration over the Harbinger Offer on the basis of that uncertainty.

48 The process was certainly not pretty. It started with a privately-negotiated Settlement Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these circumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

49 The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

50 Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so at-

tractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

51 There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

52 It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson, J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note), 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.) set out at page 112:

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

53 The Monitor in this case has been intimately involved in the proposed sale of the Fund-related Assets from the beginning and for more than a year has accumulated valuable knowledge and insight into the complications and intricacies of the very complex corporate structure of the Calpine Applicants. The opinion of the Monitor deserves respect and deference. If, as the Court in *Soundair* commented at para. 14, "(t)he best method of selling an airline at the best price is something far removed from the expertise of a court", so is navigating the difficult shoals of selling unique, illiquid assets forming part of a complex corporate network with bidders preoccupied with broader external challenges. The recommendation of the Monitor, who was faced with a number of difficult variables and a rapidly-changing set of circumstances, was sound and reasonable.

54 I therefore found that the Harbinger Final Offer should be approved, as it provided for a reasonable balance of price and closing certainty, was endorsed by many of the stakeholders and was recommended by the Monitor.

55 Given the unique nature of the assets being sold, the nature of the closing risks, and in particular the nature of the material conditions affecting the value of the Revised Catalyst Offer, I agree with the Monitor, the Calpine Applicants, the independent trustees, the ULC II Bondholder groups and the U.S. Calpine entities that the potential for increased consideration through a continuation of the process or acceptance of the more conditional offers is outweighed by the risks and potential delay that would follow.

Application granted.

END OF DOCUMENT

TAB 7

C

2009 CarswellOnt 6161, 59 C.B.R. (5th) 165, [2011] W.D.F.L. 2985, [2011] W.D.F.L. 2930, [2011] W.D.F.L. 2929, [2011] W.D.F.L. 2924, [2011] W.D.F.L. 2907, [2011] W.D.F.L. 2899, [2011] W.D.F.L. 2898

Arclin Canada Ltd./ Arclin Canada Ltée, Re

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 ARCLIN CANADA LTD./ ARCLIN CANADA LTÉE., ARCLIN MANAGEMENT HOLDINGS INC., ARCLIN HOLDINGS GP I INC., ARCLIN HOLDINGS GP II INC., ARCLIN HOLDINGS III INC. and ARCLIN HOLDINGS IV INC. (Applicants)

Ontario Superior Court of Justice

A. Hoy J.

Heard: October 13, 2009
Judgment: October 14, 2009
Docket: CV-09-8290-00CL

Counsel: Steven J. Weisz, Jackie Moher for Applicants

David Bish for Monitor, Ernst & Young Inc.

Marc Wasserman for UBS, agent for First Lien Lenders & DIP Lenders

Kevin P. McElcheran for Official Committee of Unsecured Creditors

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved; agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Substantial weight placed on strong recommendation of monitor that agreements be approved — First lien lenders and DIP lender supported agreements — Unsecured creditors would be satisfied as to reason-

ableness of agreements — CEO and CFO were approached about other opportunities for employment and indicated they would take advantage of them if agreements were not approved — CEO and CFO were essential to successful restructuring and could not easily be replaced — Amounts payable under agreements were insignificant in relation to total debt outstanding — Agreements were reasonable in relation to current compensation of CEO and CFO — US affiliates would derive benefit from agreements — Key employee retention programs were controversial and CCAA process had to be open and transparent to greatest extent possible.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved — Agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Key employee retention programs were controversial — CCAA process had to be open and transparent to greatest extent possible.

Cases considered by *A. Hoy J.*:

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

United States Code, Title 11, c. 11

Generally — referred to

APPLICATION under *Companies' Creditors Arrangement Act* for approval of key employee retention program agreements and sealing order with respect to agreements.

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

1 Arclin Canada Ltd./ Arclin Canada Ltee. ("Arclin") and related companies obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S., 1985, c. C-36 (the "CCAA") on July 27, 2009. Arclin's U.S. affiliates have commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Code (the "U.S. Code") before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court").

2 Arclin now seeks approval of key employee retention program agreements with its Chief Executive Officer, Claudio D'Ambrosio, and its Chief Financial Officer, Scott Maynard (collectively, the "KERP") and seeks a sealing order with respect to such agreements. Mr. D'Ambrosio and Mr. Maynard also fill those roles in respect of Arclin's U.S. affiliates. They are paid by Arclin, and their services are provided to the U.S. affiliates under a management agreement. The Monitor and Arclin confirmed that the costs of the KERP will be borne by

Arclin and that the KERP cannot result in increased charges under the management agreement without the approval of the U.S. Court.

3 The board of directors of Arclin has approved the KERP. The Monitor recommends approval of the KERP, and the First Lien Lenders (which I understand are owed in excess of $200 million) and the DIP Lender support the KERP. Counsel for the First Lien Lenders and the DIP Lender was involved in the negotiation of the KERP. The KERP has been contemplated since the time of the initial order, and is referenced in the Monitor's report filed at that time and reflected in cash flows filed with the Court.

4 Canadian counsel for the Official Committee of Unsecured Creditors (the "UCC"), which represents unsecured creditors of Arclin's U.S. based affiliates in the Chapter 11 proceeding, appeared at the hearing, initially to oppose the KERP. In the course of the hearing, counsel for the UCC advised that the UCC, like Arclin, the Monitor and the First Lien Lenders, was in fact of the view that a retention arrangement with Mr. D'Ambrosio and Mr. Maynard was critical. The UCC's real objection is one of process: it was not provided with the amounts payable under the KERP in advance of the hearing, and was therefore not in a position to evaluate the reasonableness of the terms. Arrangements were made during the hearing for the UCC to be provided with the KERP, through the U.S. estate, in order to ensure confidentiality. Given the payments provided for in the KERP, the level of payments that counsel for the UCC advised that the UCC was concerned about, and the fact that unless the U.S. bankruptcy court approves an increase in the management fee Arclin will bear the cost of the KERP, I am of the view that the UCC will be, as I am, satisfied as to the reasonableness of the KERP.

5 Arclin, the Monitor, the First Lien Lenders and the DIP Lender all argued that the UCC did not have standing to make objections on this motion. Counsel for the UCC sought an adjournment in relation to the standing issue. All, however, wished the motion to proceed, given the importance of implementing the KERP promptly. It was specifically agreed that the fact that counsel for the UCC was permitted to make submissions today was without prejudice to the parties' ability to argue on any subsequent motion in this matter that the UCC does not have standing. In support of this argument, the Monitor advised the court that at present Arclin is owed approximately $87 million by its U.S. affiliates; Arclin is a creditor of the U.S. affiliates, not the other way around. Also, as noted above, the KERP is without cost to the U.S. affiliates unless approved by the U.S. Court.

6 Arclin and the Monitor also submit, and I note, that the UCC was served with notice of this motion a week ago, and that counsel for the UCC only asked today to see a copy of the KERP.

7 The evidence before me is that: both Mr. D'Ambrosio and Mr. Maynard have been approached about other opportunities for long-term and stable employment and both have indicated that they will take advantage of those opportunities if the KERP is not approved; Mr. D'Ambrosio and Mr. Maynard cannot be readily or easily replaced, given their intimate knowledge of Arclin's affairs, and it would be a lengthy and costly process to do so; and Mr. D'Ambrosio and Mr. Maynard have taken on a significant volume of additional responsibilities in connection with the CCAA proceedings.

8 The amounts payable under the KERP are insignificant in relation to the total debt outstanding. They appear to me reasonable in relation to what I was advised were Mr. D'Ambrosio's and Mr. Maynard's current compensation arrangements.

9 The Monitor confirmed in court that the alternative employment opportunities available to Mr. D'Ambrosio and Mr. Maynard, referred to in the evidence, are comparable opportunities.

10 I have specifically considered that the KERP will funded by Arclin, yet its U.S. affiliates will also derive a benefit from it. Counsel for the UCC pointed out that the U.S. Code contains rigorous conditions that must be met before a key employee retention agreement can be approved for an insolvent company, and submits that, on the evidence before this Court, it appears that those conditions would not be met in this case. As Leitch, R.S.J. pointed out in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.), Canada has not adopted equivalent legislative principles.

11 I place substantial weight on the strong recommendation of the Monitor that the KERP be approved.

12 I am advised that the "goal" of the restructuring is to swap debt for equity. I understand that the First Lien Lenders are the primary economic stakeholders. They, as noted above, support this motion. They have confidence in Mr. D'Ambrosio and Mr. Maynard.

13 All parties agree that Mr. D'Ambrosio and Mr. Maynard are essential to the successful restructuring of the Arclin group.

14 I am satisfied that, in these circumstances, the KERP should be approved.

15 I understood counsel for Arclin to submit that a sealing order is important to ensure: (1) that other employees are not able to point to the terms offered to Mr. D'Ambrosio and Mr. Maynard to attempt to secure retention arrangements, and thereby jeopardize the restructuring; and (2) that third parties desirous of engaging the services of Mr. D'Ambrosio and Mr. Maynard not know what terms they have to "better" in order to woo them away from Arclin. I further understood counsel to submit that Arclin is a private company, and that sealing orders in respect of key employment retention arrangements are customary. The Monitor simply submits in its report that disclosure may cause significant prejudice to Arclin and the other Canadian participants in the CCAA proceeding.

16 Neither Arclin nor the Monitor has indicated that there are other employees that it considers essential to the current operations and the successful restructuring of the Arclin group. I assume that all truly key employees would have been identified at this time. It appears to me that the KERP does not provide that its terms are confidential and restrict Mr. D'Ambrosio and Mr. Maynard from disclosing its terms.

17 Key employee retention programs are controversial. The CCAA process should be open and transparent to the greatest extent possible.

18 I am prepared to provide for sealing of the KERP for a short period of time only -seven days, subject to such short extension as may be necessary in light of counsels' schedules - to permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submit may result if the sealing does not continue.

Application granted in part.

END OF DOCUMENT

TAB 8

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Ted Leroy Trucking [Century Services] Ltd., Re

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Supreme Court of Canada

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant

Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither

statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur

les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as

the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait prob-

able que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition

postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (Que. C.A.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (Que. S.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada

except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process termin-

ates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is ex-

plored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent

about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cut-back in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (Que. S.C.), leave to appeal granted, 2010 QCCA 183 (Que. C.A.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys

wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of

the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain

Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts

exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to de-

scribe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include

employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency*

Law 2007 (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute

an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)*

(2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no inde-

pendent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been

unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA*

provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[FN1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a sub-

mission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant).* But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA.* Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[FN2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...

> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect

the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any oth-

er action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in

subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up*

and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the com-

pany if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax*

Act, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before

that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be

so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in

that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

FN1 Section 11 was amended, effective September 18, 2009, and now states:

FN2 The amendments did not come into force until September 18, 2009.

END OF DOCUMENT

TAB 9

C

2009 CarswellQue 11821, 2009 QCCS 5482, EYB 2009-166332, 64 C.B.R. (5th) 189

AbitibiBowater inc., Re

In the Matter of the Plan of Compromise or Arrangement of: Abitibibowater Inc. and Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor) and Her Majesty the Queen in Right of the Province of Newfoundland and Labrador (Petitioner)

Cour supérieure du Québec

Clément Gascon, J.C.S.

Judgment: November 9, 2009
Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, Attorneys for the Debtors

Me Catherine Powell and Me David R. Wingfield, Attorneys for the Petitioner

Me Jason Dolman, Attorney for the Monitor

Me Rachelle F. Moncur, Attorney for the Monitor

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor had been under protection of Companies' Creditors Arrangement Act since April 17, 2009 — In context of restructuring process undertaken following initial order, it created electronic data rooms containing non-public financial and corporate information — This was done in order to allow its stakeholders and their financial and legal advisors to better assess ongoing condition of its business as restructuring evolved — To have access to electronic data rooms, permission had to first be obtained from debtor — Crown requested access to electronic data rooms but debtor rejected request — Crown brought motion seeking access to electronic data rooms — Motion dismissed — Key objective of Act is to facilitate restructuring process so as to reach compromise between debtor company and its creditors — While courts should consider public interest, they should keep in mind key objective of Act and keep process moving towards its ultimate goal, that of acceptable arrangement — However flexible Act may be, this was not case where Court should allow Crown to access data rooms — First, Crown did not have creditor status — Second, mere and general quality of stakeholder remained insufficient to

justify relief sought — Third, Crown did not have legitimate legal interest in restructuring process and had brought motion for sole purpose of investigating debtor's ongoing financial condition — Fourth, fair and equitable treatment did not correspond to equal and identical treatment at all costs — Access to data rooms had been limited by debtor and only few creditors were given access — Debtor could restrict access to data rooms and courts should not intervene in reasonable exercise of its business judgment, absent bad faith — Therefore, alleged discrimination claimed by Crown was simply not established.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débiteur était sous la protection de la Loi sur les arrangements avec les créanciers des compagnies depuis le 17 avril 2009 — Dans le cadre d'un processus de restructuration entrepris à la suite de l'ordonnance initiale, il a créé des salles de données informatiques offrant des renseignements financiers et corporatifs confidentiels — Ceci avait été fait afin de permettre aux parties intéressées et à leurs conseillers financiers et juridiques de mieux évaluer la situation courante de ses affaires au fur et à mesure que la restructuration progressait — Pour avoir accès aux salles de données électroniques, on devait d'abord obtenir une autorisation de la part du débiteur — Ministère public a demandé l'accès aux salles de données informatiques mais le débiteur a rejeté sa demande — Ministère public a déposé une requête visant à obtenir l'accès aux salles de données — Requête rejetée — Principal objectif de la Loi est de faciliter le processus de restructuration dans le but de favoriser la conclusion d'un compromis entre la compagnie débitrice et ses créanciers — Bien que les tribunaux devraient prendre en considération l'intérêt public, ils devraient garder en tête le principal objectif et mener le processus à son terme, c'est à dire un arrangement acceptable — Tout aussi flexible que soit la Loi, il ne s'agissait pas ici d'un cas où le Tribunal devrait permettre au ministère public d'accéder aux salles de données — Premièrement, le ministère public n'avait pas le statut de créancier — Deuxièmement, le simple fait de se qualifier à titre de personne intéressée ordinaire ne suffisait pas pour justifier le remède recherché — Troisièmement, le ministère public n'avait pas d'intérêt légal légitime dans le processus de restructuration et n'avait déposé la requête que pour les seules fins d'enquêter sur la situation financière courante du débiteur — Quatrièmement, un traitement juste et équitable ne signifiait pas un traitement égal et identique à tout prix — Accès aux salles de données avait été limité par le débiteur et seuls quelques créanciers avaient obtenu l'accès — Débiteur pouvait restreindre l'accès aux salles de données et les tribunaux, en l'absence de mauvaise foi, ne devraient pas s'immiscer dans l'exercice de son jugement sur le plan des affaires — Par conséquent, le ministère public avait tout simplement échoué dans sa tentative de démontrer la discrimination alléguée.

Cases considered by *Gascon J.C.S.*:

Air Canada, Re (2004), 2 C.B.R. (5th) 23, 2004 CarswellOnt 3320 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

British Columbia v. Imperial Tobacco Canada Ltd. (2005), 45 B.C.L.R. (4th) 1, [2005] 2 S.C.R. 473, 134 C.R.R. (2d) 46, 2005 SCC 49, 2005 CarswellBC 2207, 2005 CarswellBC 2208, 257 D.L.R. (4th) 193,

[2006] 1 W.W.R. 201, 218 B.C.A.C. 1, 359 W.A.C. 1, 339 N.R. 129, 27 C.P.C. (6th) 13 (S.C.C.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — distinguished

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — referred to

Estonian State Cargo & Passenger Steamship Line v. "Elise" (The) (1949), [1949] 2 D.L.R. 641, 1949 CarswellNat 79, [1949] S.C.R. 530 (S.C.C.) — referred to

Fracmaster Ltd., Re (1999), 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 CarswellAlta 461 (Alta. Q.B.) — distinguished

Indalex Ltd., Re (2009), 2009 CarswellOnt 4465, 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]) — referred to

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Reference re Upper Churchill Water Rights Reversion Act, 1980 (1984), [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, 53 N.R. 268, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General))* 47 Nfld. & P.E.I.R. 125, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General))* 139 A.P.R. 125, 1984 CarswellNfld 40, 1984 CarswellNfld 40F (S.C.C.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01

Generally — referred to

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

Generally — referred to

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Chapter 11 — referred to

MOTION brought by Crown seeking access to electronic data rooms created by debtor company.

***Gascon J.C.S.*:**

The Motion at Issue

1 Her Majesty the Queen in Right of Newfoundland and Labrador (the "*Province*") seeks a declaratory order from this Court to access the electronic data rooms set up by the Debtors ("*Abitibi*").

2 Abitibi is under the protection of the *Companies' Creditors Arrangement Act*[FN1] ("*CCAA*") since April 17, 2009. In the context of the restructuring process undertaken following the Initial Order, it created electronic data rooms containing non-public financial and corporate information.

3 This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved. To have access to the electronic data rooms, permission has first to be obtained from Abitibi. Signature of confidentiality agreements is required as well.

4 The Province requested such an access to the electronic data rooms. Abitibi denied its request.

5 In its Motion[FN2] , the Province contends that Abitibi's refusal is contrary to the principles underlying the *CCAA*. It argues that the denial is unfair, discriminatory and unjustifiable. It insists upon being treated in the same manner as other Abitibi's stakeholders.

6 Abitibi strongly opposes the Motion[FN3].

7 It considers that the Province is neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring. It adds that the Province does not come to Court with clean hands, but rather brings the Motion for collateral purposes, unrelated to the restructuring process. In that regard, Abitibi insists upon the fact the Province owes it in excess of $300 million for the recent wrongful appropriation of its assets.

The Electronic Data Rooms

8 Based on the representations made to the Court, the electronic data rooms, subject of the debate, were created voluntarily at the initiative of Abitibi. There are no statutory requirements in the *CCAA* imposing upon a

debtor company to do so.

9 Abitibi has elected to do it in order to assist, facilitate and advance its restructuring process and to help transmitting its non-public financial and corporate information to those who required it in that context.

10 Creating such data rooms for the benefit of stakeholders in a *CCAA* restructuring process is not unheard of. In large restructurings such as this one, putting in place similar data rooms is acceptable, if not common, practice. It normally enhances the chances of success of the process. Seldom does one see litigation arising from the creation of these data rooms. No precedents have indeed been found on the issue that the Court is asked to decide.

11 Here, access to Abitibi's electronic data rooms has, apparently, not been given to every stakeholder. In fact, according to Abitibi, no individual creditor has been granted such access so far.

12 To this day, the data rooms have rather been accessed solely by the financial and legal advisors of precise creditor groups like the Ad Hoc Committee of the Unsecured Noteholders, the Term Lenders, the Ad Hoc Committee of the Senior Secured Noteholders, and the Unsecured Creditors Committee put in place pursuant to the Chapter 11 proceedings pending in the State of Delaware.

13 These electronic data rooms provide information that goes beyond the quite extensive financial information already circulated by the Monitor on a regular basis. To that end, no less than 20 reports are currently available on the Monitor's public website.

14 They include, amongst others, regular four-week reporting on Abitibi's cash-flow results, receipts and disbursements with variances analysis, current liquidity and revised cash-flow forecasts, and key performance indicators review. They cover as well a timely overview of current market conditions in the forest products industry.

The Positions of the Parties

a) The Province

15 The Province pleads that it needs to have access to the electronic data rooms to properly assess Abitibi's financial status and to make informed decisions in the restructuring. It maintains that it has a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims against it.

16 To that end, it states that after Abitibi was granted *CCAA* protection in April 2009, the Province made a commitment to the latter's former employees whose entitlement to severance and termination pay was stayed by the Initial Order.

17 Thus, in June 2009, it allegedly began to implement a plan whereby Abitibi's former employees in the Province received their entitlement to severance and termination pay. In exchange, these former employees assigned their rights to make a claim in the restructuring process to an organisation created by the various unions involved and funded by the Province.

18 Apparently, the Province has expended in excess of $24 million from the public purse to fulfil these obligations. It contends that it will be repaid for these severance and termination expenses from the claims that will be made at some point during the restructuring process.

19 The Province also argues that Abitibi is responsible towards it for alleged environmental contamination from a former mine located in the town of Buchans. Relying on numerous media reports that it filed in the record[FN4] , the Province claims that because of Abitibi's economic activities, the latter has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined.

20 The Province alleges that it has incurred significant costs in that regard. It adds, furthermore, that agreements have been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's residual and environmental obligations.

21 In addition, during oral argument, the Province's Counsel claimed that his client would also have alleged tax claims to raise against Abitibi. However, no allegation in the Motion refers to such assertion.

22 Because of the above, the Province submits that it should be treated similarly to other Abitibi's stakeholders with respect to the electronic data rooms. The Court's discretion under the *CCAA* should, in its view, be exercised in favour of the Province so that the right of access sought may be granted without delay.

b) Abitibi

23 Abitibi replies that the Province is simply unable to justify any status as actual or even potential creditor in this restructuring process.

24 According to Abitibi, with regard to the funding process of Abitibi's former employees, the allegations of the Motion indicate that the Province is simply not the assignee of the claims.

25 Abitibi states further that no evidence supports either the Province's Counsel's contentions that alleged tax claims would be owed to his client.

26 As for the environmental obligations that Abitibi would have, it considers that the Province is the owner of the lands and mining rights on which the mining site was situated. It adds that any residual interest was surrendered to the Province as far back as in 1994, such that the Province has owned and managed the lands in question for over 15 years.

27 Abitibi also notes that it never itself operated the mine in question, while the reports that have been received so far by the Province indicate a number of other possible causes of contamination.

28 Simply put, Abitibi is of the view that this contingent claim is, at best, highly speculative.

29 That said, Abitibi refers to the following background elements to justify its position that the Province does not come to Court with clean hands. In fact, it submits that ulterior motives warrant the filing of the Motion.

30 From Abitibi's standpoint, the conflict with the Province on the access to the electronic data rooms has its roots in events going back to December 2008, some four months prior to the Initial Order issued in this case.

31 On December 4, 2008, after unsuccessful negotiations with the unions representing its workers, Abitibi announced the closure of the Grand Falls mill located in the Province. The closure was to take place in the first quarter of 2009.

32 In the days following the announcement, Abitibi attempted in vain to negotiate with the Province an orderly winding-down of the operations.

33 On December 16, 2008, without notice and within a single day, the Province introduced and passed into law the *Abitibi-Consolidated Rights and Assets Act*[FN5] (the "*Abitibi Act*").

34 Pursuant to the *Abitibi Act*, the Province purported:

a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in the Province;

b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province;

c) to cancel pending legal proceedings of Abitibi against the Province seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;

d) to deny Abitibi any compensation for the seized assets; and

e) to deny Abitibi access to the Province's Courts to seek redress.

35 Abitibi voiced strong opposition to this enactment and denounced it as unconstitutional, contrary to basic principles of Canadian law and adopted in bad faith. In April 2009, one of Abitibi's U.S. subsidiaries indeed filed a Notice of Intent to Submit a Claim to Arbitration in that regard under Chapter 11 of NAFTA[FN6].

36 According to Abitibi, the seized property and rights had a value in excess of $300 million. As well, the expropriated assets were generating revenues for Abitibi; some of the fixed assets could have even been sold for profit during the restructuring process[FN7].

37 Because of this, Abitibi concludes that the filing of the Motion is nothing more than a reaction to the expected claims of Abitibi against the Province. Therefore, as part of its own Motion to Contest the Province's Motion, Abitibi itself seeks declaratory conclusions to the effect that the Province cannot claim any relief until it has recognized the property rights it has unlawfully seized.

38 Abitibi even wants this Court to immediately designate a Claims Officer to hear and determine the respective claims, counter-claims, cross-claims and set-off claims of the parties against each other.

Analysis and Discussion

39 With all due respect to the position advanced by the Province, the Court considers that its Motion should be dismissed.

40 None of the arguments it submitted are persuasive under the circumstances. In contrast, Abitibi's objections to the access sought are real; they are serious and they are many.

a) The principles underlying the CCAA

41 To justify its request, the Province puts much emphasis on the principles underlying the *CCAA*. It is ap-

propriate to briefly review them.

42 It has often been said. No one seriously disputes it anymore. The *CCAA* is a remedial statute. Its purpose is to facilitate compromises or arrangements between an insolvent debtor company and its creditors[FN8].

43 Admittedly, the restructuring process conducted under the CCAA is, first and foremost, that of the debtor company and its creditors who, ultimately, have the final say on the process.

44 Still, it is now accepted that the *CCAA* is designed as well to serve a broad constituency of stakeholders, be they investors, creditors, employees or even, sometimes, local communities. It has thus been stated that Courts must have regard not only to the interests of those that are directly affected by the restructuring process, but also to a wider public interest[FN9] .

45 However, if this broader public dimension goes beyond the simple direct relations between the debtor company and its creditors, it does not stand alone by itself. This wider public interest or broader public dimension must always be put in the balance together with the interest of those most directly affected by the restructuring process.

46 Accordingly, in any application brought under the *CCAA* such as this one, it is fair to say that in giving weight to broader socio-economic or public interest considerations, the Court must keep in mind the key objectives of the Act. That is, to facilitate a restructuring so as to reach a compromise between the debtor company and its creditors and allow the business to continue as a going concern[FN10].

47 As well, in exercising its jurisdiction in a broad and flexible manner to insure the *CCAA's* effectiveness, the Court must remember that its role is one of judicial oversight. It is there to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement.

48 In *Stelco Inc., Re*[FN11], the Ontario Court of Appeal stated that in carrying this supervisory function under the legislation, the judge in a *CCAA* restructuring process is exercising the statutory discretion provided by Section 11.

49 That said, in a *CCAA* restructuring process, the radically different economic stakes of the various creditors in the debtor company entail that it is not realistic to constantly expect or have a level playing field[FN12]. There will sometimes be asymmetries, variances and distinctions. Because of the flexibility of the *CCAA*, one is not to apply its regime rigidly, in the same manner in every situation.

50 Bearing these considerations in mind, the Court considers that this is not a case where its judicial discretion should be exercised in the manner sought by the Province. There are no reasonable or reasoned justifications that would support it.

51 To begin with, the status of the Province as creditor is not established, while its alleged status as potential creditor stands on rather weak grounds.

52 Apart from that, relying on a mere and general quality of stakeholder remains quite insufficient to justify the relief sought. In this regard, the reasons for Abitibi's denial appear legitimate and reasonable considering the objectives of the *CCAA* and the interests of those involved.

b) The creditor or potential creditor status of the Province

53 In this case, the Province has simply failed to adduce any reliable or admissible evidence to establish that it is, actually, a creditor of Abitibi.

54 On one hand, the Province alleges, without supporting evidence, that it has made payments to certain former employees of the Abitibi's Grand Falls mill. Yet, no evidence to establish the nature of the payments made or any lawful assignment of the related claims has been put forward.

55 Indeed, when one reads paragraphs 7, 8 and 9 of the Motion, it appears obvious that if Abitibi's former employees in the Province claims have been assigned to anyone, it is to an organisation created by the various unions involved, not to the Province. Its role is simply to fund this organisation.

56 In that regard, the Motion itself refers to claims that will ultimately be made in the restructuring by an "Assignee". According to the Motion, this "Assignee" is certainly not the Province.

57 On the other hand, the Province has not provided the Court with any reasonable and convincing evidence in support of its other alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

58 The Motion has merely referred to several press articles in support of an alleged claim against Abitibi for the contamination arising from a closed mine in the town of Buchans.

59 These vague and unsubstantiated allegations are, at this point in time, barely supported. This is hardly sufficient to give to the Province an alleged standing as creditor or even potential creditor of Abitibi.

60 To conclude on this basis that the Province is a creditor of Abitibi would, in essence, substitute speculation for reason and guesswork for proof.

61 In a *CCAA* context, a potential creditor with a contingent claim bears the onus of showing, at the very least, that its claim is neither speculative nor remote[FN13]. Some credible and reliable evidence must be offered in support. None exists here.

62 Finally, even though the Province's Counsel raised, during oral argument, that the Province would have a status as creditor of Abitibi by reason of some outstanding tax claims, no allegation in the Motion, nor any evidence adduced in support thereof, substantiate that contention.

c) The "stakeholder" argument

63 The Province's other argument to the effect that it is, in any event, a "stakeholder" in Abitibi's restructuring process is no more convincing than the first one. Nor is the submission that, as alleged stakeholder in the process, the Province should be entitled to an unfettered access to the electronic data rooms.

64 These data rooms have been set up to assist and enhance the Abitibi's restructuring process. However, there has not been an open access to the data rooms for every creditor, and certainly not for every potential stakeholder.

65 In fact, based on the Court's understanding, access has been limited to some key undisputed creditors and their financial and legal advisors.

66 More precisely, so far, access to the electronic data rooms has only been given to secured creditors of Abitibi whose assets are being used in the restructuring process, and to committees of unsecured creditors whose status is officially recognized in the U.S. proceedings or whose support is essential to the outcome of the restructuring because of the huge extent of the debt owed to them.

67 No evidence suggests that mere potential or contingent creditors such as the Province have been given the kind of access the Province is seeking. To the contrary, it appears that it has not been the case. From that standpoint, the alleged discrimination claimed by the Province is simply not established.

68 Likewise, the evidence offered does not support either the Province's claim that it is entitled to the same rights as those of other stakeholders. Again, no stakeholder with a status similar to that of the Province has been given the access sought here.

69 Few would dispute that there are huge differences between the alleged status of the Province and that of key creditors whose claims are undisputed and whose involvement remains pivotal to the final outcome of the restructuring.

70 In that regard, the Province's reference to the testimony of Mr. Robertson at another hearing ignores the particular context in which it was given. It hardly justifies opening the doors of the electronic data rooms to all stakeholders without distinction. True, by definition[FN14] , stakeholders are people who have an interest in a company's or organization's affairs. However, while creditors are inevitably stakeholders, not all stakeholders are necessarily creditors.

71 In its Memorandum of Argument, the Province goes as far as pleading that the fact that it may not be a creditor of Abitibi is not a valid reason to deny the access sought. The Court does not share that view. With respect, this is certainly a very important consideration to keep in mind on an issue like this one.

72 In fact, in the Court's opinion, seldom would a judge allow, in a *CCAA* restructuring process, mere stakeholders who are not creditors to have access to the non-public financial and corporate information of the debtor company.

73 In a similar fashion, access to the electronic data rooms to some creditors does not mean that similar access must necessarily be given to everyone who requests it. The fact that Abitibi should ensure transparency and openness in its restructuring proceedings and process does not entail that everyone should be treated similarly. Fair and equitable treatment does not correspond to equal and identical treatment at all costs.

74 For instance, Abitibi could well, in some cases, deny access to its electronic data rooms to some categories of creditors for legitimate commercial reasons. The example of a creditor who is a competitor of Abitibi comes to mind. There are no doubt others.

75 Arguably, practical reasons could also justify Abitibi limiting access to its electronic data rooms to prevent its use becoming impractical or the signing of confidentiality agreements meaningless by reason of the fact that too many persons have access to the information.

76 This notwithstanding, the Province seems to suggest that because some creditors have had access to the electronic data rooms, all stakeholders, no matter what is their status, should be given the same opportunity. The Court disagrees.

77 Contrary to what the Province pleads, it is not a fundamental tenet of insolvency law that similarly situated "*stakeholders*" be treated in the same manner. The case law does not support this premise. It rather states that in insolvency law, *unsecured creditors* are normally treated in the same manner in similar situation[FN15] . To apply the statement to "stakeholders" as well, with no consideration to their precise status, goes way beyond what the case law indicates.

78 In a restructuring process under the *CCAA*, voting on the plan of arrangement remains, at all times, in the hands of the creditors. If the interest of stakeholders other than creditors should, sometimes, be taken into consideration in the exercise of the Court's judicial discretion or inherent jurisdiction, it does not elevate nor equate the status of stakeholders to that of creditors.

79 In the conduct of the restructuring process, mere "stakeholders" cannot realistically pretend to a status equal to that of the creditors. The latter have a say in the ultimate plan. The former do not unless they do qualify as creditors.

80 This being so, the Court is of the view that Abitibi can, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders (or, sometimes, even creditors) would not further nor enhance its restructuring process.

81 In this regard, lacking evidence of bad faith, the Court should be reluctant to intervene in the reasonable exercise of a debtor company's business judgment. Such exercise should not be second-guessed lightly.

82 Here, the Province wants access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover the Province's undetermined and potential environmental claims.

83 The Court considers it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In particular where, like here, the electronic data rooms apparently contain information concerning the economic claims of Abitibi against the Province.

84 In such a situation, the *CCAA* process should not be used to further a collateral objective that, in the end, is not in connection with the ultimate goal of the Act.

85 The broader public dimension of the *CCAA* does not entail an unlimited and unfettered access to the non-public books, records and financial data of a debtor company for all potential or contingent claimants, be they a public or governmental body.

86 Similarly, considerations for the wider public interest and broad public dimension do not confer to a mere stakeholder the same status as a creditor in all aspects of the restructuring process.

87 To that end, the judgments rendered in the cases of *Fracmaster*[FN16] and *Calpine*[FN17] hardly support the Province's argument. Transparency and openness in an asset sale process for an optimal recovery to the benefit of the debtor company is hardly comparable to the kind of openness and transparency that the Province is advocating here.

88 Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real

value of its potential claims that are yet to be established.

89 Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough.

90 This does not constitute a legitimate legal interest in the restructuring process, nor a legitimate commercial interest in its success. From the allegations of its Motion, it is rather fair to say that the Province does not appear to have any genuine interest in the restructuring of Abitibi. At the present time, nothing suggests that the Province will either shape the plan of arrangement or have a say in its approval.

91 The fact that the Province is a governmental body does not change anything. It does not have more investigative entitlement in the non-public financial or business information of a potential debtor than does any other person.

92 One could easily add that if the Province's true goal is merely to assess Abitibi's on going financial condition, what the Monitor puts regularly on its website definitely provides the reader with what it needs in this respect.

93 In sum, the Court accepts Abitibi's assertion that the Province's purpose here is a collateral one. It has nothing to do with the key objectives of the *CCAA*, namely to facilitate a restructuring and insure that Abitibi continues as a going concern.

94 Abitibi's denial of the Province's request is legitimate and reasonable. It is based on proper considerations. This is not a situation where the Court should second-guess or review the exercise of Abitibi's business judgment.

95 To paraphrase what Farley J. once wrote, justice does not dictate to grant the access sought. Nor does practicality demand that it be done here.

d) Closing remarks

96 In closing, the Court notes that both sides have said a lot on the *Abitibi Act*.

97 For its part, the Province considers that the *Abitibi Act* is constitutional, even though it is retrospective, targeted and confiscatory in nature[FN18] .

98 In contrast, Abitibi contends that the enactment is contrary to fundamental constitutional principles of the *Canadian Charter of Rights and Freedoms* and *Canadian Bill of Rights*, as well as being unconstitutional. It considers the Act to be punitive, confiscatory in nature and repugnant to public policy[FN19] .

99 While the Province argues that the potential claims of Abitibi against it as a result of the *Abitibi Act* are without merit, the latter maintains that if any claim is ever filed by the Province in the restructuring process, the Court will have to assess the constitutional validity of the *Abitibi Act* and the value of its cross-claims or set-off claims against the Province for the wrongful expropriation it has been subjected to.

100 Be that as it may, the Court views as premature the requests contained in the conclusions of Abitibi's own Motion to Contest. It is not necessary to immediately designate a former judge as Claims Officer to hear and determine all alleged claims filed by the Province as well as any counter-claims or set-off claims to be

raised by Abitibi.

101 For the time being, the Province has filed no claim in the Claims Process established in Abitibi's *CCAA* restructuring. Consequently, it is too early to implement any kind of special process in that regard.

For These Reasons, the Court:

102 **DISMISSES** the "Motion for a Declaration that the Petitioner is Entitled to Access to the Electronic Data Rooms Created by the Debtors";

103 **DISMISSES** as well conclusions [25] and [26] of the "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners";

104 **WITH COSTS** against Her Majesty the Queen in Right of Newfoundland and Labrador.

Schedule "A" — Abitibi Petitioners

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY

18. SCRAMBLE MINING LTD.

19. 9150-3383 QUÉBEC INC.

Schedule "B" — Bowater Petitioners

1. BOWATER CANADIAN HOLDINGS INC.

2. BOWATER CANADA FINANCE CORPORATION

3. BOWATER CANADIAN LIMITED

4. 3231378 NOVA SCOTIA COMPANY

5. ABITIBIBOWATER CANADA INC.

6. BOWATER CANADA TREASURY CORPORATION

7. BOWATER CANADIAN FOREST PRODUCTS INC.

8. BOWATER SHELBURNE CORPORATION

9. BOWATER LAHAVE CORPORATION

10. ST-MAURICE RIVER DRIVE COMPANY LIMITED

11. BOWATER TREATED WOOD INC.

12. CANEXEL HARDBOARD INC.

13. 9068-9050 QUÉBEC INC.

14. ALLIANCE FOREST PRODUCTS (2001) INC.

15. BOWATER BELLEDUNE SAWMILL INC.

16. BOWATER MARITIMES INC.

17. BOWATER MITIS INC.

18. BOWATER GUÉRETTE INC.

19. BOWATER COUTURIER INC.

Schedule "C" — 18.6 CCAA Petitioners

1. ABITIBIBOWATER INC.

2. ABITIBIBOWATER US HOLDING 1 CORP.

3. BOWATER VENTURES INC.

4. BOWATER INCORPORATED

5. BOWATER NUWAY INC.

6. BOWATER NUWAY MID-STATES INC.

7. CATAWBA PROPERTY HOLDINGS LLC

8. BOWATER FINANCE COMPANY INC.

9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED

10. BOWATER AMERICA INC.

11. LAKE SUPERIOR FOREST PRODUCTS INC.

12. BOWATER NEWSPRINT SOUTH LLC

13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC

14. BOWATER FINANCE II, LLC

15. BOWATER ALABAMA LLC

16. COOSA PINES GOLF CLUB HOLDINGS LLC

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008 ONCA 587 (Ont. C.A.), at paras 44-61.

Mine Jeffrey inc., Re, [2003] R.J.Q. 420 (Que. C.A.), at paras 27-30.

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 (B.C. C.A.), at paras 27-29.

Motion dismissed.

FN1 R.S.C. 1985, c. C-36.

FN2 "Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors" dated October 16, 2009.

FN3 "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners" dated October 26, 2009.

FN4 Exhibit NL-1.

FN5 S.N.L. 2008, c. A-1.01, filed as Exhibit R-2.

FN6 Exhibit R-3.

FN7 Testimony of Alice Minville at the hearing.

FN8 *Stelco Inc. (Bankruptcy), (Re)* (2005), 9 C.B.R. (5th) 135, 2005 ONCA 8671 (Ont. C.A.), at paras 32ff;

FN9 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), at paras 50-52;

FN10 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), at paras 50-52;

FN11 (2005), 75 O.R. (3d) 5 (Ont. C.A.), at paras 32-34.

FN12 Janis P. SARRA, *Rescue!: The Companies' Creditors Arrangement Act*, (Toronto: Thomson Carswell, 2007), at page 11.

FN13 *Air Canada, Re* (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List])

FN14 Collins COBUILD Advanced Learner's English Dictionary on CD-ROM, Lexicon, 2003, HarperCollins Publishers, <stakeholder>.

FN15 See, in this respect, *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]); *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); *Pacific National Lease Holding Corp. (Re)* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

FN16 *Fracmaster (Re)* (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.)

FN17 *Calpine (Re)* (2007), 28 C.B.R. (5th) 185 (Alta. Q.B.).

FN18 To that end, it refers notably to *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 (S.C.C.), at pp. 503-504.

FN19 Amongst others, it invokes *Reference re Upper Churchill Water Rights Reversion Act, 1980*, [1984] 1 S.C.R. 297 (S.C.C.) and *Estonian State Cargo & Passenger Steamship Line v. "Elise" (The)*, [1949] S.C.R. 530 (S.C.C.).

END OF DOCUMENT